

# SUPREME COURT OF QUEENSLAND

CITATION: *International Piping Products (East Coast) Pty Ltd v Berg & Ors* [2016] QSC 271

PARTIES: **INTERNATIONAL PIPING PRODUCTS (EAST COAST) PTY LTD ACN 145 571 517**  
(plaintiff/respondent)  
v  
**JASON BRUCE BERG**  
(first defendant/first applicant)  
**DAVID CHRISTOPHER KEITH**  
(second defendant/second applicant)  
**KEVIN RILAND BEDFORD**  
(third defendant/third applicant)

FILE NO/S: SC No 10727 of 2014

DIVISION: Trial Division

PROCEEDING: Interlocutory Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 24 November 2016

DELIVERED AT: Brisbane

HEARING DATE: 13 October 2016

JUDGE: Boddice J

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

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where each defendant is a former director or senior employee of the plaintiff – where the plaintiff alleges each defendant, whilst employed by the plaintiff, used his position and the plaintiff's resources to secretly establish a competing business, of which each defendant subsequent became a director and shareholder – where the plaintiff alleges such conduct was in breach of contract, breach of fiduciary duty and breach of statutory duty – where the defendants allege the plaintiff's case is premised on a legal fallacy, namely that an employee is not entitled at law to form an intention to compete with an employer upon cessation of the employment and to undertake steps by way of preparation for that new employment, whilst still employed by the previous employer – where the defendants submit employees are entitled to form an intention to compete, absent any restraint clause – where the

defendants also submit the pleading does not comply with the requirements of the *Uniform Civil Procedure Rules 1999* (Qld), including that the pleading is not specific enough to apprise each defendant of the case he has to meet at trial, pleads evidence instead of material facts, and contains irrelevant allegations – where the plaintiff submits the defendants application is based on a misunderstanding of its case – where the plaintiff submits its case is not premised on an assertion that an employee is not free to leave and establish a competing business – where the plaintiff submit its case is that the defendants improperly used their position and company resources and time to secretly establish a rival business and thereby, in breach of their contractual fiduciary and statutory duties, promoted their own interests above those of the plaintiff with the intention of causing, and actually causing, damage to the plaintiff – whether the pleading ought to be struck out in its entirety – whether specific paragraphs of the pleading ought to be struck out

CORPORATIONS – WINDING UP – LIQUIDATORS – PROVISIONAL LIQUIDATORS – APPOINTMENT – where the second and third defendants apply to wind up the plaintiff on the just and equitable ground – where those defendants apply for the appointment of a provisional liquidator – where those defendants allege the appointment of a provisional liquidator is justified having regard to the conduct of the plaintiff's current directors, including their failure to comply with Australian law and to act in the best interests of the plaintiff – where those defendants also submit the evidence establishes the plaintiff is insolvent because any prospects of meeting the outstanding claims of its creditors is dependent upon the support of its majority shareholder – where the plaintiff submits the appointment of a provisional liquidator is a remedy of an extraordinary nature to be exercised with great care, particularly where the applicants are also defendants in a proceeding brought by the plaintiff and the provisional liquidator will have control over the continuation of that proceeding – where the plaintiff submits it is unlikely the winding up application will ultimately succeed – whether a provisional liquidator should be appointed

*Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625, cited

*Dey v Victorian Railways Commissioner* (1949) 78 CLR 62; [1949] HCA 1, cited

*General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125; [1964] HCA 69, cited

*Grace v Grace* (2007) 25 ACLC 141; [2007] NSWSC 6, cited

*Lee v Abedian* [2016] QSC 92, cited

*Peffer v Taylor & Company Pty Ltd* [1997] QCA 449, cited

*Westpac Banking Corporation v Hughes* (2012) 1 Qd R 581;  
[\[2011\] QCA 42](#), cited

COUNSEL: D A Kelly QC, with P D Hay, for the plaintiff/respondent  
 D R Cooper QC, with C Francis, for the  
 defendants/applicants

SOLICITORS: Corrs Chambers Westgarth for the plaintiff/respondent  
 McKays Solicitors for the defendants/applicants

- [1] On 18 November 2014, the plaintiff filed a claim and statement of claim seeking a variety of relief from the defendants, each of whom was a former director or senior employee of the plaintiff. The relief sought was based on allegations the defendants, whilst in the employ of the plaintiff, used their position and the plaintiff's resources to secretly establish a competing business operated by a company of which they became shareholders and directors. It was alleged such conduct was in breach of contract, breach of fiduciary duty and breach of statutory duty. It was further alleged each of the defendants undertook this conduct intending to cause, and actually causing, damage to the plaintiff.
- [2] The plaintiff filed an amended statement of claim on 1 October 2015. On 14 January 2016, the defendants applied to strike out multiple paragraphs of that amended statement of claim or alternatively, the entire amended statement of claim. The grounds relied upon include that the allegations contained therein are not supported in law, are irrelevant, are embarrassing and are likely to prejudice a fair conduct of their trial.
- [3] A further amended statement of claim was filed on 11 July 2016. The strike-out application is maintained in respect of the further amended statement of claim.
- [4] By a separate application, filed on 4 March 2016, the second and third defendants seek the appointment of a provisional liquidator to the plaintiff. This application is made in support of an application by those defendants to wind up the plaintiff on the just and equitable ground.
- [5] The two applications were heard together. At the hearing, multiple objections were taken to aspects of the evidence relied upon by the parties. It was agreed that any ruling as to the admissibility of that evidence ought properly to be considered as part of the determination of the applications themselves.

### **Background**

- [6] The plaintiff operates a business supplying specialised piping and related products to the gas, petroleum and oil industries. It operates on a global basis. Prior to 16 March 2014, each of the defendants held a senior position in the employ of the plaintiff. The first defendant was employed as the plaintiff's managing director. He commenced employment with the plaintiff on 3 August 2010. As managing director, he was responsible for the day-to-day management of the plaintiff's operations.
- [7] The second defendant commenced employment with the plaintiff on 11 October 2010. He was formally appointed a director of the plaintiff on 15 February 2011. The third

defendant commenced employment with the plaintiff on 5 January 2012. His duties of employment included buying and selling product, overseeing contracts and assisting with sales and tenders.

- [8] On 16 March 2014, each of the defendants gave notice of their resignation from the plaintiff's employment. Shortly thereafter, they commenced employment in a competing business. Each became a shareholder and director of the company operating that business. The competing business also operated in a global market, supplying specialised piping and related products to the gas, petroleum and oil industries.

### **Pleadings**

- [9] The further amended statement of claim is extensive. It contains voluminous allegations against each defendant, individually and collectively. In summary, it alleges:
- (a) subsequent to the cessation of the defendants' employment with the plaintiff, the plaintiff discovered that each defendant, whilst still in the employ of the plaintiff, secretly attended to the establishment of the competing business;
  - (b) the defendants failed to attend to their duties of employment during that period, failed to disclose relevant material facts and notified customers and suppliers of the plaintiff of their intending departure;
  - (c) the defendants sought to destroy relevant documentation which showed that conduct;
  - (d) the defendants sought the defection of key employees of the plaintiff to the competing business whilst still employed by the plaintiff;
  - (e) the defendants diverted business away from the plaintiff whilst employed by the plaintiff in the hope of securing such business for the competing business;
  - (f) the conduct of the defendants was in conflict with duties owed by them to the plaintiff;
  - (g) as a consequence of the defendants' conduct, the plaintiff suffered significant loss and will continue to suffer loss in the future.
- [10] The defendants filed a defence to the original statement of claim but have not yet filed any amended defence. In the defence the defendants denied:
- (a) the existence of the alleged duties;
  - (b) any breaches by any of them of such duties;
  - (c) the suffering of loss by the plaintiff.

## **Strike-out application**

### **Defendants' submissions**

- [11] The defendants contend the plaintiff's claim is based on a legal fallacy. The defendants contend the plaintiff's case is premised on an assertion that an employee is not entitled at law to form an intention to compete with an employer upon cessation of the employment and to undertake steps by way of preparation for that new employment, whilst still employed by the previous employer.
- [12] The defendants contend employees are entitled to form an intention to compete, absent any restraint clause. Further, such an employee can lawfully acquire the services of staff, including those employed by the current employer, terminate the contract of employment in accordance with its conditions and acquire a financial interest in a new employer. There is no duty of disclosure in such circumstances. Further, any fiduciary duty is itself constrained in its nature and scope by the relationship of employer and employee.
- [13] The remaining basis for the application is that the pleading does not accord with the requirements of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR"). The requirements said not to have been complied with are a requirement that the pleading contain a statement of all the material facts relied upon including, where the party includes a conclusion of law, the material facts in support of that conclusion. The defendants also contend the pleading must be specific enough to ensure the party is apprised of the case to be met at trial. That requires the pleading of material facts, not evidence. Pleading in a conclusory manner fails to comply with the function of establishing the facts to be met at trial.
- [14] The defendants further contend the pleading pleads evidence and irrelevant allegations which as a whole are embarrassing and will prejudice a fair trial of the proceeding.
- [15] The defendants further contend that the pleading is so voluminous that a consideration requires the defendants to "wade through a series of unconnected assertions searching for the issues" with allegations being pleaded in a rolled-up manner such that the pleading is wholly defective in meeting the obligation of properly apprising the defendants of the case to be met at trial.

### **Plaintiff's submissions**

- [16] The plaintiff submits the application to strike-out proceeds on a misapprehension and mischaracterisation of the plaintiff's case. That case is not premised on an assertion that an employee is not free to leave and establish a competing business. The plaintiff's contention is that the defendants improperly used their position and company resources and time to secretly establish a rival business and thereby, in breach of their contractual fiduciary and statutory duties, promoted their own interests above those of the plaintiff with the intention of causing, and actually causing, damage to the plaintiff.
- [17] The defendants submit that once the case is properly understood there is no substance in the plaintiff's complaints in support of the strike-out application. The matters pleaded by the plaintiff are relevant to the plaintiff's contentions. They are pleaded separately and

in accordance with the Rules. There is no basis to conclude they are properly the subject of a strike-out application.

### **Applicable principles**

- [18] The relevant principles to be applied on a strike-out application are not in dispute. The power is to be exercised in clear cases<sup>1</sup> where there is no real question to be determined, whether of fact or law.<sup>2</sup>
- [19] These principles do not prevent the striking out of a defective pleading. However, caution is to be exercised in undertaking an examination of pleadings less an analysis be too critical and amount to an undue level of pedantry.<sup>3</sup>

### **Discussion**

#### *Legal fallacy*

- [20] The defendants' primary contention that the proceeding is based on a legal fallacy depends upon a determination of the appropriate obligation or obligations owed by an employee to an employer in these circumstances and the nature and scope of each such obligation. In respect of those matters, the nature and scope thereof will depend upon a consideration of all of the circumstances, in the context of the law.
- [21] The defendants' contentions may properly be the subject of consideration on an application for summary judgment, assuming the Court was satisfied it was appropriate in the circumstances to exercise that summary jurisdiction, notwithstanding obvious and extensive factual disputes yet to be determined on the evidence. However, they are not appropriate matters for determination on an application to strike-out a statement of claim on that basis.
- [22] As was conceded by the defendants in their extensive written submissions, the terms of any duties owed by an employee to an employer are delineated in large measure by the terms of the employment contract. Any overriding fiduciary obligations or, indeed, statutory obligations are not imposed at large but in the context of that specific relationship between the employee and the employer.
- [23] That being so, it is wholly inappropriate to determine the nature and scope of such duties, in a pleading context, on a strike-out basis. It is dependent upon a consideration of the evidence as a whole that is properly a matter for trial. I decline, in the exercise of my discretion, to strike out the further amended statement of claim in its entirety on the basis it is premised on a legal fallacy.

#### *Specific complaints*

- [24] Some of the specific complaints made by the defendants also depend upon the defendant's contention that the proceeding is based on a legal fallacy. For the reasons I have given to

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<sup>1</sup> *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 129.

<sup>2</sup> *Dey v Victorian Railways Commissioner* (1949) 78 CLR 62 at 91.

<sup>3</sup> *Westpac Banking Corporation v Hughes* (2012) 1 Qd R 581 at 599 [54].

refuse the application to strike-out the pleading in its entirety, I decline to strike out those specific paragraphs that rely on that same contention. There are, however, some aspects of specific complains that require individual discussion.

*Paragraphs 29, 30(a) and 90(c)*

- [25] Paragraph 29 pleads a duty that each of the defendants owed to the plaintiff, pursuant to section 183 of the *Corporations Act 2001* (Cth), to not misuse information obtained during the course of his employment. The defendants argue that such a duty was relevant only to allegations pleaded in paragraphs 172 to 177 of the statement of claim, which have been abandoned by the plaintiff. The plaintiff argues the allegation in paragraph 29 remains relevant to its allegations in paragraphs 83 – 91 of the statement of claim. However, an examination of those paragraphs does not reveal any reliance on paragraph 29 or section 183. The pleading does not properly inform the defendants of the case to be met at trial. Paragraph 29 should be struck out, with leave to re-plead.
- [26] Paragraph 30(a) alleges that the “duty and obligation of each defendant not to use information confidential to the plaintiff” lasted indefinitely. It is not clear what specific duty and obligation is referred to in this paragraph. Paragraphs 21 to 29 set out a number of obligations and duties. None seem to be a duty and obligation to not use information confidential to the plaintiff”. For example, paragraph 21(d) alleges each defendant had implied contractual obligation of good faith and fidelity for the period of employment, and this included an obligation to protect confidential information. However, this is an obligation to protect confidential information, not an obligation to refrain from using such information. In any event, paragraph 21 restricts the duration of this obligation to “the period of employment”.
- [27] Paragraph 25(g) alleges that each defendant owed the plaintiff a duty to act as trustee of the plaintiff’s property, including its confidential information. This is also not an allegation that each defendant refrain from using confidential information. This ambiguity would easily be resolved by including in paragraph 30(a) a cross-reference to the paragraph that contains the duty alleged to last indefinitely.
- [28] The pleading also suffers the same defect identified in respect of paragraph 29. Paragraphs 172 – 177 contained allegations about improper use of confidential information. Those paragraphs have been abandoned. There are no allegations of misuse of confidential information in paragraphs 83 – 91. Paragraph 30(a) is does not properly inform the defendants of the case to be met at trial. It should be struck out, with leave to re-plead.
- [29] Paragraph 90(c) is a conclusion that, based on certain allegations contained in the statement of claim, each of the defendants breached his duty to protect commercially sensitive information of the plaintiff. There is no connection between this paragraph and the allegations formerly contained in paragraphs 172 – 177 of the statement of claim. There is no merit in the defendants’ argument that the deletion of those paragraphs renders paragraph 90(c) irrelevant. I decline to strike out this paragraph.

*Paragraphs 37 to 54*

- [30] The defendants contend the allegations pleaded in these paragraphs plead a claim of fraud and conspiracy but fail to comply with the requirement to plead such allegations with a high level of particularity. A consideration of the paragraphs as a whole does not support a conclusion that the pleading is one of fraud and conspiracy.
- [31] The plaintiff expressly eschews a cause of action of fraud and contends it is not necessary to plead its case as a case of fraud. There is authority for the plaintiff's contention.<sup>4</sup> Further, the contents of these paragraphs are capable of being relevant to and supportive of findings of deliberate concealment supportive of breaches of duty of the kind contended for by the plaintiff. There is no basis to conclude such allegations are improperly pleaded in all the circumstances. I decline to strike them out on this basis.
- [32] Similarly, whilst these paragraphs include matters of fact pleaded by way of particulars, in the circumstances of the pleading as a whole those allegations are not irrelevant and are not improperly pleaded. The particular paragraphs plead a material fact sought to be established by the plaintiff, with particulars in the nature of the basis upon which that fact is to be established at trial.
- [33] Having regard to the nature of the case pleaded by the plaintiff and, in particular, the assertion of secretive conduct by the defendants, such a pleading properly apprises the defendants of the case to be met at trial. There is no basis to conclude the pleading so departs from the requirements of the UCPR or the general rules of pleading as to justify a conclusion that they ought to be struck out on that basis.
- [34] In coming to this conclusion I have had regard to the defendants' contention that these paragraphs are defective for containing "rolled-up" allegations. The pleading does contain "rolled-up" allegations. However, it does so in circumstances where the plaintiff expressly pleads that each defendant is alleged to have engaged in the particular conduct and, where reliance is had on the conduct of one particular defendant to support the allegation against each defendant, that matter is specifically pleaded in the paragraph. That form of pleading ensures each defendant is informed of the facts relied upon in respect of the cause of action against that defendant. It ensures the ambiguity that normally arises from a rolled-up allegation is not present.<sup>5</sup>
- [35] I decline, in the exercise of my discretion, to strike out these paragraphs.

*Paragraphs 55 to 62*

- [36] The defendants make similar complaints in relation to paragraphs 55 to 62. For the reasons previously given, I do not accept the pleading in its current form constitutes a plea of fraud. These paragraphs plead material facts relied upon to support the defendants' ultimate contentions that each defendant engaged in conduct in breach of duty with the intention of inflicting damage on the plaintiff. The pleading pleads material facts, not conclusions.

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<sup>4</sup> *Peffer v Taylor & Company Pty Ltd* [1997] QCA 449.

<sup>5</sup> *Lee v Abedian* [2016] QSC 92 at [119].

- [37] However, there is substance in the defendants' contention that paragraph 60B is a non-sequitur. There is also substance in the contention that reliance upon, collectively, paragraphs 37 to 60 to form the basis for the intention to be inferred in respect of each defendant impermissibly contains a rolled-up allegation which fails to properly inform each defendant of the case to be met at trial. Such a pleading causes each defendant difficulty in ascertaining which facts are relied upon in respect of the cause of action against each defendant. A defendant ought not to be required to trawl through an extensive and lengthy pleading to ascertain the facts relied upon from which it is contended an intention is to be drawn in all the circumstances. Such a pleading is objectionable.
- [38] A consideration of these paragraphs as a whole reveals there is also substance in the defendants' assertion that these paragraphs seek to deal with serious allegations of breach of fiduciary and other duties in a rolled-up method. Whilst these paragraphs make assertions that each of the defendants engaged in specified conduct in breach of those duties, the paragraphs contain multiple permutations as to which defendant engaged in the conduct and which duty or duties is said to have been breached by that conduct.
- [39] As paragraphs 55 to 62 form part of a separate allegation against the defendants, paragraphs 55 to 62 should be struck out, with liberty to re-plead.

*Paragraphs 63 to 70*

- [40] For the reasons previously given, I do not accept these paragraphs constitute a pleading of fraud. I also do not accept that paragraph 64 pleads allegations without identifying the facts relied upon to support that allegation. The "said consent" is not, in context, ambiguous. The paragraph adequately informs the defendants of the case to be met at trial.
- [41] However, there is substance in the defendants' contention that paragraphs 67A to 69 impermissibly contain rolled-up allegations. These paragraphs, whilst alleging that each defendant engaged in specified conduct, identify the conduct relied upon in support of those allegations by reference back to multiple paragraphs covering multiple allegations against various defendants. Such a pleading is defective for containing an ambiguity of the nature which justifies the exercise of the power to strike out, with liberty to re-plead.
- [42] The defendants' complaint that paragraph 70 is defective as it contains the words "has or will suffer loss and damage", whilst relying upon paragraph 97 which has been amended to delete the words "or will", also has substance. It would appear paragraph 70 ought to have likewise been amended. Lest that assumption not be correct, paragraph 70 should be struck out in its present form as it is speculative and fails to adequately plead loss and damage in accordance with the UCPR. The plaintiff should have liberty to re-plead.

*Paragraphs 70A to 75*

- [43] Paragraph 70A repeats and relies upon paragraphs 1 to 69 of the further amended statement of claim, purportedly in support of a claim of the receipt of an improper benefit by the defendants. It is not apparent from the pleading what part of parts of those particular paragraphs are said to be relevant to this claim. The pleading fails to properly

apprise the defendants of those parts sought to be relied upon in support of this aspect of the claim. Paragraph 70A should be struck out, with liberty to re-plead.

- [44] The remaining paragraphs do, however, plead specific allegations in respect of specific defendants. Whilst the paragraphs contain more than one allegation, in that they make allegations in respect of each defendant, the paragraphs set out the matters relied upon in respect of each of the defendants. As such, they apprise the defendants of the case to be met at trial. I decline, in the exercise of my discretion, to strike out paragraphs 71 to 75.

*Paragraphs 76 to 82*

- [45] For the reasons previously expressed, I do not accept these paragraphs plead a claim alleging fraud. I also do not accept these paragraphs are otherwise irrelevant. The paragraphs specify the conduct alleged against each of the relevant defendants. That conduct is alleged to be not in the interests of the plaintiff or contrary to its interests. Whilst the paragraphs rely on an allegation the defendants approached employees of entities related to (but separate from) the plaintiff, it cannot be said the allegations as a whole are irrelevant to the claim against the plaintiff. I decline, in the exercise of my discretion, to strike out these paragraphs.

*Paragraph 84*

- [46] This paragraph asserts each defendant sent notification of his resignation via email to “clients, suppliers and representatives” of the plaintiff, purportedly with the approval of the plaintiff. The particulars contain the basis for that allegation. That basis is not so inconsistent as to justify striking out the allegation. There is also no basis to conclude the paragraph is otherwise properly to be struck out. I decline, in the exercise of my discretion, to strike out this paragraph.

*Paragraphs 86A to 91*

- [47] The defendants contend these paragraphs impermissibly attempt to plead a case by particulars or otherwise contain conclusions premised on assumptions without merit. Subject to one exception, a consideration of these paragraphs, does not support the defendants’ contentions. These paragraphs plead specific allegations. The particulars inform the defendants of the case to be met at trial. Ultimately, it will be a matter for trial to determine whether the allegations are made out. I decline, in the exercise of my discretion, to strike out these paragraphs.
- [48] The one exception is in relation to the words “or potential effect” in paragraph 87. There is substance in the defendants’ contention that those words, insofar as they suggest only a potential, cannot be causative of loss or damage. The words “or potential effect” are struck out from paragraph 87.

*Paragraphs 92 to 97*

- [49] These paragraphs allege damage by way of loss of customers’ earnings. Paragraphs 93 and 94 plead such loss would not have occurred but for the conduct of the defendants in

breach of their duty. Having regard to the multiple breaches of duty contained in the statement of claim and the multiple acts sought to be relied upon as conduct each of the defendants, these paragraphs fail to properly apprise the defendants of the case to be met at trial. Paragraphs 93 and 94 should be struck out, with liberty to re-plead.

- [50] There is no basis to conclude that the remaining paragraphs are embarrassing. Each of the remaining paragraphs apprises the defendants of the case to be met at trial. I decline, in the exercise of my discretion, to strike out the remaining paragraphs.

*Paragraphs 98 to 113A*

- [51] I decline to strike out these paragraphs on the basis they fail to plead material facts or give particulars of the basis for any knowledge and consent. The paragraphs plead material facts from which inferences are to be drawn. The particulars properly apprise the defendant of the case to be met at trial.
- [52] There is also no merit in the defendants' submission that paragraph 112 is an embarrassing example of a rolled-up plea. That paragraph identifies the conduct of each defendant relied upon to support the allegation of breaches of specified duties. The paragraph sufficiently identifies the acts relied upon in respect of each defendant so as to apprise the defendants of the case to be met at trial. The paragraph does not contain an ambiguity of a nature justifying striking out this paragraph on the basis it contains a rolled-up plea.
- [53] I decline, in the exercise of my discretion, to strike out these paragraphs.

*Paragraphs 113B to 118*

- [54] These paragraphs contain specific allegations in relation to matters said to be the responsibility of one or more of the defendants prior to their cessation of their employment. The paragraphs plead material facts which properly apprise the defendants of the case to be met at trial. To the extent they refer to conduct after the resignation of the defendants, that conduct is relevant to the consequences of the alleged failure to perform their duties whilst an employee.
- [55] The paragraphs as a whole are not embarrassing and are not so deficient as to justify the exercise of the summary power to strike out. I decline, in the exercise of my discretion, to strike out these paragraphs.

*Paragraphs 119 to 127*

- [56] These paragraphs contain allegations that the defendants had knowledge of events or ought to have been aware of those events. The paragraphs plead material facts, and particulars by which those facts will be established at trial. They sufficiently apprise the defendants of the case to be met at trial. I decline, in the exercise of my discretion, to strike out these paragraphs.

*Paragraphs 133 to 140*

- [57] These paragraphs contain allegations which the defendants contend are contradictory as they allege the defendants were contemplating the relevant agreement to establish a competing business in November and December 2013, but paragraphs 42 and 43 allege the agreement was proposed in February 2014. Whilst on its face that may appear contradictory, the difference in terminology is significant. Paragraph 133 deals with when the agreement was being contemplated, whereas paragraphs 42 and 43 deal with when the agreement was being negotiated by the defendants. Ultimately, the evidence at trial will determine the true position. There is no basis to conclude that the allegations in their present form are embarrassing. I decline, in the exercise of my discretion, to strike out these paragraphs.

*Paragraphs 150 to 153*

- [58] These paragraphs concern a claim that the third defendant was paid a sum of money on a specified basis which was not satisfied prior to the third defendant's resignation. A consideration of the paragraphs in their entirety does not support the defendants' contention that the paragraphs are contradictory and fail to identify the relevant facts relied upon in support of those allegations.
- [59] The paragraphs plead material facts which apprise the defendants of the case to be met at trial. The alleged illegality is set out in the particulars to paragraph 152. Whether that allegation is correct in law is a matter for trial. Similarly, the words "in the premises" in paragraph 153 apprised the defendants of the case to be met at trial. These paragraphs appear under a discreet section of the pleading, namely "dividend payments to Bedford".
- [60] I decline, in the exercise of my discretion, to strike out these paragraphs.

*Paragraphs 155 to 171*

- [61] There is no basis to find these paragraphs are irrelevant. They are relied upon as a basis for alleged failures of duties by each of the defendants. These paragraphs plead material facts in a manner which apprises the defendants of the case to be met at trial.
- [62] I decline, in the exercise of my discretion, to strike out these paragraphs.

*Paragraphs 195 to 199*

- [63] The defendants contend these paragraphs are irrelevant, because paragraph 199 pleads the monies the subject of paragraphs 195 to 198 were agreed to be treated as a loan to the first defendant. However, the circumstances by which the first defendant obtained these monies cannot be said to be irrelevant to the plaintiff's claim for the return of these sums. I decline, in the exercise of my discretion, to strike out these paragraphs.

*Damages*

- [64] The further amended statement of claim sets out the amounts claimed in respect of each claim for relief. Whilst the amounts claimed are pleaded in the alternative, they apprise the defendants of the damages sought in respect of each cause of action.
- [65] There is, however, substance in the defendants' contention that the claim for exemplary damages or a punitive monetary award is not pleaded in accordance with the UCPR. That claim does not specify the amount sought or the basis upon which it is said the defendants are obliged to pay such damages. Paragraph 1(c) of the prayer for relief is struck out, with liberty to re-plead.

**Provisional liquidator***Submissions*

- [66] The second and third defendants seek the appointment of a provisional liquidator on the basis the conduct of the plaintiff by the current directors of the plaintiff supports a winding up of the plaintiff on the just and equitable ground. The second and third defendants submit that the Court has a wide discretion to appoint a provisional liquidator where there has been filed a bona fide winding up application on proper grounds.
- [67] The second and third defendants submit it is essential the provisional liquidator be appointed as the current directors of the plaintiff are failing to comply with Australian company and other laws in the running of the plaintiff and are not acting in the best interests of the plaintiff, including preferring the interests of related entities to the detriment of creditors. The second and third defendants also submit there has been a lack of candour in their conduct to date in circumstances where the current litigation has been brought for an improper purpose. Finally, the second and third defendants submit the evidence establishes the plaintiff is insolvent because any prospects of meeting the outstanding claims of its creditors is dependent upon the support of its majority shareholder.
- [68] The plaintiff submits the appointment of a provisional liquidator is a remedy of an extraordinary nature to be exercised with great care. There is no basis for the appointment in the present case as the plaintiff is continuing to be a trading entity which is solvent and the current proceedings are in the best interests of the company as a whole.
- [69] The plaintiff submits it is unlikely the winding up application will ultimately succeed. In those circumstances, there is no proper basis upon which to appoint a provisional liquidator to a trading entity which is operating as a going concern. The consequences of such an appointment, when there is no evidence of insolvency, would be dire.

*Discussion*

- [70] There is no doubt this Court has power to appoint a provisional liquidator in aid of a winding up application. However, the exercise of that power is to be undertaken with

great care.<sup>6</sup> Generally, such an order will only be made where the Court is satisfied a winding up order is likely to be made and the appointment is necessary to preserve the assets of the company which otherwise are in jeopardy.<sup>7</sup>

- [71] Where, as here, the application is made by defendants to a proceeding brought by the plaintiff seeking substantial damages against those defendants, the Court should be slow to act on the defendant's request unless there is a basis to conclude the proceedings brought against the defendants are hopeless or prosecuted for an improper purpose.
- [72] This is particularly so where there is no reliable evidence that the plaintiff is insolvent. Whilst the plaintiff depends upon the support of its major shareholder, that fact does not constitute grounds for insolvency. Significantly, no other creditors of the plaintiff seek its winding up. Further, the evidence suggests the plaintiff continues to trade on an ongoing basis.
- [73] Whilst the material suggests there have been creditors owed money for periods longer than normal trading terms, that material must be viewed in the context of an allegation that the resignations of the defendants had a significant adverse consequence on the plaintiff's business and that significant steps have had to be taken to rebuild that business.
- [74] Those allegations are also relevant to the circumstances that the plaintiff was being operated for a significant period of time without a resident Australian director. That position has since been rectified and there does not appear to be any suggestion that the regulatory authorities are proposing to take action against the plaintiff company in relation to that deficiency.
- [75] Having considered the material relied upon by the second and third defendants in its entirety, I am not satisfied that they will succeed in obtaining a winding up order on their application. The financial information, at best, supports a finding of liquidity problems. But there is no basis to conclude that the plaintiff's majority shareholder will not continue to financially support the plaintiff in the future. That being so, there is no basis to conclude that the plaintiff company is currently insolvent or at significant risk of insolvency in the near future.
- [76] The remaining matters relied upon by the second and third defendants as to the operation of the company, including that its guiding mind is essentially its overseas based director, do not support a conclusion that the assets of the company are in jeopardy or that the company is not being operated in a manner consistent with the duties of its directors. It is also significant to have regard to the consequence of an order being made for the appointment of a provisional liquidator. As the authorities recognise, such an order has significant adverse consequences.<sup>8</sup>
- [77] The evidence as a whole does not establish that it is necessary that a provisional liquidator be appointed to preserve the status quo of the plaintiff's affairs ahead of the winding up application. The evidence also does not establish that a winding up order is likely to be made at the hearing of that application. Finally, having regard to the adverse consequences following the appointment of a provisional liquidator and the great care

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<sup>6</sup> *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625 at 635.

<sup>7</sup> *Grace v Grace* (2007) 25 ACLC 141 at 147 [27].

<sup>8</sup> *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625 at 638.

with which such a power is to be exercised, I am satisfied that the balance of convenience favours the refusal of the application for the appointment of a provisional liquidator.

### **Conclusion**

- [78] I decline, in the exercise of my discretion, to strike out the further amended statement of claim.
- [79] Paragraphs 29, 30(a), 55 – 62, 67A – 70, 70A, 93 and 94, and paragraph 1(c) of the prayer for relief, ought to be struck out with liberty to re-plead within 28 days. The words “or potential effect” are struck out from paragraph 87.
- [80] The application for the appointment of a provisional liquidator is dismissed.
- [81] I shall hear the parties as to the form of orders and costs.