SUPREME COURT OF QUEENSLAND

CITATION:	*Australia Pacific Investments (Qld) Pty Ltd & Anor v Najibi General Trading Company LLC & Ors* [2020] QSC 173
PARTIES:	**AUSTRALIA PACIFIC INVESTMENTS (QLD) PTY LTD (ACN 142 235 710)** (first plaintiff) **ARTHUR CHARLES DOWNING** (second plaintiff) **v** **NAJIBI GENERAL TRADING COMPANY LLC** (first defendant) **NURROWIN PTY LTD (ACN 608 022 528)** (second defendant) **BRADLEY PHILIP SUTHERLAND** (third defendant)
FILE NO:	BS No 5048 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	15 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	23 January 2020 Further written submissions on 6, 10 and 20 February 2020
JUDGE:	Davis J
ORDER:	**1. Rosella Bricalli and Anna Gassow jointly, as executors of the estate of the late Louis Venturiello, be joined as a fourth defendant to the proceeding.** **2. Rosella Bricalli be joined as a fifth defendant to the proceeding.** **3. Anna Gassow be joined as a sixth defendant to the proceeding.** **4. I will hear the parties as to the appropriate directions to be given to progress the proceeding, and on the question of costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES – GENERALLY – where the plaintiffs apply to join three new defendants to the proceedings – where the application is opposed by both the

existing defendants and the proposed defendants – where the plaintiffs now allege tortious conspiracy between the existing defendants and the proposed defendants – where the defendants submit that the plaintiff has not pleaded a case of conspiracy – where the defendants also submit that the balance of convenience favours not joining the proposed defendants – whether the proposed defendants should be joined to the proceeding

Australian Consumer Law, s 18, s 20, s 21, s 236
Uniform Civil Procedure Rules 1999, r 69, r 150

Assad v Eliana Construction and Developing Group Pty Ltd [2015] VSCA 53, cited
Bishop v Bridgelands Securities (1990) 25 FCR 311, cited
Coomera Resort Pty Ltd v Kolback Securities Ltd [2004] 1 Qd R 1, cited
Downing v Baird [2018] QCA 347, cited
Downing v MNSBJ Pty Ltd & Ors [2018] QCA 223, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640, cited
Hagan v Bank of Melbourne Ltd [1994] 2 Qd R 507, cited
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, cited
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1, cited
Lee v Abedian & Ors [2017] 1 Qd R 549, considered
Macquarie Bank Ltd v Lin [2002] Qd R 188, applied
MAM Mortgages Ltd (in liq) v Cameron Bros (a firm) [2002] QCA 330, cited
McKernan v Fraser (1931) 46 CLR 343, cited
Park v Brothers (2005) 80 ALJR 317, cited
Pegang Mining Co Ltd v Choong Sam [1969] 2 MLJ 52, cited
Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd (1954) 90 CLR 235, cited
Stacks Managed Investments Ltd v Tolteca Pty Ltd; Tolteca Pty Ltd v Lillas & Loel Lawyers Pty Ltd [2015] QSC 80, considered
The Koursk [1924] 1 P 140, cited
The Queen v Darby (1982) 148 CLR 668, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, cited
Williams v Hursey (1959) 103 CLR 30, cited

COUNSEL: Mr Downing appeared for himself and the first plaintiff
B Strangman for the defendants
P Arthur (solicitor) for the proposed defendants, Rosella Bricalli and Anna Gassow, as the executors of the estate of the late Louis Venturiello, Rosella Bricalli and Anna Gassow in their personal capacity

SOLICITORS: Mr Downing appeared for himself and the first plaintiff
B Strangman appeared on a direct brief for the defendants
Mooloolaba Law for the proposed defendants, Rosella Bricalli and Anna Gassow, as the executors of the estate of the late Louis Venturiello, Rosella Bricalli and Anna Gassow in their personal capacity

[1] The plaintiffs apply to join three new defendants to proceedings commenced in 2016. They are, Rosella Bricalli and Anna Gassow, as the executors of the estate of the late Louis Venturiello, and Ms Bricalli and Ms Gassow each in their personal capacity (the proposed defendants). The application is opposed by both the existing defendants and the proposed defendants.

History

[2] The second plaintiff, Mr Downing, has experience in the development of tourist attractions. He identified a parcel of land on the Sunshine Coast as a potential water park. The land was owned by Louis Venturiello, who is now deceased and whose executors are the proposed fourth defendant.

[3] As a vehicle through which to develop the land, Mr Downing acquired the first plaintiff, Australia Pacific Investments (Qld) Pty Ltd (API).

[4] On 7 May 2012, Mr Venturiello and API entered into a written option agreement (the Option Agreement) which was signed on behalf of Mr Venturiello by his attorneys, Rosella Bricalli, the proposed fifth defendant, and Anna Gassow, the proposed sixth defendant. By the Option Agreement, API could purchase the land for the sum of $3,250,000.

[5] Attached as an annexure to the Option Agreement was a form of contract which would come into existence if the option was exercised (the Sale Contract). That form of contract contained special conditions, including Special Condition 1:

> "**1. PLAN**
>
> 1.1 The Contract is conditional on the parties procuring registration in the Department of Natural Resources, Mines and Water of a survey plan(s) to effect the realignment of the boundaries between Lot 2 on RP 122911 ('Lot 2') and Lot 22 on SP 221902 ('Lot 22') so that the area of Lot 2 is 11,000m2 and the northern front boundary is 80.474m in length, in accordance with the Plan annexed as Annexure B 'Plan').
>
> 1.2 The survey plan shall generally be in accordance with the Plan but is subject to those variations that may arise on the final survey and as a result of any requirement of any authority to obtain registration of the survey plan.
>
> 1.3 The Buyer is responsible for payment of all costs of preparing and registering the survey plan including surveyor's fees, registration fees and new title fees.

1.4 Each party must cooperate with each other to obtain registration of the survey plan in the Department of Natural Resources, Mines and Water. The Seller will promptly when requested to do so by the Buyer:

(1) Execute the survey plan and any other documents required to obtain registration of the survey plan;

(2) Deliver to the Buyer the title (if any) to the Seller land, being Lot 2 and if necessary to obtain registration the consent of the Seller's mortgage registered on the title to the survey plan.

1.5 If special condition 1.1 is not satisfied within one month of the Contract Date, either party may terminate this contract by providing notice of termination to the other."

[6] Lot 22 on SP 221902 is the site of the proposed water park. Lot 2 on RP 122911 is the adjacent land. Mr Venturiello wished to retain Lot 2 but increase its size by realigning the boundary with Lot 22. That was the subject of Special Condition 1.

[7] By the terms of the Option Agreement, AFI could apply for all appropriate approvals necessary to develop Lot 22 as a water park. Mr Downing and API set about obtaining the approvals. They were successful in those endeavours[1] which substantially increased the value of the land.

[8] Clause 7 of the option agreement was as follows:

"**7. NOMINEE**

7.1 The Grantee[2] may at any time prior to the Call Option Expiry Date nominate another person as being entitled to exercise the Option by giving notice to the Seller's Lawyers signed by both the Grantee and the Nominee.

7.2 On and from the Nominate[3] Date:

(1) the Nominee is entitled to the rights of the Grantee under this Agreement, including the right to exercise the Option and is subject to the obligations of the Grantee under this Agreement; and

(2) the Grantee may not exercise the Option while the nomination remains in force and has not been withdrawn by the Grantee.

7.3 Nothing in this clause 5[4] releases the Grantee or Seller in respect of any antecedent breach of this Agreement by the Grantee or the Seller respectively prior to the Nomination Date.

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1 Approval in principle was obtained on 27 January 2015.
2 Australia Pacific Investments (Qld) Pty Ltd.
3 This is clearly a typographical error. It should read "Nomination Date"; see clause 1.1.
4 Another error. It clearly should read "in this clause 7".

> 7.4 The Grantee may appoint as its nominee to exercise the Option one or more persons and may include itself as one of the nominees."

[9] Clause 20.3 of the Option Agreement was as follows:

> "20.3 Each party to this Agreement will do all things and sign, execute and deliver all deeds and other documents as may be legally necessary or reasonably required of it by Notice from another party to carry out and give effect to the terms and intentions of this Agreement and to perfect, protect and preserve the Rights of the other parties to this Agreement."

[10] Another company controlled by Mr Downing, Sunshine Surf Park Pty Ltd, raised capital for the venture. It did this by issuing shares to a number of investors, including MNSBJ Pty Ltd. Mr Downing was still, though, looking for capital. He struck a bargain with Mr David Baird by which Mr Baird would fund the project in exchange for a 49 per cent shareholding in API. Mr Baird seemed unable to secure the funding and a dispute arose. Mr Baird introduced Mr Downing to the third defendant, Mr Bradley Sutherland.

[11] On 21 September 2015, API and the second defendant, Nurrowin Pty Ltd (a company controlled by Mr Sutherland), entered into a "Deed of Nomination". This agreement was permitted by clause 7 of the Option Agreement.[5] API nominated Nurrowin under the Option Agreement and thereby effectively assigned its interests to Nurrowin. In consideration of the nomination, Nurrowin, by the Deed of Nomination agreed to pay API a nomination fee of $1,250,000.

[12] By agreements entered into at about the same time as the Deed of Nomination, Mr Downing agreed with MNSBJ, and the other investors, to buy their shares in Sunshine Surf Park for $264,000.[6] He and API also agreed to pay Mr Baird $165,000[7] settling their dispute. By the Deed of Nomination, part of the nomination fee would be paid to Mr Baird and the investors to discharge these obligations.

[13] The effect of the Deed of Nomination was that Nurrowin would acquire Lot 22 for a price of $4,500,000 representing the purchase price of the land under the Option Agreement ($3,250,000) plus the nomination fee payable to API ($1,250,000). In commercial terms, the nomination fee represented the increase in value of the land as a result of Mr Downing's efforts to obtain the approvals.

[14] The Deed of Nomination provided, relevantly, as follows:

> "**Completion**" means the date on which the sale and purchase agreement between the Assignee[8] and the Seller[9] in respect of the sale and purchase of the Land is completed and the Land is transferred to the Assignee."[10]

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5 Set out above.

6 The "Share, Sale And Purchase Deed" dated September 2015 and the subject of *Downing v MNSBJ Pty Ltd & Ors* [2018] QCA 223.

7 The "Settlement Deed" dated September 2015 and the subject of *Downing v Baird* [2018] QCA 347.

8 Nurrowin Pty Ltd.

9 Mr Venturiello.

10 Clause 1.1.

"**Long Stop Date**" means 23 December 2015, or any extension to such date as may be agreed between the Parties from time to time."[11]

"**2. NOMINATION**

2.1 **Nomination by Assignor**[12]

(1) The Assignor, with effect from the Nomination Date, transfers and assigns to the Assignee, by way of nominating the Assignee under the Option, all of the Assignor's right, title and interest as Buyer under the Option, subject to the Assignor's Obligations under the Option.

(2) From the Nomination Date and subject to the Conditions being satisfied, the Assignee accepts from the Assignor a transfer of the Assignor's right, title and interest as Buyer under the Option, subject to the Assignor's Obligations under the Option.

…

(4) In consideration of the Assignor complying with clause 2.1(1) and 2.1(3)[13] the Assignee shall pay the Assignor the Nomination Fee on Completion.

(5) The Parties agree that the Nomination Fee represents consideration for the purchase of the Land.

…

3.1 The Assignee:

(1) from the Nomination Date must perform the Assignor's Obligations under the Option as if named in the Option as the buyer;

(2) from the Nomination Date is to have all the rights as the Buyer under the Option …

…

8. TERMINATION

8.1 This Agreement may be terminated by the Assignee at its election, at any time prior to Completion if any one or more of the Conditions has not been satisfied by the Nomination Date.[14]

8.2 This Agreement shall terminate immediately upon the occurrence of any of the following events:

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11 Clause 1.1.

12 Australia Pacific Investments (Qld) Pty Ltd.

13 Clause 2.1(3) obliged Australia Pacific Investments (Qld) Pty Ltd to perform certain steps to perfect the assignment.

14 A date by which certain government approval must be obtained; now irrelevant.

(1) the Foreign Investment Review Board refuses to grant its approval to the Assignee purchasing the Land and developing the ultimate projects as contemplated; or

(2) Completion is not reached by the Long Stop Date. …"

[15] The option was exercised and the Sale Contract was executed. The result was that settlement on the purchase of Lot 22 was due on 23 December 2015. Issues arose concerning the realignment of the boundary between Lots 2 and 22 and the fulfilment of Special Condition 1 of the sale contract. Mr Venturiello, in all these dealings acted through his attorneys, Ms Bricalli and Ms Gassow.

[16] In the end:

(a) Mr Venturiello purported to terminate the contract with Nurrowin;

(b) Nurrowin purported to terminate the Deed of Nomination as completion of the acquisition of Lot 22 had not occurred by the "Long Stop Date";

(c) Nurrowin purchased both Lots 2 and 22 directly from Mr Venturiello for $3,710,000; and

(d) that contract settled on 24 December 2015 leading to the acquisition by Nurrowin of both Lots 2 and 22 for a total of $3,710,000. The effect of that transaction is said by the defendants to be:

(i) Nurrowin's obligation under the Deed of Nomination and the Option Agreement to pay $4,500,000 for Lot 22 was extinguished;

(ii) Nurrowin acquired both Lots 2 and 22 for $3,710,000;

(iii) Nurrowin took the benefit of all the work of Mr Downing in locating the site and obtaining approvals;

(iv) API received nothing; and

(v) Mr Downing and API were left with the burden of paying Mr Baird $165,000 and MNSBJ and the other shareholders $264,000.[15]

[17] The plaintiffs say that the liability for the nomination fee was not legally extinguished. Mr Downing and API commenced proceedings in 2016 against Mr Sutherland, Nurrowin and Najibi General Trading Company LLC,[16] which is a company controlled by Mr Sutherland. That claim was supported by a statement of claim that has been amended on several occasions.

[18] In its state immediately prior to the application being made for joinder, the statement of claim alleged:

1. *Misleading, deceptive and unconscionable conduct leading to the signing of the various agreements.* In substance, the allegations are that Mr Sutherland made numerous representations causing Mr Downing to believe that the transactions evidenced by the various deeds would be advantageous to him and to API;

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15 Although MNSBJ and the other shareholders discontinued their action to recover that money.

16 Which is said to have been knowingly involved in conduct of Mr Sutherland and Nurrowin.

2. *Misleading, deceptive and unconscionable conduct concerning the boundary realignment issue and the compliance or non-compliance with Special Condition 1 of the contract of sale.* The boundary realignment issue is critical to the new case sought to be alleged against the proposed new defendants.

3. *Breach of fiduciary duty by Mr Sutherland.* A fiduciary obligation may be imposed upon one party to a contract and owed to another party but that can fairly be said to be unusual;[17] and

4. *Breach of contract and estoppel.* The breach of contract case is based on implied terms as follows:

> "92. The Nomination Deed contained an implied term that Sutherland would:
>
> (a) take all reasonable steps in relation to the Call Option Agreement and the Second Land Sale Contract to ensure that Downing and API had the benefit of the bargain contemplated by the Nomination Deed;
>
> (b) not take steps in relation to the Call Option Agreement and the Second Land Sale Contract that would deprive Downing and API from obtaining the benefit of the bargain contemplated by the Nomination Deed."

[19] The reliance upon implied terms may not be necessary and may indeed be misplaced. The Deed of Nomination provides that "… from the Nomination Date [Nurrowin] must perform [API's] obligations under the Option as if named in the Option as the Buyer".[18] My preliminary view is that despite the definition of "Option" in cl 1.1, the covenant to fulfil API's obligations under the option must extend to compliance with the terms of the Sale Contract if the option is exercised. Given that the obligation to pay the nomination fee is dependent upon the completion of the Sale Contract entered into pursuant to the option, that must surely be so. The alternative construction would produce a commercially absurd result.[19]

[20] Therefore, Nurrowin owed API an obligation to comply with Special Condition 1 of the Sale Contract. The evidence which has now been disclosed shows that Nurrowin could have complied with Special Condition 1 because Mr Venturiello was prepared to remove the encroaching buildings to enable registration of the plan of realignment.[20] Instead of complying with Special Condition 1, Nurrowin abandoned the contract and entered into another, on different terms. It must surely be arguable that Nurrowin has breached the Deed of Nomination by not completing

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17 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97, *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [86], *Assad v Eliana Construction and Developing Group Pty Ltd* [2015] VSCA 53 at [54].

18 Clause 3.1(1).

19 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657, *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [41].

20 Exhibit ACD30 to the Affidavit of A Downing sworn 15 January 2020 (CFI 121).

the Sale Contract and thereby, by its own actions, avoiding the fulfilment of conditions precedent to its obligation to pay the nomination fee to API.[21]

[21] Late last year disclosure was obtained by the plaintiffs of various documents which showed the detail of the dealings between the Sutherland interests and those acting for Mr Venturiello. On that basis, the plaintiffs seek to join the estate of Mr Venturiello and Ms Bricalli and Ms Gassow who were acting as his attorneys in the lead-up to the sale of the land to Nurrowin. As against the proposed new defendants, the plaintiffs seek to claim:

1. damages for misleading and deceptive conduct pursuant to ss 18 and 236 of the *Australian Consumer Law*;[22]

2. unconscionable conduct pursuant to ss 20, 21 and 236 of the *Australian Consumer Law*;

3. damages for tortious conspiracy between the Sutherland interests, Mr Venturiello and his attorneys, Ms Bricalli and Ms Gassow;

4. damages for Mr Venturiello's unjust enrichment; and

5. other relief arising from the disputes with Mr Baird and MNSBJ.

[22] The application came before me on 23 January 2020 when I made various directions, including:

1. the parties have leave to file and serve further submissions on the plea of tortious conspiracy; and

2. the application would then be determined on the papers.

[23] In due course, the further submissions were received.

Legal principles

[24] Joinder of additional parties to an existing claim is allowed by r 69 of the *Uniform Civil Procedure Rules* 1999 (UCPR). Rule 69(1) provides:

> "**69 Including, substituting or removing party**
>
> (1) The court may at any stage of a proceeding order that—
>
> (a) a person who has been improperly or unnecessarily included as a party, or who has ceased to be an appropriate or necessary party, be removed from the proceeding; or
>
> (b) any of the following persons be included as a party—

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21 *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 and *Park v Brothers* (2005) 80 ALJR 317 at [41].

22 *Competition and Consumer Act 2010* (Cth), sch 2.

> (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;
>
> (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding."

[25] Joinder under r 69(1)(b)(i) requires that the presence of the proposed defendants is "necessary" to enable the adjudication of the dispute involving the plaintiff and the existing defendants. In *Macquarie Bank Ltd v Lin*,[23] the Court of Appeal followed *Pegang Mining Co Ltd v Choong Sam*[24] where Lord Diplock put the test as:

> "Will the [person's] rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"

[26] Here, there is no suggestion that a determination of the rights of the plaintiffs under the *Australian Consumer Law*, or any of the various contracts, will affect the interests of the proposed defendants. The finding of a conspiracy as against one conspirator is not determinative against the other. Even in the criminal law, it is recognised that a case of conspiracy may exist on evidence admissible against one but not all conspirators and therefore a conspiracy may be proved against one but not all conspirators.[25]

[27] If the proposed defendants are to be joined, then it will be under r 69(1)(b)(ii) which has a wider ambit than r 69(1)(b)(i). All that is required is that the claim against the proposed new defendants is "connected with" the claims against the existing defendants.[26] Here, the allegations against the existing defendants and the proposed defendants all concern the broader transaction effected by the Option Agreement, the Sale Contract entered into pursuant to the option, the Deed of Nomination, and the subsequent transfer of Lots 2 and 22 to Nurrowin.

[28] Mr Strangman of counsel made submissions for the existing defendants. Mr Arthur, the solicitor for the proposed new defendants, was content to adopt the submissions of Mr Strangman, although he also sought an order that the plaintiffs furnish copies of various documents to him. On 23 January 2020, I ordered that to occur.

[29] There was no serious argument that the claims against the proposed new defendants were not "connected with" the claims against the existing defendants; nor could there be. A conspiracy is an agreement between the participants to act in concert with a common goal. The common law recognises such parties as joint tortfeasors, jointly and severally liable for the one damage.[27] It is not necessary to analyse the other claims. As already observed, all the claims arise either directly or indirectly

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23 [2002] Qd R 188.
24 [1969] 2 MLJ 52.
25 *The Queen v Darby* (1982) 148 CLR 668.
26 See *MAM Mortgages Ltd (in liq) v Cameron Bros (a firm)* [2002] QCA 330.
27 *The Koursk* [1924] 1 P 140 at 155-156 and 159-160.

from the broader transaction whereby the land was transferred from Mr Venturiello to Nurrowin. Once the claims against the proposed defendants are seen to be "connected with" the claims against the existing defendants, a discretion to order joinder arises.

[30] Mr Strangman advanced two submissions against joinder:

1. the plaintiff has not pleaded a case of conspiracy in the proposed further amended statement of claim; and

2. the balance of convenience favours not joining the proposed defendants to the action which has been on foot for four years.

[31] Recently in *Lee v Abedian & Ors*,[28] Bond J analysed the tort of conspiracy. There are two separate torts, namely conspiracy to injure by lawful means and conspiracy to injure by unlawful means. His Honour analysed the similarities and distinctions between both torts as follows:

> "The conspiracy to injure causes of action
>
> *The elements of the causes of action*
>
> [68] There are two torts of conspiracy to injure – the first is a conspiracy to injure by lawful means and the second is a conspiracy to injure by unlawful means.
>
> [69] The elements of the tort of conspiracy to injure by lawful means are:[29]
>
> (a) there was a combination or agreement between two or more persons;
>
> (b) the sole or dominant purpose of the combination or agreement was to injure the plaintiff;
>
> (c) the combination or agreement was carried into effect by the defendants' conduct;
>
> (d) the defendants' conduct in carrying the combination or agreement into effect caused damage to the plaintiff.
>
> [70] The elements of the tort of conspiracy to injure by unlawful means are:[30]
>
> (a) there was a combination or agreement between two or more persons to engage in conduct amounting to unlawful means;
>
> (b) a purpose of that combination or agreement was to injure the plaintiff;

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28 [2017] 1 Qd R 549.

29 *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290 at [60] to [61].

30 *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 at 102; [1999] FCA 899 at [421] per R D Nicholson J; *Weston v Publishing and Broadcasting Ltd* [2011] NSWSC 433 at [612] per Ward J.

(c) the combination or agreement was carried into effect by the commission of the agreed unlawful acts; and

(d) those unlawful acts caused damage to the plaintiff.

[71] It can be seen that the two torts have in common the need to prove the conspiracy; that the conspiracy involved an intention to injure; that the conspiracy was carried into effect; and that so doing caused damage to the plaintiff. And it may also be observed in relation to both torts, that in a case based on a clandestine arrangement or arrangements between conspirators, a plaintiff, who can be expected to be unable to plead the terms of an express agreement in the usual way, must at the least be able to plead and particularise the overt acts it intends to rely on to justify the inference that the agreement on which it relies was in fact made as it alleges.[31]

[72] There are three key distinctions between the two torts.

[73] The first lies in the prominence of the required purpose of injuring the plaintiff. Both torts require the plaintiff to prove that a purpose of the conspiracy was to injure the plaintiff. For a lawful means conspiracy, however, the plaintiff must prove that the purpose of injuring the plaintiff was the sole or predominant purpose of the conspiracy. That is not required for an unlawful means conspiracy where it will suffice for a plaintiff to prove that causing injury to the plaintiff was a purpose of the conspiracy.

[74] The second lies in the nature of the means agreed to be used to injure the plaintiff. For an unlawful means conspiracy, the plaintiff must prove that the combination or agreement was to engage in conduct which amounted to unlawful means.[32] In other words the unlawful means aspect must exist at the time the combination or agreement was made. That is not required for a lawful means conspiracy.

[75] The third lies in the nature of the means in fact used to carry the conspiracy into effect and cause injury to the plaintiff. For an unlawful means conspiracy, the plaintiff must prove that the conspiracy was carried into effect by commission of the agreed unlawful acts and those agreed unlawful acts caused damage to the plaintiff.[33] That is not required for a lawful means conspiracy where the plaintiff does not have to show that it was the unlawful part of the conspiracy that caused loss to the plaintiff."

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31 Cf *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* (1998) 157 ALR 135 at 140 per Drummond J. See also *Weston v Publishing and Broadcasting Ltd* [2011] NSWSC 433 at [639] to [640].

32 *Williams v Hursey* (1959) 103 CLR 30 at 78; *Szanto v Bainton* [2011] NSWSC 985 at [180].

33 *Vickery v Taylor* (1910) 11 SR (NSW) 119 at 130 to 131; *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169 at [7]; *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) at [186] and annex I at [3].

[32] The plaintiffs do not allege a lawful means conspiracy. They allege a conspiracy to injure by unlawful means. In *Coomera Resort Pty Ltd v Kolback Securities Ltd*,[34] Mackenzie J held that a conspiracy to cause a person to breach a fiduciary duty was not a conspiracy to injure by "unlawful means".[35] The weight of authority, though, favours the view that a conspiracy to cause a breach of a contractual agreement does constitute the application of "unlawful means".[36]

[33] Mr Strangman submits that the plaintiffs:

(a) do not plead the unlawful act;

(b) to the extent that the plaintiffs allege that breach of the *Australian Consumer Law* is unlawful, they do not identify the provision(s) said to be contravened; and

(c) do not plead the combination or agreement between the existing and proposed defendants.

[34] The proposed pleading of conspiracy is not eloquent. There is, obviously enough, no written conspiracy agreement which identifies the elements of the tort. The tort will have to be proved circumstantially. It is necessary, therefore, for the plaintiffs to plead the material facts from which inferences ought to be drawn. The inferences themselves should be expressly pleaded.[37] The draft further amended statement of claim is therefore technically deficient.

[35] It is, though, quite clear what the plaintiffs' case is.

1. By early December 2016, an issue had arisen about encroachments onto Lot 22 of buildings situated primarily on Lot 2. This was relevant to Special Condition 1 of the Sale Contract.

2. On 15 December 2016, Nurrowin's solicitors wrote to Mr Venturiello's solicitors asking for the encroachment to be removed. They agreed to do so.

3. Despite the option to resolve the building alignment issues and proceed with the contract, Mr Venturiello and Nurrowin negotiated for the sale of both Lots 2 and 22. They could, of course, have proceeded with the sale of Lot 22 on the terms contemplated by the Sale Contract entered into pursuant to the option and entered into a separate contract for the sale of Lot 2.

4. Mr Venturiello knew that the course proposed would disadvantage the plaintiffs. He was so concerned that he secured an indemnity from Nurrowin against any claim by the plaintiffs.

5. Mr Venturiello must have known that by Nurrowin's rescission of the Sale Contract pursuant to the option, Nurrowin could secure Lot 2 without additional outlay. In other words, some of the money which was to be paid to API was going to Mr Venturiello (to purchase Lot 2), not the first plaintiff in payment of the nomination fee.

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34 [2004] 1 Qd R 1.

35 At 37-38.

36 *Coomera Resort Pty Ltd v Kolback Securities Ltd* [2004] 1 Qd R 1 at 37, *McKernan v Fraser* (1931) 46 CLR 343 at 378 and *Williams v Hursey* (1959) 103 CLR 30 at 122.

37 *Uniform Civil Procedure Rules* 1999, r 150.

6. The contract for both Lots 2 and 22 was signed before the termination of the Sale Contract pursuant to the option.

7. Because the Long Stop Date had expired, Nurrowin then rescinded the contract the subject of the option.

[36] It was right of the plaintiffs not to plead a conspiracy to injure by lawful means. There is no inference open on the material before me that the "sole or dominant" purpose of the alleged conspiracy was to injure the plaintiffs. Mr Sutherland's objective was, on the plaintiffs' case, to secure Lots 2 and 22 for as little as possible. Avoiding Nurrowin's obligation to pay API the nomination fee was just a way of lessening the final burden of the purchase. Mr Venturiello, knowing that what was proposed by Mr Sutherland would secure a sale of both Lots 2 and 22.

[37] On the material before me, the plaintiffs are in a position to plead a case of conspiracy that:

(a) there was an agreement between Mr Sutherland and Nurrowin and Mr Venturiello through his attorneys to:

(i) abandon the obligations in the Sale Contract to cooperate with each other to secure a solution to the boundary realignment issue;[38]

(ii) therefore causing Nurrowin to breach the Deed of Nomination; and

(iii) thus causing Mr Venturiello to be in a position to terminate his contract with Nurrowin, which in turn released Nurrowin from its obligations to API under the Deed of Nomination;

(b) one of the purposes of that agreement was:

(i) to release Nurrowin from its obligations to the plaintiffs to pay the nomination fee;

(ii) thus assisting Nurrowin to purchase Lot 2; and

(iii) thereby injuring API by denying it the nomination fee;

(c) the agreement was carried into effect by:

(i) not resolving the boundary realignment issues;

(ii) Mr Venturiello terminating the sale contract; and

(iii) Nurrowin terminating the nomination agreement;

(d) the allegedly unlawful acts damaged API by denying it the nomination fee.

[38] Mr Strangman points to various discretionary features which he submits should lead to the exercise of discretion against ordering joinder. These are:

1. *Delay*. The action has been on foot for four years, pleadings have closed and the defendants are in a position to seek directions for trial.

2. *The joinder will complicate the litigation*. It is submitted that the addition of further defendants will increase the length of the trial and cause further

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38 Sale Contract, special condition 1.4; Option Agreement, clause 20.3.

expense. Mr Sutherland says that the defendants have already spent in excess of $750,000 on the action and the prospect of recovery of costs against the plaintiffs is slim.

3. *Commercial inconvenience*. It is submitted that the litigation is hampering the defendants from securing funding and proceeding with the development of the water park.

4. *The new documents did not tell the plaintiffs anything they did not already know*. The point of this submission is that the proposed defendants could have been joined initially, or in any event much sooner.

[39] Mr Strangman relies upon the general statement of principle by Bond J in *Stacks Managed Investments Ltd v Tolteca Pty Ltd; Tolteca Pty Ltd v Lillas & Loel Lawyers Pty Ltd*[39] where his Honour considered that when determining an application brought pursuant to r 69:

> "It seems to me, therefore, that the Court must balance two competing considerations:
>
> (a) the desirability of avoiding multiple proceedings, excessive costs and the possibility of divergent findings in separate proceedings traversing the same subject matter;
>
> (b) the interest of Stacks in being allowed to prosecute its action and obtain judgment without being delayed or inconvenienced by Tolteca's endeavours to obtain a remedy against a further party."[40]

[40] Delay will no doubt be caused in the finalisation of the matter by the joinder of further defendants. It follows that the proceedings will be more expensive. Delay here is not, I think, a big issue. The matter has not been set down for trial. Directions can be made for the new defendants to plead and complete interlocutory steps.

[41] In the circumstances of this case, great weight should not be put on Mr Sutherland's complaints about the expense of the proceedings. On any view of it, Nurrowin was prepared to pay $4,500,000 for Lot 22 and because of circumstances which the existing defendants say entitled Nurrowin to abandon the sale contract, the defendants were $1,250,000 better off as they avoided paying the nomination fee. I accept that the defendants say they acted lawfully, but my preliminary view is that there are real questions as to the proprietariness of their conduct.

[42] There may be difficulties in the existing defendants recovering costs from the plaintiffs. However, the plaintiffs' impecuniosity is clearly enough caused by the fact that API was not paid the nomination fee but was left liable to Mr Baird and the shareholders of Sunshine Surf Park Pty Ltd.[41]

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39 [2015] QSC 80.

40 At [20]; and at [25] where it was held that delay and increased costs were powerful considerations in favour of rejection of the joinder application. And see generally *Bishop v Bridgelands Securities* (1990) 25 FCR 311 at 314 followed in *Hagan v Bank of Melbourne Ltd* [1994] 2 Qd R 507.

41 Although I note that action by the shareholders was discontinued.

[43] The submission that the new documents did not tell the plaintiffs anything they did not already know is probably true to a point. The plaintiffs knew that a replacement contract was entered into but did not know the details of the negotiations which led to it.

[44] There is evidence that it is likely that Nurrowin has agreed to indemnify Mr Venturiello against any claims by API as a result of the termination of the contract entered into pursuant to the Option Agreement. That likelihood appears from the documents that have been recently disclosed even though no signed copy of the deed of indemnity is in evidence.[42] Mr Sutherland, in his affidavit, did not deny that Nurrowin has agreed to indemnify Mr Venturiello.

[45] It follows then that if the proposed new defendants were sued in separate proceedings by the existing plaintiffs, then those defendants would no doubt seek indemnity from Nurrowin which would then involve Nurrowin in the second proceedings. That tends to nullify many of Mr Strangman's submissions as to the convenience of keeping the two proceedings separate.

[46] The issues in dispute between the existing parties are inextricably bound up with the issues between the existing plaintiffs and the proposed defendants. It is desirable to avoid inconsistent findings and order that all the claims against all defendants be tried together. None of the potentially contrary considerations identified by Mr Strangman, in my view, outweigh the desirability of joining the proposed defendants.

Conclusion and order

[47] I will order that Rosella Bricalli and Anna Gassow be joined as defendants to the action in their own right and as executors of the estate of the late Louis Venturiello.

[48] While it is evident that there are cases, including conspiracy, which can be pleaded against the new defendants, the proposed further amended statement of claim certainly needs work. I will therefore not make further orders but receive submissions from the parties on the question of directions and costs.

Orders

[49] It is ordered that:

1. Rosella Bricalli and Anna Gassow jointly, as executors of the estate of the late Louis Venturiello, be joined as a fourth defendant to the proceeding.

2. Rosella Bricalli be joined as a fifth defendant to the proceeding.

3. Anna Gassow be joined as a sixth defendant to the proceeding.

4. I will hear the parties as to the appropriate directions to be given to progress the proceeding, and on the question of costs.

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42 Exhibit ACD35 to the Affidavit of A Downing sworn 15 January 2020 (CFI 121).