SUPREME COURT OF QUEENSLAND

CITATION:	*Quinlan v ERM Power Ltd & Ors* [2021] QSC 35
PARTIES:	**KENT MATTHEW QUINLAN** (Plaintiff) **v** **ERM POWER LIMITED ACN 122 259 23** (First Defendant) **PHILIP MATTHEW ST BAKER** (Third Defendant) **TREVOR CHARLES ST BAKER** (Fourth Defendant) **ANTHONY GEORGE BELLAS** (Fifth Defendant) **ANTONINO MARIO IANNELLO** (Sixth Defendant) **MARTIN ROGER GREENBERG** (Seventh Defendant) **JAMES BRETT LOCHRAN HEADING** (Eighth Defendant) **JONATHAN HUGH STRETCH** (Ninth Defendant) **JULIEANNE MARGARET ALROE** (Tenth Defendant) **ALBERT GOLLER** (Eleventh Defendant) **GEORGANNE MARIE HODGES** (Twelfth Defendant) **PHILIP ANDREW DAVIS** (Thirteenth Defendant)
FILE NO/S:	BS No 6601 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	26 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2021
JUDGE:	Bowskill J
ORDERS:	**I direct the parties to provide draft minutes of order, reflecting the reasons given below for striking out paragraphs of the further amended statement of claim, with a grant of leave to re-plead where appropriate.** **I will hear from the parties as to the costs of the applications**

CATCHWORDS: COMMUNICATIONS LAW – WHISTLEBLOWER PROTECTION AND PUBLIC INTEREST DISCLOSURE LEGISLATION — where the plaintiff claims that he made whistleblower disclosures to directors and officers of the first defendant and another company which qualify for protection under Part 9.4AAA of the *Corporations Act* 2001 (Cth) – where one of the requirements to qualify for protection, under s 1317AA of the *Corporations Act* 2001, is that the discloser has reasonable grounds to suspect that the information indicates or concerns certain things – where the plaintiff seeks to establish that he had reasonable grounds to suspect certain things, in part, by reference to what he alleges was, objectively, the actual purport or effect of particular transactions, whether he had knowledge of those things or not – where the first defendant contends that the question of reasonableness is to be determined by reference only to what the plaintiff knew or believed at the time of the disclosures – consideration of the proper construction of the phrase "has reasonable grounds to suspect" in s 1317AA of the *Corporations Act* 2001.

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – EMBARRASSING, TENDENCY TO CAUSE PREJUDICE, SCANDALOUS, UNNECESSARY ETC OR CAUSING DELAY IN PROCEEDINGS – applications to strike out paragraphs of the further amended statement of claim under r 171 of the *Uniform Civil Procedure Rules* 1999 on the basis that they have a tendency to prejudice or delay the fair trial of the proceeding including on the basis of irrelevance having regard to the proper construction of s 1317AA of the *Corporations* Act 2001, imprecision and a failure to properly comply with the requirement to specifically plead motive, intention or other condition of mind as required by r 150(1)(k) and (2) of the *Uniform Civil Procedure Rules* 1999 (Qld)

Corporations Act 2001 (Cth), s 1317AA
Uniform Civil Procedure Rules 1999 (Qld), rr 149, 150(1)(i), 150(1)(k), 150(2), 155, 157(c), 171

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Australian Competition and Consumer Commission v Woolworths Ltd [2019] FCA 1039
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors [2011] QCA 252
Edwards v Noble (1971) 125 CLR 296
Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486
George v Rockett (1990) 170 CLR 104
Graham & Linda Huddy Nominees Pty Ltd v Byrne [2016]

QSC 221
Hyder v Commonwealth of Australia (2012) 217 A Crim R 571; [2012] NSWCA 336
Lee v Abedian [2017] 1 Qd R 549
LM Investment Management Limited (in liq) v EY & Ors (No 5) [2020] QSC 264
Mio Art Pty Ltd v Macequest Pty Ltd (2013) 95 ACSR 583
New South Wales v Bouffler (2017) 267 A Crim R 545; [2017] NSWCA 185
O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286
Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (2017) 123 ACSR 223
Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 7) [2019] QSC 241
The Environmental Group Ltd v Bowd (2019) 137 ACSR 352; [2019] FCA 951
Walsh v Umoona Tjutagku Health Service Aboriginal Corporation (No 2) [2017] FCA 852
WorkPac Pty Lt v Skene (2018) 264 FCR 536; [2018] FCAFC 131

COUNSEL:	A J H Morris QC and K Stoyle for the plaintiff/respondent D G Clothier QC and E L Hoiberg for the first defendant/applicant D O'Brien QC and A Nicholas for the third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth defendants/applicants Jamal, N (*sol*) for the eighth defendant
SOLICITORS:	Sterling Law for the plaintiff/respondent Clayton Utz for the first defendant/applicant Carter Newell for the third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth defendants/applicants Wotton & Kearney for the eighth defendant

Introduction

[1] The plaintiff is a former employee of the first defendant (ERM). He claims to have made whistleblower disclosures to directors and officers of ERM and another company, Empire Oil & Gas NL, which qualify for protection under Part 9.4AAA of the *Corporations Act* 2001 (Cth). The protected disclosures are alleged to have been made on four occasions (in May and June 2012, January and July 2014) and to have concerned what the plaintiff contends were "sham transactions" conducted by ERM and "substantial insider trading" by the managing director and CEO of ERM, Mr St Baker (the third defendant).[1] The plaintiff alleges that on twelve different occasions, spanning from May 2012 to September 2019, details of or related to these disclosures were improperly disclosed by various of the defendants (there are 13 in all), without his consent. These are referred to in the pleading as the "perfidious divulgations".[2] The

1 The four Protected Disclosures are set out in part F of the statement of claim.
2 The 12 Perfidious Divulgations are set out in part G of the statement of claim.

plaintiff then alleges that, as a consequence of the perfidious divulgations, he was "victimised by a litany of retaliatory conduct", over a period of seven years from 2012 to 2019, which took 23 different forms, and caused him to suffer detriment including depriving him of pay rises and other benefits, and the loss of his employment. These are referred as to the "vindictive stratagems".[3] By this proceeding, the plaintiff seeks to recover compensation for the loss, damage and injury he claims to have suffered as a result of the detrimental conduct alleged.

[2] The proceedings were commenced on 26 June 2020. The present version of the statement of claim was filed on 8 September 2020, in response to earlier complaints by the defendants. No defences have yet been filed.

[3] There are presently before the court two applications to strike out parts of the further amended statement of claim: an application by the first defendant; and an application by the third to seventh and ninth to thirteenth defendants. As for the remaining defendants, the proceedings have been discontinued as against the second defendant, Empire; and the eighth defendant appeared but did not participate in the strike out applications.

[4] The first defendant's application raises a legal issue concerning the proper construction of s 1317AA of the *Corporations Act,* in terms of the relevant elements of a disclosure qualifying for protection under Part 9.4AAA of the Act. There is a related issue which arises from without prejudice communications between the plaintiff and the first defendant prior to the commencement of the proceedings, and a contention by the plaintiff that the first defendant has waived the privilege as a result of conduct amounting to an estoppel. Both applications also raise a common question as to what is required by r 150(1)(k) and r 150(2) of the *Uniform Civil Procedure Rules* 1999 (Qld), for a pleading of motive, intention or other condition of mind. Otherwise, the applications are brought on the basis that the challenged parts of the pleading have a tendency to prejudice or delay the fair trial of the proceeding, because they are imprecisely or insufficiently pleaded, contain matters which are irrelevant, or in some respects are unnecessary or scandalous (r 171(1)(b) and (c)). Neither application contends the plaintiff's claim is untenable and should be struck out on that basis. There is no opposition to the grant of leave to re-plead, where appropriate. The principles affirmed in *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors* [2011] QCA 252 at [22], [27]-[28] apply.

[5] I will deal with two of the plaintiff's preliminary arguments at the outset. I reject the contention that the strike out applications are an abuse of process, either because of a failure to give proper notice of the applications or because it should be inferred the applications are merely a strategy by the defendants to deplete the plaintiff's resources to conduct the litigation. I can see no basis for either of those contentions. The applications were filed on 29 September 2020. Detailed outlines of argument were filed by the applicants on 26 and 27 October 2020. The plaintiff's equally detailed outline was filed on 18 November 2020. The applications were heard on 8 February 2021, over four months after they were filed. That is ample notice. The fact that the applications raised points not previously flagged in the earlier correspondence between the parties does not support a conclusion that they amount to an abuse of process. The statement of claim is very long and complex. It is unsurprising that further attention to

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[3] The 23 Vindictive Stratagems are set out in part H, I and J of the statement of claim.

it gave rise to additional complaints. For the reasons which appear below, I have found merit in almost all the arguments of the defendants, as a result of which I cannot see how it can be regarded as an abuse of process. In so far as the assertions of a resource depleting strategy is concerned, there is no evidence before the court to support such an assertion, and I propose to say no more about it.

[6] I will deal first with the issue of the construction of s 1317AA of the *Corporations Act*; then the related estoppel argument; and then address in a sequential way the complaints about the various other parts of the pleading, and in that context address the r 150 UCPR issue where it arises.

Section 1317AA of the Corporations Act

[7] Part 9.4AAA of the *Corporations Act* contains provisions which provide protection for "whistleblowers". The part was first enacted in 2004.[4]

[8] The part begins with s 1317AA, which defines the disclosures qualifying for protection under Part 9.4AAA.

[9] As originally enacted, s 1317AA provided, relevantly:

> "**1317AA Disclosures qualifying for protection under this Part**
>
> (1) A disclosure of information by a person (the ***discloser***) qualifies for protection under this Part if:
>
> (a) the discloser is:
>
> (i) an officer of a company; or
>
> (ii) an employee of a company; or
>
> (iii) a person who has a contract for the supply of services or goods to a company; or
>
> (iv) an employee of a person who has a contract for the supply of services or goods to a company; and
>
> (b) the disclosure is made to:
>
> (i) ASIC; or
>
> (ii) the company's auditor or a member of an audit team conducting an audit of the company; or
>
> (iii) a director, secretary or senior manager of the company; or
>
> (iv) a person authorised by the company to receive disclosures of that kind; and

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4 *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004 (No. 103 of 2004) (the **2004 amending Act**).

(c) the discloser informs the person to whom the disclosure is made of the discloser's name before making the disclosure; and

(d) the discloser **has reasonable grounds to suspect** that the information **indicates** that:

(i) the company has, or may have, contravened a provision of the Corporations legislation; or

(ii) an officer or employee of the company has, or may have, contravened a provision of the Corporations legislation; and

(e) the discloser makes the disclosure in good faith."[5]

[10] Section 1317AA was substantially amended in 2019.[6] Section 1317AA now provides:[7]

"**1317AA Disclosures qualifying for protection under this Part**

Disclosure to ASIC, APRA or prescribed body

(1) A disclosure of information by an individual (the ***discloser***) qualifies for protection under this Part if:

(a) the discloser is an eligible whistleblower[8] in relation to a regulated entity;[9] and

(b) the disclosure is made to any of the following:

(i) ASIC or the Registrar;

(ii) APRA;

(iii) a Commonwealth authority prescribed for the purposes of this subparagraph in relation to the regulated entity; and

(c) subsection (4) or (5) applies to the disclosure.

Disclosure to eligible recipients

(2) A disclosure of information by an individual (the ***discloser***) qualifies for protection under this Part if:

(a) the discloser is an eligible whistleblower in relation to a regulated entity; and

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5 Emphasis added.

6 *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act* 2019 (No 10 of 2019) (the **2019 amending Act**).

7 Including a minor amendment to s 1317AA(1)(b)(i) made by the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act* 2020 (No 69 of 2020).

8 See s 1317AAA.

9 See s 1317AAB.

(b) the disclosure is made to an eligible recipient[10] in relation to the regulated entity; and

(c) subsection (4) or (5) applies to the disclosure.

Disclosure to legal practitioner

(3) A disclosure of information by an individual qualifies for protection under this Part if the disclosure is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part.

Disclosable matters

(4) This subsection applies to a disclosure of information if the discloser **has** reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to:

(a) the regulated entity;

(b) if the regulated entity is a body corporate – a related body corporate of the regulated entity.

(5) Without limiting subsection (4), this subsection applies to a disclosure of information if the discloser **has** reasonable grounds to suspect that the information indicates that any of the following:

(a) the regulated entity, or an officer or employee of the regulated entity;

(b) if the regulated entity is a body corporate – a related body corporate of the regulated entity, or an officer or employee of a related body corporate of the regulated entity;

has engaged in conduct that:

(c) constitutes an offence against, or a contravention of, a provision of any of the following:

(i) this Act;

(ii) the ASIC Act;

(iii) the *Banking Act 1959*;

(iv) the *Financial Sector (Collection of Data) Act 2001*;

(v) the *Insurance Act 1973*;

(vi) the *Life Insurance Act 1995*;

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10 See s 1317AAC.

(vii) the *National Consumer Credit Protection Act 2009*;

(viii) the *Superannuation Industry (Supervision) Act 1993*;

(ix) an instrument made under an Act referred to in any of subparagraphs (i) to (viii); or

(d) constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more; or

(e) represents a danger to the public or the financial system; or

(f) is prescribed by the regulations for the purposes of this paragraph.

Note: There is no requirement for a discloser to identify himself or herself in order for a disclosure to qualify for protection under this Part."[11]

[11] The two main changes effected by the 2019 amendment were (1) to remove the separate requirement that the disclosure be made in "good faith"; and (2) to remove the requirement for the discloser to identify themselves.

[12] It is relevant to have regard to both forms of the legislation, given the time period over which the conduct alleged by the plaintiff occurred.[12]

[13] Where a person makes a disclosure which qualifies for protection under Part 9.4AAA, it is an offence for another person to disclose their identity, or to disclose information which is likely to lead to the identification of the discloser (previously s 1317AE; now s 1317AAE).

[14] Causing (or threatening to cause) detriment to a person because of a protected disclosure is also prohibited. As originally enacted s 1317AC(1) provided:

"(1) A person (the ***first person***) contravenes this subsection if:

(a) the first person engages in conduct; and

(b) the first person's conduct causes any detriment to another person (***second person***); and

(c) the first person intends that his or her conduct cause detriment to the second person; and

(d) the first person engages in his or her conduct because the second person or a third person made a disclosure that qualifies for protection under this Part."

[15] Following amendment in 2019, s 1317AC(1) provides:

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11 Emphasis added.

12 See the transitional provision in s 1644 of the *Corporations Act*.

> "(1) A person (the ***first person***) contravenes this subsection if:
>
> (a) the first person engages in conduct; and
>
> (b) the first person's conduct causes any detriment to another person (the ***second person***); and
>
> (c) when the first person engages in the conduct, the first person believes or suspects that the second person or any other person made, may have made, proposes to make or could make a disclosure that qualifies for protection under this Part; and
>
> (d) the belief or suspicion referred to in paragraph (c) is the reason, or part of the reason, for the conduct."

[16] The question of construction which arises in the context of the strike out applications is whether it is relevant for the purposes of s 1317AA to plead, and eventually prove, what is alleged to be the actual (mis)conduct or state of affairs the subject of the information disclosed? For the plaintiff, it is submitted that it is – as a component of the element of "reasonableness". That is, the plaintiff submits that in order to demonstrate that the discloser "has reasonable grounds to suspect" that the information disclosed concerns misconduct, or an improper state of affairs or circumstances, or indicates conduct which constitutes an offence, it is relevant to have regard to what (is alleged to have) actually occurred, even if those matters were not known to the discloser, to determine whether they had reasonable grounds for suspecting. For the first defendant, it is submitted that it is not. The first defendant submits that pleading (what is alleged to be) the purport and effect of what actually occurred is not relevant to the question whether the discloser had (at the relevant time) reasonable grounds to suspect (the relevant things). The first defendant submits the question is to be determined by reference to what the discloser knew or believed at the time of the disclosure.

[17] For the following reasons, I find that the plaintiff's construction is not supported by the language, context or purpose of the relevant provision.[13]

[18] The purpose of part 9.4AAA, as articulated in the explanatory memorandum to the Bill which became the 2004 amending Act, is "to encourage employees, officers and subcontractors engaged by a company to report suspected breaches of the corporations law to either ASIC or internally within the company". The policy behind such encouragement reflects the dual aims of facilitating the early detection and prosecution of corporate misconduct, and promoting improved business practices and standards.[14] The provisions were intended to provide protection for people willing to take the risk of speaking out, by "prohibiting employers from victimising employees, officers or subcontractors when they report a suspected breach in good faith and on reasonable grounds".[15] In addition, the explanatory memorandum records that the use of "good

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13 For the relevant principles, see *R v A2* (2019) 93 ALJR 1106 at [32]-[37] and the discussion in *Coeur de Lion Investments Pty Ltd v Lewis & Ors* [2020] QCA 111 at [13]-[15].

14 See, for example, the second reading speech, in relation to, inter alia, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (7 December 2017).

15 Explanatory Memorandum to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* at [5.381].

faith" was "intended to raise the threshold for obtaining qualified privilege", in contrast to s 89 of the *Corporations Act*, under which qualified privilege attaches in the absence of malice. The explanatory memorandum stated that this was "considered appropriate given the need to discourage malicious or unfounded disclosures being made and ensure the integrity of these provisions of the Bill".[16]

[19] In the explanatory memorandum to the Bill which became the 2019 amending Act by which, among other things, the separate requirement for the disclosure to be made in good faith was removed, the following was said:

> "***Subjective requirement replaced by objective 'reasonableness'***
>
> 2.42 The new law addresses conclusions of recent reviews that the requirement that a whistleblower makes a qualifying disclosure 'in good faith' creates uncertainty and risk for whistleblowers. It is common for companies accused of wrongdoing to allege subjective or collateral motivation of the whistleblower that may defeat a 'good faith' requirement in whistleblower protection laws.
>
> 2.43 The 'good faith' requirement is also inconsistent with the approach taken in the PID Act and Registered Organisations Act, as well as with best practice legislative approaches in other countries including the United Kingdom.
>
> 2.44 The amendments remove the concept of the requirements for making a qualified disclosure, and ensure the protections and remedies are based on the objective reasonableness of the whistleblower's grounds to suspect that information disclosed indicates misconduct or other disclosable matters."

[20] The plaintiff submits that both the "good faith" and the "has reasonable grounds to suspect" elements are able to be satisfied by reference to the existence of objective facts, whether or not those facts were known to the discloser at the time of making the disclosure.[17]

[21] It is clear that the earlier requirement under s 1317AA(1)(e), that the "discloser makes the disclosure in good faith", involves subjective considerations: it directs attention to the discloser's state of mind, in terms of the purpose or motive which actuated them to make the disclosure(s).[18] I reject the plaintiff's submission that this element could be satisfied by reference to "underlying facts" unknown to him at the time of his disclosures, for example, "surrounding facts that would establish the [alleged] misconduct as particularly serious".

[22] Turning then to the requirement, which arises both under the former s 1317AA(1)(d) and the current s 1317AA(4) and (5), that the discloser "has reasonable grounds to suspect".

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16 Ibid, at [5.391].

17 Although, in oral submissions, counsel for the plaintiff seemed to accept that the "good faith" requirement is subjective: see T 1-47.32.

18 See *Walsh v Umoona Tjutagku Health Service Aboriginal Corporation (No 2)* [2017] FCA 852 at [40], referring, inter alia, to *Cussen v Sultan* (2009) 74 ACSR 496 at [34]. See also *The Environmental Group Ltd v Bowd* (2019) 137 ACSR 352 at [143], [148]-[152] and [180]-[182] per Steward J.

[23] That is a familiar phrase in the context, in particular, of statutes regulating the exercise powers of arrest and to issue search warrants.

[24] The phrase has been held to comprise both subjective and objective elements: the discloser must, themselves (subjectively) possess grounds to suspect the relevant things; and those grounds must, objectively, be reasonable.

[25] As to the objective element, in *George v Rockett* (1990) 170 CLR 104, which was concerned with the power of a magistrate to issue a search warrant, where he or she was satisfied there were reasonable grounds for suspecting certain things,[19] the Court said that:

> "When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."[20]

[26] As the Court in *George v Rockett* also said:

> "In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s 679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind…
>
> Suspicion, as Lord Devlin said in *Hussein v Chong Fook Kam*, 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove"' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees,* a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s 95(4) of the *Bankruptcy Act* 1924 (Cth). Kitto J said:
>
> > 'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the subsection describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the

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19 Under s 679 of the Queensland *Criminal Code.*

20 *George v Rockett* (1990) 170 CLR 104 at 112.

> payment would have as between the payee and the other creditors.'
>
> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an indication of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."[21]

[27] As the next case makes clear, the factual basis for the suspicion, to which the test of reasonableness is applied, is that which is known to the person who suspects. It is not an objective set of circumstances. In *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, the House of Lords considered the meaning of the phrase "has reasonable grounds for suspecting" in the context of a power to arrest without warrant. In that case, the plaintiff (the subject of an arrest) contended, as the plaintiff does here, that the test required proof that the reasonable grounds on which the police officer based his suspicion existed in fact; that the objective part of the test required proof of something more than what was in the mind of the arresting officer. That argument was unanimously rejected. As Lord Hope (with whom the other members of the Court agreed) explained:

> "… the test [that 'a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be….'] is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.
>
> This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it

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21 Ibid, at 115-116. Underlining added. References omitted.

> may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."[22]

[28] *George v Rockett* and *O'Hara v Chief Constable of Royal Ulster Constabulary* were applied by the New South Wales Court of Appeal in *Hyder v Commonwealth of Australia* (2012) 217 A Crim R 571. That case, like *O'Hara*, concerned the meaning of a power in the *Crimes Act* 1914 (Cth) authorising the arrest of a person, without warrant, albeit where the constable *believes* (rather than *suspects*) on reasonable grounds that the person has committed or is committing an offence.

[29] The Court of Appeal divided as to whether the primary judge had erred in their approach (McColl JA and Hoeben JA finding that they had not; Basten JA concluding otherwise). However, on the question of principle, as to the meaning of the test, there was no disagreement. McColl JA, at [15] summarised a number of propositions relevant to the test. These included:

> "(7) What constitutes reasonable grounds for forming a suspicion or a belief must be judged against 'what was known or reasonably capable of being known at the relevant time': *Ruddock v Taylor* [2005] HCA 48; (2005) 222 CLR 612 (at [40]) per Gleeson CJ, Gummow, Hayne and Heydon JJ; whether the relevant person had reasonable grounds for forming a suspicion or a belief must be determined not according to the subjective beliefs of the police at the time but according to an objective criterion: *Anderson v Judges of the District Court of New South Wales* (1992) 27 NSWLR 701 (at 714) per Kirby P (Meagher and Sheller JJA agreeing); see also *O'Hara v Chief Constable of Royal Ulster Constabulary* (at 298) per Lord Hope;
>
> (8) The information acted on by the arresting officer need not be based on his own observations; he or she is entitled to form a belief based on what they have been told. The reasonable belief may be based on information which has been given anonymously or on information which turns out to be wrong. The question whether information considered by the arresting officer provided reasonable grounds for the belief depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances and, having regard to the source of that information, drawing inferences as to what a reasonable person in the position of the independent observer would make of it: *O'Hara v Chief Constable of the Royal Ulster Constabulary* (at 298, 301, 303) per Lord Hope …"

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22 *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 at 298, see also at 301-302. Underlining added.

[30] Further, at [43], her Honour said:

> "It is important in this, as in other fields of legal discourse, to be careful not to judge the 'reasonable grounds' issue with the benefit of hindsight. As I have earlier explained (see [15](8)), a reasonable belief may be based on information which turns out to be wrong. That much was accepted in the appellant's case when the charges against him were withdrawn. However a court must be careful not to assess the question whether the arresting officer had reasonable grounds for his or her suspicion or belief prior to the arrest through the prism of *ipso facto* acquired knowledge."[23]

[31] Basten JA, likewise, confirmed that in respect of both the subjective and objective elements of the test, the inquiry must be determined by reference to matters known to the constable at the time of carrying out the arrest; and that "nothing which was not before [the constable] at the time he carried out the arrest is of any relevance to the objective assessment" (at [59] and [80]).

[32] *George v Rockett, O'Hara* and *Hyder,* have more recently been applied by a differently constituted New South Wales Court of Appeal in *New South Wales v Bouffler* (2017) 267 A Crim R 545, which reinforced the principle that the objective requirement of the "reasonable grounds for suspecting" test does not require looking beyond what was in the mind of the officer who effected the arrest (see at [87]-[92]).[24]

[33] This approach gives meaning to the word "has" in the phrase "has reasonable grounds to suspect". The discloser must, himself or herself, have – in the sense of possessing – reasonable grounds for suspecting the relevant matters before disclosure of those matters can qualify for protection. The text of the statute directs attention to the information which formed the basis of the particular discloser's suspicion; rather than, objectively, by reference to other information not known by the discloser, or which becomes known subsequently.[25]

[34] There is no reason why the approach to construction of the test, where the words "has reasonable grounds to suspect" are used in s 1317AA, should be any different from the now well-settled approach where those words appear in provisions dealing with arrests or warrants. Although the context in which the test appears is different, by using, without alteration, a phrase which has been judicially considered, the legislature is presumed to have intended the words to bear the meaning already judicially attributed to them.[26] In addition, construing the phrase "has reasonable grounds to suspect" consistently with the authorities discussed above is consistent with the purpose of the provisions, as discussed in paragraph [18] above; namely, to provide a statutory inducement or incentive to encourage appropriate disclosure of suspected corporate misconduct – to facilitate early detection of such misconduct; but to balance the risk of improper invocation of the qualified protection by imposing a requirement of objective reasonableness upon the whistleblower's grounds for suspecting. To permit or require

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23 See also per Hoeben JA at [86]-[89].

24 An application for special leave to appeal to the High Court from this decision was refused: [2017] HCASL 321.

25 See, by analogy, *Australian Competition and Consumer Commission v Woolworths Ltd* [2019] FCA 1039 at [129].

26 *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [107].

"reasonableness" to be established by reference to material not known by the discloser is not consistent with that purpose. Nor is limiting "reasonableness" to circumstances where the suspected matters can be shown to have actually occurred. On the contrary, that would place an unnecessarily onerous burden on a potential whistleblower, which would discourage reporting.

[35] Consistent with that position, in the only authority I have been able to find dealing specifically with s 1317AA, *The Environmental Group Ltd v Bowd* (2019) 137 ACSR 352, Steward J (then of the Federal Court) applied *George v Rockett* to the meaning of "reasonable grounds to suspect" (at [180]). The approach his Honour took to considering whether the discloser's grounds to suspect were reasonable accords with the authorities discussed above – that is, to consider what the discloser says he knew at the time of the disclosure and, by reference to that, form a view whether that provided reasonable grounds to suspect contraventions had occurred.

[36] In the context of addressing the meaning of "good faith", I was referred to a decision in which a similarly worded whistleblower protection provision, s 466-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth), was construed – *Walsh v Umoona Tjutagku Health Service Aboriginal Corporation (No 2)* [2017] FCA 852.[27] In this case, Charlesworth J also construed the provision by reference, inter alia, to *George v Rockett* (see at [38]). However, at [39], her Honour said that the inquiry (into the reasonableness of the grounds to suspect) "is an inquiry into the objectively formed state of mind of a person of ordinary competence", citing *Australian Securities and Investments Commission v Edwards* (2005) 220 ALR 148 at [249] as authority for that proposition. The latter is concerned with s 588G(1)(c) of the *Corporations Act*,[28] in respect of which Barrett J held that the inquiry relevant to s 588G(1)(c) is not an inquiry concerning the particular director whose conduct is under scrutiny; it is an inquiry into the objectively formed state of mind of a person of ordinary competence. In my view, that is not the proper construction of "has reasonable grounds to suspect" in s 1317AA, which is concerned with the state of mind of the particular discloser, albeit viewed through the application of an objective lens, by the requirement that the discloser's grounds to suspect be reasonable. To the extent that this part of [39] of *Walsh v Umoona Tjutagku Health Service Aboriginal Corporation (No 2)* could be taken as holding otherwise, I respectfully disagree. Although, I note that the particular point I am concerned with does not appear to have been the subject of argument or consideration in that case, and that it may be that was not the court's intended meaning.

[37] I therefore find that, as a matter of the proper construction of s 1317AA(1)(d) (before the 2019 amendment) and s 1317AA(4) and (5) (after the 2019 amendment), matters not within the knowledge of the plaintiff at the time of the disclosures are not relevant to the question of whether those disclosures qualify for protection; and allegations of the purport or effect of what is said to have actually occurred, divorced from what was in the mind of the plaintiff, are not relevant.

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27 The relevant paragraph in relation to the "good faith" requirement is [40], which I have referred to above.

28 Dealing with a director's duty to prevent insolvent trading. Section 588G(1) sets out the criteria for when the section applies including, in (c), that at the time when the company incurs a debt, "there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be".

The estoppel argument

[38] Before applying my conclusion on the construction issue to the strike out application, it is necessary to deal with the related argument on behalf of the plaintiff, that the first defendant is estopped from raising that point.

[39] Based on the oral submissions of counsel for ERM, the facts of which were not disputed by counsel for the plaintiff, the argument arises in the following way.[29] Prior to commencing these proceedings, the plaintiff provided a draft of the statement of claim, in essentially the same form as was eventually filed, to ERM's solicitors on a without prejudice basis, inviting agreement to a form of out of court dispute resolution process. In the course of without prejudice exchanges about that, ERM's solicitors indicated that before ERM would participate in, or agree to, an out of court process, it would need to investigate the alleged underlying conduct, to find out what had actually occurred. The matter reached an impasse due to a dispute about disclosure of information about the allegations, including the plaintiff's identity, to unidentified employees of ERM. The plaintiff contends that, as a consequence of those prior dealings (in particular the fact that ERM, through its solicitors, said it wanted to investigate the substance of the alleged transactions before engaging in an out of court process) ERM is estopped from now contending that allegations of actual misconduct, divorced from what was in the mind of the plaintiff, are irrelevant for the purposes of s 1317AA.

[40] The without prejudice exchanges are also relied upon by the plaintiff in another way, as part of the plaintiff's claim for aggravated damages (paragraph 353B of the statement of claim).

[41] In each case, the plaintiff contends that the without prejudice privilege attaching to the communications has been lost as a result of the estoppel which he says arises.

[42] I reject the plaintiff's arguments in this regard. Having regard to the uncontroversial description of the purport of the correspondence, no estoppel arises. There is no basis upon which to conclude that ERM made a representation, in the circumstances as they are described, as to what it considered relevant to the legal basis on which disclosures may qualify for protection under s 1317AA, as opposed to communicating what it would wish to do before engaging in an alternative dispute resolution process; an entirely separate matter. Further, it is not apparent what reliance was placed on this in any event. The plaintiff says he disclosed the draft statement of claim to one of the named defendants, but I fail to see how that could have caused him detriment, given that he ultimately filed and served the proceedings on that defendant. The plaintiff also says he delayed commencing the proceeding for a period of time, as a result of the without prejudice exchanges. However, the statement of claim as ultimately filed is said to have been essentially in the same form as the draft which was provided, and I can see no basis to conclude that any delay in filing the claim and statement of claim, as a result of the without prejudice communications, caused detriment to the plaintiff.

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[29] The plaintiff did put in evidence of the without prejudice communications, the admissibility of which was the subject of objection by the first defendant. I do not refer to that evidence here, as the consequence of my conclusions on this issue is that the objection is upheld; and the evidence is inadmissible. It is nevertheless necessary to articulate the broad effect of the correspondence, in order to address the point raised.

[43] In any event, whatever exchanges may have taken place between the plaintiff and ERM's solicitors cannot logically bind the Court in such a way as to require it to deal with the proceedings on a basis which is inconsistent, as a matter of law, with the proper construction of the statute.

[44] I reject the plaintiff's argument that the first defendant is estopped from relying on its argument as to the proper construction of s 1317AA to contend that parts of the pleading are irrelevant. It follows that I also reject the plaintiff's argument that the without prejudice protection attaching to the correspondence has been lost, as a result of such an estoppel. For completeness, I also reject the plaintiff's argument that the first defendant's conduct, in now pressing its strike out application, in the context of the without prejudice communications, amounts to an abuse of process.

[45] Finally, on this point, the plaintiff also protests that the court should not stifle the development of the law by determining the construction issue on a strike out application. I do not accept that this principle applies to prevent me from determining the issue which has been raised. In my view, the construction is clear; and it would be wrong to let the matter progress, requiring the defendants to plead in response to allegations in the pleading which are not relevant to ultimately determining the dispute, and leaving the court to determine an issue which is not relevant.

[46] I turn now to address the parts of the pleading the subject of the strike out applications.

Paragraphs pleading the actual purport and effect of the alleged sham transactions and insider trading transactions

[47] The first defendant applies to strike out paragraphs 3, 49(c)-(d), 50(c)-(f), 85-88, 93-94, 97-99, 100(c)-(d), 101-102, 106-108, 110-111, 117(b)(i), 118-119, 122, 123(g)(i), 128(b), 130 and 139 of the statement of claim, on the basis that they contain irrelevant matters, namely, factual allegations about the *actual* purpose, effect and impropriety of the various sham transactions and insider trading deals, as distinct from the plaintiff's grounds for suspecting misconduct and the basis on which it is alleged those grounds were reasonable. The point is also made that it is not specifically pleaded that the plaintiff knew of those matters and, if he did not, they are not relevant to consideration of whether he had reasonable grounds to suspect the things he disclosed.

[48] It follows from my conclusion above as to the proper construction of s 1317AA, and my rejection of the estoppel argument, that I accept the first defendant's submission that allegations of the actual purpose and effects of the transactions and deals, and allegations of actual misconduct, divorced from what is alleged to have been known or believed by the plaintiff at the time of his disclosures, are not relevant and should be struck out.

[49] This applies to paragraphs 85-88, 97-99, 100(c)-(d), 101-102, 108, 110-111, 117(b)(i), 118-119, 123(g)(i), 128(b) and 139. Paragraph 3 is a general introductory paragraph, which reflects the subsequent pattern of pleading what is said to be the objective purpose or effect of the transactions. To that extent, it too is irrelevant and should be struck out.

[50] In relation to paragraphs 49(c)-(d) and 50(c)-(f), I accept the submission that these are irrelevant, as it is nowhere pleaded that the plaintiff knew or was aware of Stanwell's

Code of Conduct or Macquarie's various Codes of Conduct and other governance statements, referred to in those paragraphs. The plaintiff submitted these paragraphs should be seen in their context, as part of the definition of the various "dramatis personae", and as containing plain facts about each entity. However, if those matters are not relevant, which I find they are not, because it is not alleged they formed any part of the plaintiff's knowledge and therefore grounds for suspicion, they should not be pleaded.

[51] In relation to paragraphs 93-94 (Stanwell Transactions), 106-107 (Macquarie Transactions), 122, 130 and 139 (the various St Baker Trades), the complaint is slightly different, but also valid. Paragraphs 93 and 94, for example, plead that "in the premises of the matters set forth in the preceding paragraphs in Parts D(1) and (2) of this pleading…" the plaintiff believed certain things. The preceding paragraphs of parts D(1) and (2) of the pleading are paragraphs 80 to 92. But it is not pleaded that the plaintiff was aware of all the things pleaded in those paragraphs. The same criticism applies to paragraphs 106-107 and 122, 130 and 139. I accept the submission that the use of "in the premises", by reference to all that precedes, is insufficient to plead the reasonable basis of the plaintiff's beliefs. It may be that this will be corrected by the striking out of the substantive paragraphs. But it is appropriate for the plaintiff to be specific about the basis on which the plaintiff believed (or, more accurately in terms of the statute, suspected) the things that he says he did.

[52] For completeness, I note that counsel for the first defendant accepted that allegations about the actual purpose or effect of the alleged transactions could potentially be relevant to the motive of a particular defendant, not on the basis of the objective occurrence of an event, but if it could be connected to the state of mind of the individual.[30] But at present that is not pleaded.

Paragraphs dealing with the "protected disclosures"

[53] The next set of paragraphs the subject of the first defendant's application are in section F, dealing with the alleged "protected disclosures". The application seeks to strike out paragraphs 4, 140(c), 143, 144(a)-(b), 147(b), 150, 151(a)-(b), 154(b), 157, 158(a)-(b), 161(b), 164 and 165(a)-(b).

[54] The first complaint, which relates to paragraphs 140(c), 147(b), 154(b) and 161(b), concerns the lack of precision in the pleading of what was actually disclosed by the plaintiff on each of the four occasions. A consistent formula is used in paragraph 140(c) and 147(b), in which it is alleged the plaintiff informed the relevant person of "the occurrence, nature and effect of the" Stanwell Transactions and the Macquarie Transactions, and "the substance of the matters set forth in Part D of this pleading". A similar formula is used in paragraphs 154(b) and 161(b), in relation to the First and Second St Baker Trades. As already discussed, it is not pleaded or apparent that the plaintiff was aware of all the matters "set forth in Part D of this pleading". As defined,[31] the Stanwell Transactions, Macquarie Transactions and First and Second St Baker Trades are as described in paragraphs 84, 96, 116 and 127 of the statement of claim, which contain bare allegations of the transactions and share acquisitions, as distinct from what the plaintiff knew or suspected about those paragraphs.

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30 See also plaintiff's submissions at [34].

31 See the list of defined words and expressions in schedule A to the statement of claim.

[55] I accept the submission for the first defendant that, in circumstances where the "protected disclosures" are alleged to give rise to obligations of confidentiality on the defendants under the *Corporations Act,* in equity and at common law, and be the impetus for the defendants' subsequent alleged wrongful conduct, the defendants are entitled to precision as to what was actually disclosed by the plaintiff on each of the four occasions. In the manner in which these paragraphs are currently drafted, they are broad and general and incorporate by reference matters which it is not alleged were within the knowledge of the plaintiff, nor which are alleged to have been the basis of his suspicions. It is not unreasonable, given the nature of the plaintiff's claims in this proceeding to require that he be specific about what he disclosed. Paragraphs 140(c), 147(b), 154(b) and 161(b) should be struck out, with leave to re-plead.

[56] The first defendant's complaints about paragraphs 143, 150, 157 and 164 (which plead the basis on which it is said the plaintiff had reasonable grounds for suspecting) and paragraphs 144(a)-(b), 151(a)-(b), 158(a)-(b) and 165(a)-(b) (which plead that the plaintiff made the disclosures in good faith) once again focus upon the generalised cross-reference to things "set forth in part D [or E]" of the pleading. For the reasons already discussed, I accept the first defendant's submission that the plaintiff's reasonable grounds for suspecting, and good faith, can only be assessed based on what he actually knew at the time. To the extent that part D or E incorporates matters not within the plaintiff's knowledge, it is not only imprecise but incorrect. Again, the cross-reference may be corrected once those earlier paragraphs, pleading the actual purpose or effect of the transactions, separate from the knowledge or belief of the plaintiff, are removed. But in any event, this should be addressed so that the pleaded grounds for suspicion, and good faith, can be accurately understood and assessed. These paragraphs are also struck out, with leave to re-plead.

[57] Paragraph 4 is a general introductory paragraph which suffers the same flaws of imprecision. Although it seems innocuous, it is a paragraph in the pleading to which the defendants would have to respond in some way if it remains, and so it should not.

Paragraphs dealing with the identification of the plaintiff

[58] Part G of the statement of claim pleads the details of the twelve alleged "perfidious divulgations". Both applications seek to strike out paragraph 211(b), which pleads that "Each of the Perfidious Divulgations … caused loss, damage, detriment, injury and harm to [the plaintiff], as set forth in Part N of this pleading". The first defendant also applies to strike out paragraph 6 which is, again, a general introductory paragraph. Both paragraph 211(b) and paragraph 6 should be struck out as being imprecise and failing to clearly articulate the case each party is required to meet.[32] Each of the "perfidious divulgations" cannot have caused all the loss, damage, detriment, injury and harm the plaintiff alleges. There is a broad range of conduct, spanning a lengthy period of time, covered by the plaintiff's allegations against the third to thirteenth defendants. It is not unreasonable to require the plaintiff to be precise about the links in the chain of causation as against each of those individual defendants. This point will be addressed further in dealing with the complaints about part N of the pleading.

[59] Paragraphs 213, 213A, 214(a)(iii) and (b)(iii), 216(a)(iii) and (b)(iii) and 217(a)(iii) and (b)(iii) of the statement of claim plead the vicarious liability of Empire (formerly

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[32] *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [22].

the second defendant) for the actions of its directors, officers or employees where they are alleged to have made the "perfidious divulgations". As the proceedings against Empire have been discontinued, it is appropriate for these paragraphs to be struck out on the basis that they are irrelevant to the determination of the proceeding. Counsel for the plaintiff seemed to submit the paragraphs remained relevant, because some of the defendants were directors of both ERM and Empire. I do not see how that matters. Allegations are made in the pleading against the individual directors, as parties in their own right; and as against ERM where it is contended it is vicariously responsible. Since Empire is no longer a party to the proceeding, allegations as to its vicarious liability for the acts of its directors are irrelevant.

Paragraphs pleading acts causing detriment to the plaintiff: Parts H, I and J of the statement of claim

[60] A number of complaints are made about various paragraphs in parts H, I and J of the statement of claim.

[61] In some cases, the complaint is on the basis of a "temporal flaw". For example, in paragraph 219, it is pleaded that the "First Vindictive Stratagem" (something done by the third defendant, Mr St Baker, between June and December 2012) was actuated by the fact that Mr St Baker had become aware that the plaintiff had made "some or all of the Protected Disclosures". But the Protected Disclosures includes all four disclosures, including the third (made on 8 January 2014) and the fourth (made on 17 July 2014). The plaintiff submits this is a "mere technicality", which would not prevent the defendants from pleading in response, including by pointing out the flaw. But that is not the point. It is for the plaintiff to properly plead his case. The same, or a similar "temporal flaw" arises in relation to paragraphs 222, 225, 228,[33] 231, 236, 238, 240, 243, 247, 250, 253, 255, 257, 260, 263, 268 and 271 which adopt a common formula. It is less clearly a temporal flaw in the case of paragraphs 273, 275, 278, 280, 284, 288, 294, 297, 300, 307 and 316, where the same formula is used, because the alleged "stratagems" pleaded in these paragraphs seem to have been undertaken after the four disclosures. In each respect where this issue arises, the paragraph should be struck out, and re-pleaded with precision in terms of what is alleged.

[62] The next basis for complaint, which also relates to these paragraphs, raises the question of what is required for a pleading of "motive, intention or other condition of mind, including knowledge", having regard to r 150(1)(k), r 150(2) and r 157(c) of the UCPR. Taking paragraph 219 as an example again, it pleads that the "first vindictive stratagem", inter alia:

(a) was *actuated by* the fact that Mr St Baker had become *aware* the plaintiff had made some or all of the Protected Disclosures and "was so incensed by" his awareness, that he was "unable to deal with [the plaintiff] in a civil manner"; and

(b) was *intended* to cause detriment to the plaintiff.

[63] The same (or substantially the same) formula appears in the subsequent paragraphs dealing with the second to twenty-third "vindictive stratagems" (paragraphs 222, 236,

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[33] An additional complaint was made about paragraph 228(c), that it failed to identify "the person who disseminated" the information. As clarified by counsel for the plaintiff in oral argument, the person who disseminated the information is identified in paragraph 227, as Mr Anderson.

238, 243, 247, 250, 253, 255, 257, 260, 263, 268, 271, 273, 275, 278, 280, 284, 288, 294, 297, 300, 307 and 316). In each case, it is a pleading of knowledge (awareness), motive and intention. The defendants' complaint is that no material facts are pleaded in support of the allegations of state of mind (awareness), motive or intent in respect of each natural person defendant; and to the extent that state of mind, motive or intent may be said to be inferred from other facts, either those facts are not specifically pleaded, or if they are pleaded elsewhere in the statement of claim, the fact that they are relied upon as the basis for the inference is not specifically identified.

[64] The flaw inherent in the adoption of a formula for pleading is demonstrated by reference to the position of the third defendant, Mr St Baker, and the tenth defendant, Ms Alroe. Mr St Baker is alleged to have been involved in almost all the alleged retaliatory conduct complained of. Ms Alroe only became a director of ERM in August 2018, and is only said to be involved in the twenty-third "vindictive stratagem", which is said to have involved ERM sending correspondence to a large number of current and former employees in February 2019 about the plaintiff. The plaintiff's employment with ERM had ceased some six and a half years earlier, in June 2012. Yet precisely the same formula is used in paragraph 316 of the statement of claim (as against Ms Alroe and others) as appears in the earlier paragraphs dealing with the other twenty-two "vindictive stratagems", with no attempt at all to specifically plead the factual basis of allegations of motive, intention and knowledge.

[65] It is not sufficient for a plaintiff simply to plead facts somewhere in the statement of claim; later to plead in a conclusory way that a party(ies) had a particular motive, intention or other state of mind; and contend that the other party(ies) are on notice, because of the general pleading, of what is to be alleged against them. It is incumbent on the plaintiff to be specific about the basis upon which they allege the motive, intent or other state of mind was held by each particular defendant. Contrary to the plaintiff's submissions,[34] what r 150(1)(k) and (2) UCPR require <u>is</u> the "explicit linking" of facts to inferences; the drawing of an inference is not a matter of law for the court, but a matter of fact;[35] and a party <u>is</u> required to "spell out in the statement of claim" the precise manner in which underlying facts are to be deployed so as to establish a matter alleged to be available as a matter of inference from those facts. That is the point of r 150(2). It is not appropriate to plead a whole lot of facts, and leave it for the other parties to guess which are relied upon to support the pleaded inference, and for the court ultimately to "reach the correct decision", irrespective of the parties' arguments: it is for the party making the allegations to identify the case which it seeks to make and to do that clearly and distinctly".[36] This is all the more essential where the allegations are of fraudulent or serious misconduct, in respect of which more precision is required than in other cases.[37]

[66] It is no answer to the defendants' complaints in this regard to say, as the plaintiff does, that the failure to explicitly plead the underlying facts relied upon to support the inference of motive, intention or other state of mind does not matter because:

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34 Plaintiff's submissions at [91(a), (b) and (d)].

35 See, for example, *Edwards v Noble* (1971) 125 CLR 296 at 304 per Barwick CJ; and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 (whether facts are capable of supporting a particular inference is a question of law, but the drawing of an inference from facts is a question of fact).

36 See *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [25]-[27].

37 *Mio Art Pty Ltd v Macequest Pty Ltd* (2013) 95 ACSR 583 at [70].

(a) the natural person defendants intend to claim the privilege against self-incrimination – on the contrary, and as discussed further below, this underscores the need for specificity; and

(b) the defendants are inherently aware whether they possessed the alleged state of mind or not – that proposition only has to be stated for its inaccuracy to be manifest. The pleading rules are designed to reflect the basic requirements of procedural fairness. If you make an allegation against a person, you are required to coherently articulate it, so that they are in a position to respond to it.

[67] Although the plaintiff contends that to specifically plead these matters would make the pleading even longer and more complex, and impose an unreasonably onerous burden on a person in his position, that cannot be accepted. If reformulated in accordance with the principles set out above, and r 149 of the UCPR, the plaintiff is likely to be able to simplify it.

[68] The paragraphs referred to in paragraph [63] above are also struck out, with leave to re-plead.

[69] A further complaint raised about the paragraphs pleading the vindictive stratagems is that where it is alleged they amounted to a breach by the relevant person (and/or ERM) of the "germane terms of" a particular document, the statement of claim does not identify which terms are alleged to have been breached. For example, paragraph 219 pleads that the "First Vindictive Stratagem" was, inter alia, a breach by Mr St Baker and ERM of the germane terms of ERM's Code of Business Conduct and ERM's Whistleblower Policy. Paragraph 17(c) of the statement of claim says that a reference to "the germane terms of" a specified instrument or document is a reference to those terms of the instrument or document "which are set forth in this pleading". In the case of the Code of Business Conduct, Schedule E is headed "Material Terms of ERM's Code of Business Conduct", and the schedule goes on to say that, in a given time period, the document "relevantly contained provisions to the following effect" (setting them out). The Whistleblower Policy is dealt with in Schedule F. The same formula is used in multiple paragraphs, right up to the twenty-third "Vindictive Stratagem", which is said to be the conduct of eight of the natural person defendants, and ERM, in respect of which, in paragraph 316, it too is said to have been a breach of "the germane terms of" ERM's Code of Business Conduct and ERM's Whistleblower Policy. Counsel for the plaintiff submitted that there is no need to identify specific parts which are said to have been breached, in part because the relevant documents are akin to "mission statements" or "press releases", rather than a contract; and otherwise because every part set out in the schedule has been breached.

[70] There are a number of problems with the formula used in this respect:

(a) is the phrase "germane terms" to be understood as having the same meaning as "material terms"?

(b) if the instruments or documents are to be considered merely "mission statements" or media releases", on what basis is it contended that a person can have "breached" such things. I note in this regard that the plaintiff submits the contractual provision is what is pleaded in paragraph 13(b), on p 253 of the statement of claim (part of schedule C, the material terms of the service

contract). But as pleaded, that obliges the plaintiff to be bound by and abide by ERM policies and procedures; and

(c) if the language of "breach" is appropriate, reflecting a consistent theme of the complaints about the statement of claim, whilst it might be apt to plead that the alleged conduct of Mr St Baker "breached" all of the provisions set out in the Code of Conduct and/or Whistleblower Policy, it is not apparent how that can be said of other defendants, whose involvement came much later in time and on a much narrower scale.

[71] There is a need for much greater attention to detail, if allegations of breach of these documents, by all the defendants, are to be maintained.

[72] Separately, the defendants apply to strike out paragraph 315, which pleads that on unidentified occasions when the plaintiff has attended general meetings of ERM, as a shareholder, "directors and employees of ERM have behaved with overt hostility towards" him. I accept the submission that this paragraph should be struck out, on the basis it lacks any particularity.

Paragraphs dealing with alleged liability for the vindictive stratagems: Part K of the statement of claim

[73] I accept the defendants' submission that paragraphs 319 to 321 should be struck out, with leave to re-plead. There are multiple possibilities and alternatives rolled up into these paragraphs, none of which deal individually with the twelve remaining defendants. It is very difficult to see how any particular defendant could properly plead in response to these paragraphs as they are presently drafted, as it is very difficult to understand from them what the plaintiff's case is in respect of each alleged breach. This is a prime example of what Jackson J described as the price for the death of that hero, brevity, being paid in the valuable coin of precision.[38]

Paragraphs dealing with causation and loss: Part N of the statement of claim

[74] The defendants apply to strike out paragraphs of the statement of claim which purport to address causation and loss. I have referred already to paragraph 211(b), which pleads that "Each of the Perfidious Divulgations … caused loss, damage, detriment, injury and harm" to the plaintiff. A similar formula appears in paragraph 318 (at the start of Part K) which pleads that "Each of the Vindictive Stratagems, and every instance of them, caused loss and damage to [the plaintiff] as set forth in Part N of this pleading". Paragraph 342 (at the start of Part N) then pleads that the plaintiff has suffered loss and damage as a result of "the breaches hereinbefore pleaded" (of a Service Contract, common law duties of care and equitable duties of confidence), the "breaches hereinbefore pleaded, of statutory duty", and (all of) the Perfidious Divulgations and the Vindictive Stratagems. Everything referred to in paragraph 342 is defined as "the actionable conduct",[39] which is referred to in a number of other paragraphs (including paragraphs 13, 344, 346, 347, 348, 350, 352, 353A, 354 and 359). For example, in paragraph 344 it is alleged that "[b]ut for the actionable conduct, the Service Contract would have remained on foot". Since the "actionable conduct" is

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38 *Mio Art Pty Ltd v Macequest Pty Ltd* (2013) 95 ACSR 583 at [62].

39 Schedule A (definitions), p 241 of the statement of claim.

said to incorporate everything referred to in paragraph 342 (which spans conduct both before and after the plaintiff's Service Contract was terminated), this makes no sense.

[75] I accept the defendants' submission that the pleading is deficient in this respect. Rolling up the allegations of causation and loss in this way fails to fulfil the fundamental function of a pleading, which is to state with sufficient clarify the case that must be met by each party. As Bond J put it in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 7)* [2019] QSC 241 at [17]:

> "It is a trite proposition of law that defendants are entitled to a direct and unambiguous identification of the material facts relied on to establish the causal link between the conduct which plaintiffs impugn and the loss they allegedly suffered, and which identification at least arguably establishes that link."[40]

[76] There are twelve current defendants to the proceeding. The alleged conduct spans a period of seven years, from 2012 to 2019. Each defendant is entitled to have the case against them articulated clearly, so that they are able to understand the case against them and respond to it. In its present form, there is no attempt made to identify the alleged breaches with specificity, or to identify in a direct and unambiguous way the causal link between the various breaches, or other alleged acts, and the loss claimed against each of the defendants.

[77] In addition, the natural person defendants have flagged an intention to claim privilege against self-incrimination. The question whether that is available will need to be considered having regard to the specific allegations against each of them, and whether there is a real and appreciable risk of self-incrimination or exposure to a penalty.[41] I accept the submission that this reinforces the requirement, which arises in any event from the pleading rules, for the case against each defendant to be clearly and coherently articulated – rather than by reference to rolled-up, formulaic pleadings.

[78] Two further complaints are made about this part of the pleading. First, that the loss alleged to have been suffered by the plaintiff is pleaded at a high level, without the particulars required by r 155 and, in addition, that the alleged loss of opportunity pleaded in paragraph 349 fails to meet the pleading requirements for alleging this type of loss.

[79] The plaintiff says, in the pleading and in submissions, that he will provide further particulars of his loss and damage after disclosure. I accept the submission for the first defendant, supported by the other defendant applicants, that the plaintiff is required to plead a causal link between each instance of alleged conduct and each alleged loss, and that this should not be left to particulars (to which the opposing party is not required to plead),[42] nor should it await disclosure – either the plaintiff has such a case and can plead it, or he does not.

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40 See also *Lee v Abedian* [2017] 1 Qd R 549 at [81(f)] per Bond J and *Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu* (2017) 123 ACSR 223 at [80]-[81].

41 See, for example, *LM Investment Management Limited (in liq) v EY & Ors (No 5)* [2020] QSC 264 at [14]-16] and the approach taken from [59] onwards.

42 *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors* [2011] QCA 252 at [43].

[80] As for the loss of opportunity claim, having regard to *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221 at [50], in which Jackson J summarises what is required to properly plead such a claim, I accept the submission that paragraph 349 is inadequate.

[81] Separately, the defendants also seek to strike out the following paragraphs in Part N:

(a) Paragraph 354(b), in which it is alleged that "by the actionable conduct" the plaintiff suffered and continues to suffer "psychological injuries, namely anxiety and extreme depression". He pleads in the chapeau to paragraph 354 that this is "aside from loss or damage which might be the subject of a PIPA claim"; which he also states, in paragraph 1, he expressly abandons. I accept that it is not clear what psychological injury might remain that is not covered by the *Personal Injuries Proceedings Act* 2002. However, for the plaintiff it is submitted the allegation is relevant to the allegation that he suffered distress (as a result of the alleged conduct). As the pleading makes plain that the plaintiff is not seeking to recover relief under the PIPA, and as the allegation may be found to be relevant in the manner submitted by the plaintiff, it will not be struck out.

(b) Paragraph 353B, which pleads a claim for aggravated damages, based on the "without prejudice" dealings. Having regard to the conclusion which I have reached above, that no exception to the privilege arises in the circumstances of this case, this paragraph should be struck out.

(c) Paragraphs 355, 356, 357(c)-(f) and 359, which plead a claim for exemplary damages. The complaint is of a failure to properly particularise allegations, for example, that the Vindictive Stratagems were undertaken and committed "consciously and deliberately", and "spitefully, malevolently, vengefully and rancorously", and in "contumelious disregard" of the defendants' duties and obligations and the plaintiff's rights (para 355). I accept the submission that what is pleaded are conclusory statements, without any pleading of the basis on which it is alleged to be reasonable to infer each defendant had the state of mind alleged. The deficiency is a lack of proper pleading, particularisation and identification of the conduct and involvement of separate defendants – as opposed to lumping all defendants in together as an amorphous group.

(d) Paragraph 358, which alleges a deterioration in the business fortunes of ERM and Empire, following the plaintiff's departure. I accept the submission that this paragraph is irrelevant to the plaintiff's claims the subject of the proceeding and should be struck out.

Orders

[82] I have upheld all but one of the first defendant's complaints about the pleading. Accordingly, in so far as the first defendant's application is concerned, it seems appropriate to make an order that the paragraphs of the statement of claim identified in the amended schedule handed up at the commencement of the hearing (other than paragraph 354(b)) be struck out. There will be a general grant of leave to re-plead (save in the respects in which the basis of striking out is irrelevance or privilege). There was significant cross-over between the first defendant's and the other defendants' applications. As such, an order in those terms should address the paragraphs the subject of the other defendants' application also. However, I will give

the parties the opportunity to consider these reasons, before bringing in draft minutes of order reflecting the outcome. This was contemplated at the hearing of the applications, given that in many instances the argument was addressed to an example of a formula used in a number of other paragraphs. I will also hear the parties as to costs.