SUPREME COURT OF QUEENSLAND

CITATION:	*JM Kelly Builders Pty Ltd (in liq) v Milton* [2021] QSC 59
PARTIES:	**JM KELLY BUILDERS PTY LTD (IN LIQUIDATION)** ACN 009 801 665 (first plaintiff) and **KAWANA JOINERY CO PTY LTD (IN LIQUIDATION)** ACN 010 109 038 (second plaintiff) and **BURNS & TWIGG PTY LTD (IN LIQUIDATION)** ACN 009 658 057 (third plaintiff) and **BPM COWLRICK PTY LTD (IN LIQUIDATION)** ACN 010 366 300 (fourth plaintiff) **v** **ARNOLD VINCENT MILTON** (first defendant) and **ARNOLD MILTON PTY LTD** ACN 001 922 603 (second defendant)
FILE NO/S:	No 8790 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	9 December 2020
JUDGE:	Flanagan J
ORDER:	**1. The application is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the defendants submit that the plaintiffs have suffered no loss – where the alleged loss consists of accrued and unpaid liabilities to trade creditors

incurred during a period of trading following the defendants' alleged negligence – where it is alleged that the plaintiffs would have ceased trading if the defendants had discharged their tortious and contractual duties – where it is alleged that liabilities could not have been incurred if the plaintiffs had ceased trading – where there is no allegation of misappropriation of the plaintiffs' assets – whether a deficit of assets to liabilities after a period of trading is a recoverable form of loss

Uniform Civil Procedure Rules 1999 (Qld), r 171, r 658

BCI Finances Pty Ltd (in liq) v Binetter (No 4) (2016) 117 ACSR 18; [2016] FCA 1351, considered
Bilta (UK) Ltd (in liq) v Nazir (No 2) [2016] AC 1; [2015] UKSC 23, considered
Re PrimeSpace Property Investment Ltd (in liq) [2017] NSWSC 386, considered
Singularis Holdings Ltd (in liq) v Daiwa Capital Markets Europe Ltd [2020] AC 1189; [2019] UKSC 50, cited
Spencer v Commonwealth (2010) 241 CLR 118; [2010] HCA 28, applied
Stone & Rolls Ltd (in liq) v Moore Stephens (a firm) [2009] 1 AC 1391; [2009] UKHL 39, considered
Travel Compensation Fund v Tambree (2005) 224 CLR 627; [2005] HCA 69, cited

COUNSEL: C Heyworth-Smith QC, with M de Waard, for the defendants/applicants
C Wilkins, with A Psaltis, for the plaintiffs/respondents

SOLICITORS: Mills Oakley Lawyers for the defendants/applicants
Clayton Utz for the plaintiffs/respondents

[1] The defendants apply for two orders: an order that the plaintiffs' statement of claim be struck out pursuant to r 171(1)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) on the basis that it discloses no reasonable cause of action, and an order that the plaintiffs' claim be dismissed pursuant to r 658(1).[1]

[2] As is evident from the nature of the orders sought, the defendants apply to summarily terminate the proceeding. The Court must exercise "great care"[2] in deciding whether or not to exercise a discretion to terminate a proceeding prior to trial, bearing in mind that the consequence is to deprive a party of the chance to prove their claim at trial.[3] As observed by French CJ and Gummow J in *Spencer v Commonwealth*:

> "The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition

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1 Rule 658(1) provides that the court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.
2 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99.
3 *Chan & Ors v Macarthur Minerals Ltd & Ors* [2019] QSC 143, [71] (Flanagan J).

> is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous or vexatious or an abuse of process."[4]

[3] In *Agar v Hyde*, Gaudron, McHugh, Gummow and Hayne JJ stated that:

> "… a court … should not decide the issues raised in … proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[5]

[4] For the reasons that follow, and adopting this cautionary approach, I am not satisfied that the plaintiffs' statement of claim does not disclose a reasonable cause of action nor that the proceeding should be summarily dismissed.

The statement of claim

[5] Before I consider the statement of claim in detail it is convenient to give a brief overview of the factual matrix that forms the basis of the plaintiffs' claim.

[6] The plaintiffs are all companies that were, in one way or another, involved in the building and construction industry. From 27 June 2016, John Murphy was the sole director of each plaintiff as well as other related companies. His sister, Elizabeth Murphy, was the financial controller of a group of companies which included the plaintiffs.

[7] Each plaintiff, until 27 November 2018, was the holder of a licence issued by the Queensland Building and Construction Commission (**QBCC**) under the *Queensland Building and Construction Commission Act* 1991 (Qld) (**QBCC Act**). A condition of each licence was that the licensee's financial circumstances satisfied the relevant financial requirements stated in the QBCC board's policies.[6] One such policy, called "Minimum Financial Requirements", came into effect on 9 October 2015 (**MFR Policy**).[7] It provided for the minimum financial requirements for licensing under the QBCC Act. By s 1.4 of the MFR Policy, it was "a statutory condition of holding a licence that the licensee's financial circumstances must at all times continue to satisfy the Minimum Financial Requirements stated in this policy". Pursuant to the MFR Policy, a licensee was required to have sufficient net tangible assets (**NTA**) which could be evidenced through an "MFR Report" completed by an "Accepted Independent Accountant". It was a condition of all QBCC licences that the licensee's NTA position was not to decrease by more than 30 per cent from its last advised NTA position. In determining a licensee's NTA, related entity loans

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4 (2010) 241 CLR 118, [24].
5 (2000) 201 CLR 552, [57].
6 *Queensland Building and Construction Commission Act* 1991 (Qld) s 35(3)(a), as at 24 March 2016.
7 *Queensland Building and Construction Commission Regulation* 2003 (Qld) sch 1A, item 6, as at 9 October 2015 (repealed).

and investments recorded as an asset in the licensee's accounts were not to be included or relied upon.

[8] The first defendant is a chartered accountant and registered auditor. He is the sole director of the second defendant which carries on the business of providing accounting and tax agent services. It is alleged that each of the plaintiffs engaged the first defendant to act as the Accepted Independent Accountant for the purposes of preparing and providing MFR Reports to the QBCC.

[9] The plaintiffs were placed into voluntary liquidation between October and November 2018. On 12 August 2020, the liquidators, on behalf of each of the plaintiffs, commenced the present proceeding against the defendants, seeking damages for negligence and breach of contract, as well as damages for misleading or deceptive conduct under the *Australian Consumer Law* in its various manifestations in New South Wales, Queensland and the Commonwealth.

[10] The plaintiffs allege that, by various acts or omissions, the first defendant (and, through him, the second defendant) caused inaccurate or false MFR Reports to be provided to the QBCC and that the first defendant carried out his role as the Accepted Independent Accountant negligently, in breach of contract or in breach of the *Australian Consumer Law*. They say that, had the first defendant acted with the requisite standard of care, skill and diligence, he would have ascertained that each of the plaintiffs failed to meet the minimum financial requirements of the MFR Policy for the relevant year and, therefore, would not have signed the MFR Reports. If the inaccurate or false MFR Reports had not been provided to the QBCC, the QBCC would have suspended or cancelled the licence of each plaintiff. Thereafter, each plaintiff would have ceased trading and incurring debts to creditors.

[11] The statement of claim, aside from the allegations against the defendants, also pleads that Elizabeth Murphy was engaged in a course of conduct that contributed to the provision of inaccurate MFR Reports to the QBCC. For example, in respect of the first plaintiff's[8] MFR Report for the year ended 30 June 2016, paragraph 55 pleads:

> "On or about 20 or 21 July 2016 Elizabeth changed the draft of the MFR report which the first defendant had signed by rewriting two pages of that report (being the pages numbered 52 and 54) so as to:
>
> (a) correctly state current assets for Builders as at 30 June 2016 as being $12,449,924; and
>
> (b) incorrectly state the related entity loan amount included in the net tangible assets calculation as being $1,628,984."

[12] Similar allegations against Ms Murphy of alteration or confection of the calculations are pleaded in respect of each MFR Report except for the third plaintiff's MFR Report for the year ended 30 June 2016 and the second plaintiff's MFR Report for the year ended 30 June 2017.[9]

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8 The first plaintiff is referred to in the Statement of Claim as "Builders", the second plaintiff as "Kawana Joinery", the third plaintiff as "Burns & Twigg", and the fourth plaintiff as "BPM Cowlrick".

9 See, for example, paragraphs 78, 128 and 153(c).

[13] Paragraphs 202 to 204 of the statement of claim plead the duty of care that is said to have been owed by the first defendant to the plaintiffs. It is a duty to exercise such reasonable care, skill and diligence as one would expect of a reasonably competent independent auditor or independent practising accountant when reviewing and signing an MFR Report.

[14] Paragraphs 205 to 210 plead that, in the premises of the matters pleaded in paragraphs 31 to 201,[10] the first defendant breached his duty of care to each of the plaintiffs.

[15] Of critical significance to the present application are paragraphs 211 to 214, which are headed "Causation and loss and damage", and paragraphs 217 to 222. They relate directly to the defendants' primary submission that the plaintiffs have suffered no loss. It is expedient to set these paragraphs out more fully.

[16] Paragraph 211, which is ostensibly intended to plead the element of causation in respect of the MFR Reports for each of the plaintiffs for the year ended 30 June 2016, provides:

> "Had the first defendant acted with the reasonable care, skill and diligence one would expect of a reasonably competent independent auditor or reasonably competent independent Practising Accountant in respect of (respectively) [each of the MFR Reports], then:
>
> (a) the first defendant would have ascertained that each of Builders, Kawana Joinery, Burns & Twigg and BPM Cowlrick failed to meet the minimum financial requirements of the MFR Policy for the year ended 30 June 2016;
>
> (b) the first defendant would not have signed the draft MFR report for:
>
> (i) Builders, as pleaded at paragraph 41 above;
> (ii) Kawana Joinery, as pleaded at paragraph 68 above;
> (iii) Burns & Twigg, as pleaded at paragraph 91 above; and
> (iv) BPM Cowlrick, as pleaded at paragraph 113 above,
>
> (c) the licences for each of Builders, Kawana Joinery, Burns & Twigg and BPM Cowlrick would have been suspended or terminated by the QBCC with effect on and from about 30 September 2016;
>
> (d) each of Builders, Kawana Joinery, Burns & Twigg and BPM Cowlrick would not have been able to trade from about 30 September 2016; and
>
> (e) each of Builders, Kawana Joinery, Burns & Twigg and BPM Cowlrick would not have incurred any creditors from about 30 September 2016."

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[10] Paragraphs 31 to 201 plead the effect of the factual matrix set out in [6] to [12] above.

[17] In essence, paragraph 211 pleads that if the first defendant had not acted in breach of his duty of care he would not have signed the MFR Reports, resulting in the QBCC either suspending or cancelling the plaintiffs' licences.[11]

[18] Paragraph 212 pleads the loss incurred by each of the plaintiffs in respect of their MFR Reports for the year ended 30 June 2016 in the following terms:

> "Since 30 September 2016:
> (a) Builders has:
> (i) continued to trade as a company with a licence;
> (ii) continued to incur debts to creditors; and
> (iii) not paid or discharged debts incurred by it since 30 September 2016 of at least $12,408,279;
>
> Particulars of unpaid debts incurred:
> - Unrelated party trade debts of $7,738,182.30
> - Related party trade debts of $329,390.40
> - Employee entitlements of $445,762.41
> - NAB debt of $3,894,944.70 (being the likely shortfall);
>
> (b) Kawana Joinery has:
> (i) continued to trade as a company with a licence;
> (ii) continued to incur debts to creditors; and
> (iii) not paid or discharged debts incurred by it since 30 September 2016 of at least $5,203,655;
>
> Particulars of unpaid debts incurred:
> - Unrelated party trade debts of $1,004,437.40
> - Related party trade debts of $8,986.60
> - Employee entitlements of $295,286.96
> - NAB debt of $3,894,944.70 (being the likely shortfall);
>
> (c) Burns & Twigg has:
> (i) continued to trade as a company with a licence;
> (ii) continued to incur debts to creditors; and
> (iii) not paid or discharged debts incurred by it since 30 September 2016 of at least $5,168,048;
>
> Particulars of unpaid debts incurred:
> - Unrelated party trade debts of $1,009,815.40
> - Related party trade debts of $3,425.10
> - Employee entitlements of $259,863.70
> - NAB debt of $3,894,944.70 (being the likely shortfall); and
>
> (d) BPM Cowlrick has:
> (i) continued to trade as a company with a licence;
> (ii) continued to incur debts to creditors; and
> (iii) not paid or discharged debts incurred by it since 30 September 2016 of at least $4,938,176;
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> Particulars of unpaid debts incurred:
> - Unrelated party trade debts of $783,027
> - Related party trade debts of $111,589.50

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[11] Paragraph 26 of the Statement of Claim pleads the QBCC's power to suspend or cancel a licence under s 48(1)(h) of the QBCC Act in circumstances where a licensee contravenes a condition to which the licence was subject under s 35.

- Employee entitlements of $148,615.39
- NAB debt of $3,894,944.70 (being the likely shortfall)"

[19] Paragraph 213 then pleads, in almost identical terms except for the dates and quantum of unpaid debts, the same matters as paragraphs 211 and 212 but in respect of the first plaintiff's MFR Report for the year ended 31 December 2016.

[20] Likewise, paragraph 214 pleads, in almost identical terms except for the dates and quantum of unpaid debts, the same matters as paragraphs 211, 212 and 213 but in respect of the second plaintiff's MFR Report for the year ended 30 June 2017.

[21] Paragraphs 215 to 222 further allege that, by signing inaccurate MFR Reports for provision to the QBCC, the first defendant (and, through him, the second defendant) also engaged in misleading and deceptive conduct. The plaintiffs rely on the same allegations of loss and damage pleaded at paragraphs 211 to 214.

[22] Each of paragraphs 217 to 222 deal with a separate MFR Report but are otherwise materially identical. By way of example, paragraph 217, which deals with causation, loss and damage in relation to the first plaintiff's MFR Report for the year ended 30 June 2016, provides:

> "In respect of Builders June 2016 MFR Report:
>
> (a) by reason of the matters pleaded at paragraphs 31 to 59 above, the conduct of the first defendant (and, further or in the alternative, the first and second defendants) as pleaded at paragraphs 41 and 42 above in signing a draft of that report and giving it to Elizabeth:
>
> (i) was misleading or deceptive or likely to mislead or deceive the QBCC; and
>
> (ii) contravened the *Australian Consumer Law (NSW)*, s.18, further or in the alternative, the *Australian Consumer Law (Queensland)*, s.18, and, further or in the alternative, the *Australian Consumer Law (Cth)*, s.18; and
>
> (b) Builders suffered the loss or damage pleaded at subparagraph 212(a) above because of that conduct; in that, but for that conduct:
>
> (i) the licence of Builders would have been suspended or terminated by the QBCC with effect on and from about 30 September 2016;
>
> (ii) Builders would not have been able to trade from about 30 September 2016; and
>
> (iii) Builders would not have incurred any creditors from about 30 September 2016."

[23] This is a sufficient summary of the pleading for the purposes of determining the application.

Consideration

(a) Nine grounds for striking out

[24] The defendants' written submissions identify nine defects in the statement of claim which are said to be fatal to the plaintiffs' claim. The defendants submit that these nine defects or any one of them reveals "that the case theory on which the claim is based is fundamentally flawed".[12]

[25] Those defects are, in my words, that:

1. the alleged loss is the creditors' loss, not the plaintiffs' loss;
2. other than pursuant to the liquidation process in the *Corporations Act* 2001 (Cth), the plaintiffs do not have standing to commence an action in the Court for recovery of the creditors' losses;
3. the statement of claim fails to adequately plead that the defendants owed the plaintiffs a duty of care to avoid pure economic loss to the plaintiffs' creditors;
4. the pleaded case is a "no transaction case" and the plaintiffs have failed to adequately plead the counterfactual (that is, what would have happened if the licences had not been renewed);
5. the alleged loss has been inadequately quantified;
6. the element of causation has not been satisfied because:
   (a) firstly, there was an intervening event, being Ms Murphy's intentional alteration of the MFR Reports; and
   (b) secondly, Ms Murphy's knowledge and conduct can be attributed to the plaintiffs and the plaintiffs cannot rely on their own wrongs to recover damages;
7. the statement of claim inadequately pleads the existence, terms or breach of any contract between the parties;
8. the statement of claim does not plead the essential elements of negligence against the second defendant; and
9. the statement of claim does not adequately state the nature and amount of the damages sought as required by r 155 of the UCPR.

[26] The first to fifth and ninth points in the defendants' outline are all based on the defendants' principal complaint that a plaintiff suffers no loss by incurring a liability which it does not pay. The sixth, seventh and eighth points raise different complaints and are dealt with separately below.

(b) Grounds 1 to 5 & 9 – "no loss" submission

[27] As set out at [18] above, paragraph 212 of the statement of claim pleads that each of the plaintiffs has suffered the following losses:

- unrelated party trade debts;
- related party trade debts;
- employee entitlements; and
- loan debts in favour of NAB.

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12 Defendants' Outline of Argument, paragraph 15.

The loss is not further particularised, other than by providing the specific amounts that pertain to each category in respect of each plaintiff.

[28] The defendants submit that these alleged losses are properly characterised as the creditors' losses and are not, in law, recoverable by the plaintiffs.[13] The defendants assert that amounts which have not been paid cannot amount to a loss but they have provided no authority in support of this submission. As explained by Ms Heyworth-Smith QC for the defendants in the course of the hearing:

> "… we have not referred to a particular authority to say that if a payment hasn't been made it will not be able to be recovered, but by the same token we also say that our learned friend doesn't have an authority to support their position in this case."[14]

[29] The defendants' main point appears to be that there is no loss because, in incurring the liabilities to the trade creditors, the plaintiffs also obtained assets of equal value, being the goods or services purchased from those creditors:

> "They didn't suffer a loss because it balances itself out. The incurring of the liability has to be offset against the asset that is acquired as a result of incurring that liability."[15]

[30] Ms Heyworth-Smith developed this submission as follows:

> "… Each time these debts were incurred, they received something of equivalent value. So if they received something of equivalent value, how can there be a loss for which we are responsible? … They didn't have the debt before, but they didn't have the bricks either. Now, they have the bricks and they have a debt. So X equals zero, your Honour. There's no loss. They can't have us pay for the bricks and yet keep the bricks themselves."[16]

[31] The plaintiffs submit that the defendants provide no authority for their primary proposition that the unpaid debts are not the plaintiffs' losses.[17] The plaintiffs say that "incurring a liability which the plaintiff cannot and does not pay" is a recognised form of loss.[18] The cases cited in support of this submission are *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] 1 AC 1391 at [231] per Lord Mance (***Stone & Rolls***) and *Bilta (UK) Ltd (in liq) v Nazir (No 2)* [2016] AC 1 at [43] per Lord Mance JSC, [84] per Lord Sumption JSC and [178] per Lord Toulson and Lord Hodge JJSC (***Bilta***). The plaintiffs also rely on two Australian authorities: *BCI Finances Pty Ltd (in liq) v Binetter (No 4)* (2016) 117 ACSR 18 per Gleeson J at [327]-[332] (***BCI Finances***) and *Re PrimeSpace Property Investment Ltd (in liq)* [2017] NSWSC 386 at [21] per Black J (***PrimeSpace Property***).

[32] The facts in *Stone & Rolls* were that the company, which was owned, controlled and managed by a Mr Stojevic, brought proceedings for damages against its auditors. Stojevic had used the company as a vehicle for defrauding banks. The auditors

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13 Defendants' Outline of Argument, paragraph 19.
14 T 1-11, lines 41-44.
15 T 1-12, lines 35-37.
16 T 1-13, lines 30-36.
17 Plaintiffs' Outline of Argument, paragraph 1.
18 Plaintiffs' Outline of Argument, paragraph 7.

accepted that they owed to the company a duty to exercise reasonable skill and care in carrying out their duties as auditors. They also accepted that they were in breach of that duty and that, but for their breach, the fraud that Stojevic was perpetuating through the company would have ended earlier. The company sought to recover the losses suffered by it in consequence of the fraudulent activity continuing for longer. The auditors submitted that the claim could not succeed because it was founded on the company's fraud and was met by the defence "*ex turpi causa non oritur actio*", also known as the illegality defence.

[33] The appeal to the House of Lords was from the decision of the Court of Appeal striking out the company's action. The appeal was dismissed with Lords Scott and Mance dissenting. Lord Mance considered that Stojevic's fraud could be characterised as one of fraud on the company.[19] His Lordship considered that a deficit rendering a company insolvent may constitute a loss:

> "… I note that, in a passage (para 5) with a biblical echo (1 Timothy ch 6, v 7), my noble and learned friend, Lord Phillips of Worth Matravers, suggests that S & R started life with nothing, never legitimately acquired anything and cannot realistically be said to have suffered any loss. This either ignores the abstraction of S & R's assets or wrongly assumes that a deficit rendering a company insolvent is not a loss."[20]

[34] Whilst it did not inform his ultimate conclusion, Lord Phillips initially considered that the company had suffered no loss:

> "… They started with nothing and their alleged losses are sums that they acquired by fraud and then paid away as part of the same fraudulent transaction. If a person starts with nothing and never legitimately acquires anything he cannot realistically be said to have suffered any loss ..."[21]

[35] *Stone & Rolls* was decided on principles of attribution and the illegality defence and not on what does and does not constitute a recoverable loss. The observation of Lord Mance does, however, represent some support for the proposition that a deficit rendering a company insolvent is a loss. To the extent that Lord Phillips suggested that the company had suffered no loss, these observations were primarily based on the fact that the claimed losses had been sustained as a result of the company's own fraud.

[36] *Bilta* also concerned a company in liquidation. The company's liquidators brought an action against the company's former directors (one of whom was the company's sole shareholder) and a third party Swiss entity. It was alleged that the defendants had conspired to defraud the company and that the former directors had breached their fiduciary duties in doing so, while the Swiss entity and its chief executive officer had knowingly assisted in that breach. The fraudulent scheme comprised the directors causing the company to enter into transactions whereby it sold carbon credits to the Swiss entity, incurring a taxation liability on the part of the company. The revenue generated from these transactions was then siphoned away for the

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19 *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] 1 AC 1391, [231].
20 *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] 1 AC 1391, [231].
21 *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] 1 AC 1391, [5].

benefit of the fraudulent parties and the company was left with tax liabilities that it had no means of discharging.

[37] The Swiss entity brought an application to summarily dismiss the liquidator's claim. The application was based on the following two propositions:

(a) the illegality defence applied because the company, by the actions of its directors, was party to the fraud itself; and

(b) the *Insolvency Act* 1986 (UK) did not have extraterritorial effect.

[38] The application to dismiss failed both at first instance and on subsequent appeals to the Court of Appeal and United Kingdom Supreme Court. Lords Toulson and Hodge JJSC agreed that the illegality defence did not apply because the illegal acts of the defendants could not be attributed to the company. Lord Neuberger PSC (with whom Lords Clarke and Carnwath JJSC agreed) stated:

> "…whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or the principal must depend upon the nature and factual context of the claim in question."[22]

[39] His Lordship found that attribution is a context-specific question in every case and, on the facts before him, the defendants' fraud could not be attributed to the company.

[40] Lords Toulson and Hodge JJSC specifically dealt with a submission that the company had suffered no loss "since it began life with negligible assets and never acquired any lawful assets, so it had none to lose".[23] Their Lordships did not accept this submission, observing:

> "A company's profit and loss account and its balance sheet may be positive or negative. When the directors caused Bilta to incur VAT liabilities, and simultaneously caused it to misapply money which should have been paid to HMRC, leaving the company with large liabilities and no means of paying them, the directors caused it to suffer a recognisable form of loss."[24]

[41] The plaintiffs here also rely on the statement of Lord Mance JSC at [43]:

> "At the same time, however, if the officer's breach of duty has led to the company incurring loss in the form of payments to or liability towards third parties, the company must be able as part of its cause of action against its officer to rely on the fact that, in that respect, its officer's acts and state of mind were and are attributable to the company, causing it to make such payments or incur such liability …"

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22 *Bilta (UK) Ltd (in liq) v Nazir (No 2)* [2016] AC 1, [9].
23 *Bilta (UK) Ltd (in liq) v Nazir (No 2)* [2016] AC 1, [176].
24 *Bilta (UK) Ltd (in liq) v Nazir (No 2)* [2016] AC 1, [178].

[42] These observations of Lord Mance JSC are directed to the issue of attribution. His Lordship is not making any relevant point about whether the unpaid debts of a company in liquidation are a recoverable loss *per se*. His Lordship does, however, appear to proceed on the assumption that such losses are recoverable.

[43] The defendants seek to distinguish *Bilta* on the basis that moneys that may have been used to discharge the company's liabilities were misappropriated. This is to be contrasted with the present case where the plaintiffs presumably received something of value for incurring trade debts.[25] Mr Wilkins for the plaintiffs, however, in oral submissions sought to characterise the present case as one which is analogous to *Bilta*:

> "… we've got a situation here where, at the end of the day, there's a deficit and the deficit consists in large part of the creditors whose debts have been incurred during the period of trading, we say, that, but for the defendants' negligence, would never have occurred. So the debts have been incurred in that period, not paid and they're left over in a form of the lion's share of the deficit."[26]

[44] Mr Wilkins further submitted that where companies are in liquidation, it does not matter whether the company's funds have been misapplied or properly applied for the purposes of the company.[27] On his submission, what is important is that there has been an application of the money resulting in a deficit that would not have resulted but for the continued trading of each plaintiff.[28]

[45] The paragraphs of Lord Mance in *Stone & Rolls* and Lords Toulson and Hodge JJSC in *Bilta* quoted above were cited with approval by Gleeson J in *BCI Finances* and by Black J in *PrimeSpace Property.* In *BCI Finances* it was held that the accrual of tax liabilities could amount to a recoverable loss. The case concerned a group of companies that, by their directors, submitted tax returns containing falsely inflated expenses deductions. When the Australian Taxation Office learned of the irregularities it issued the companies with revised tax assessments requiring them to pay large sums of tax. It was held that the companies could recover these sums of tax from the directors who were in breach of their directors' duties. The loss was identifiable by reference to the sums specified in the revised tax assessments.[29]

[46] In *PrimeSpace Property,* a company that was the trustee of an investment fund issued convertible notes to investors on behalf of the fund. The investors later made a demand for immediate repayment of the notes under the subscription agreements and the trustee became liable to the investors for the outstanding amounts, rendering the trustee insolvent. The trustee sued its solicitors for negligent drafting of the subscription agreements which omitted to include a liability limitation clause. The value of the unrepaid convertible notes was identified as the trustee's loss. The proceeding before Black J was an application by the liquidators of the company for directions under s 511 of the *Corporations Act* 2001 (Cth) and s 63 of the *Trustee Act* 1925 (NSW) for judicial advice as to the commencement of proceedings. Black J observed:

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25 Defendants' Outline in Reply, paragraph 6.
26 T 1-26, lines 15-19.
27 T 1-27, lines 1-3.
28 T 1-27.
29 *BCI Finances Pty Ltd (in liq) v Binetter (No 4)* (2016) 117 ACSR 18, [330]-[332].

> "… it seems to me to be at least seriously arguable that a deficit that renders a company insolvent is a recoverable loss in a claim for breach of contract or negligence although, by definition, that company will not have paid out the amount of that deficit, and that question is plainly not beyond doubt …"[30]

[47] While there is no suggestion in the present case that any deficits in the plaintiff companies' balance sheets have arisen because funds have been misapplied, it is pleaded that debts which have been incurred have not been paid or discharged. The case as pleaded is that those debts have been incurred by the plaintiff companies because each has continued to trade as a company with a licence and continued to incur debts to creditors which have not been paid or discharged.[31] While the authorities referred to by the plaintiffs are not determinative of the issue, it is not clear that a period of trading that ultimately results in a deficit cannot constitute a recoverable loss. *BCI Finances* and *PrimeSpace Property* tend to suggest that accrual of liabilities that cause insolvency are likely to be recoverable.

[48] There are two further aspects in relation to loss. Ms Heyworth-Smith sought to categorise the plaintiffs' case as analogous to a "no transaction" case.[32] On such a case, a claim for damages seeks to place a party in the position they would have been had they not engaged in the loss-making transaction. The defendants submit that the statement of claim fails to plead the position the plaintiffs would have been in had the licences not been renewed. This is, in effect, as submitted by the defendants, a failure to plead a counterfactual.[33]

[49] The plaintiffs submit, correctly in my view, that the present case is not a "no transaction" case. It is not alleged that the plaintiffs relied on the defendants' conduct in entering into a transaction. Rather, the pleaded allegation is that the QBCC relied on the MFR Reports resulting in the plaintiffs continuing to trade.[34]

[50] The second aspect is that the defendants allege that the plaintiffs have not complied with r 155 of the UCPR in that they have failed to properly claim and plead damages. I do not accept this submission. Paragraph 212 of the statement of claim pleads the nature of the losses suffered, the circumstances in which the plaintiffs suffered those losses and how those losses have been calculated.[35] In each instance, the losses have been identified and quantified. The defendants are, of course, at liberty to seek further and better particulars.

[51] For these reasons, grounds 1 to 5 and 9 fail.

(c) Ground 6 – causation

[52] The defendants' complaint is that the statement of claim does not plead how the unpaid debts incurred by the plaintiffs were caused by the negligence of the defendants and how any breach of duty was a necessary element of the occurrence

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30 *Re PrimeSpace Property Investment Ltd (in liq)* [2017] NSWSC 386, [21].
31 Statement of Claim, paragraph 212.
32 Defendants' Outline of Argument, paragraph 25.
33 *LM Investment Management Pty Ltd (in liq) v Ernst & Young & Ors* [2017] QSC 73, [56] (Jackson J); T 1-14, lines 20-28.
34 T 1-33, lines 30-36.
35 Plaintiffs' Outline of Argument, paragraph 41.

of the harm.[36] More specifically, the defendants assert that any causal link would have been severed by the conduct of the officers of the plaintiff companies:

> "… in the claim in the current proceeding, the Plaintiffs allege that Mrs Murphy 'confected' certain documents and changed others after the Defendants provided them and before they were submitted to the QBCC. The conduct and the states of mind of Mr Murphy and Mrs Murphy are attributable to the Plaintiffs. The Plaintiffs cannot rely on their own wrongs to recover damages against the Defendants in this proceeding."[37]

[53] In the context of the present case, these submissions do not constitute a basis for striking out the pleading. The statement of claim adopts the "but for" test of causation and pleads to the following effect:

> "If the first defendant had not breached the duty of care he owed to the plaintiffs, he would not have signed the MFR Reports, the licences of the plaintiffs would have been suspended or terminated, and the plaintiffs would not thereafter have incurred the liabilities to creditors which they respectively claim from the defendants as losses. The negligence of the first defendant caused those losses."[38]

[54] More importantly it is, in my view, a matter for trial whether the knowledge and actions of Mr Murphy and Ms Murphy may be attributed to each of the plaintiff companies. Whether John and Elizabeth Murphy were, either together or separately, the controlling mind and will of each of the plaintiffs when (and if) they were privy to confection or alteration of the MFR Reports are mixed questions of fact and law. Further, there is no evidence before the Court to show that the plaintiffs are "one-man companies" as that phrase is used in *Stone & Rolls* and *Bilta.* Baroness Hale PSC, with whom the other members of the United Kingdom Supreme Court agreed, in *Singularis Holdings Ltd (in liq) v Daiwa Capital Markets Europe Ltd*[39] considered both *Stone & Rolls* and *Bilta:*

> "[30] *Stone & Rolls* has prompted much debate and criticism. It was analysed in detail by a panel of seven justices of this court in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1. The company and its liquidators brought claims against its directors and others who were alleged to have dishonestly assisted the directors in a conspiracy to defraud the company. The claim was defended on the basis that the fraud of its directors was attributable to the company which could not then make a claim against the other conspirators relying on its own illegality. This court held unanimously that where a company has been the victim of wrongdoing by its directors, the wrongdoing of the directors cannot be attributed to the company as a defence to a claim brought against the directors – and their co-conspirators – by the company's liquidator for the loss suffered by the company as a result of the wrongdoing. …"

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36 Defendants' Outline of Argument, paragraph 29, citing s 11 of the *Civil Liability Act* 2003 (Qld).
37 Defendants' Outline of Argument, paragraphs 30 and 31.
38 Plaintiffs' Outline of Argument, paragraph 16.
39 [2020] AC 1189, [29]-[35].

[55] Importantly, her Ladyship further observed:

> "[34] … But in any event, in my view, the judge was correct also to say that 'there is no principle of law that in any proceedings where the company is suing a third party for breach of a duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company' (para 182)."

[56] The plaintiffs identify a further difficulty with the defendants' position in relation to causation and attribution. The plaintiffs submit that these issues must be considered having regard to the relevant statutory context which the defendants have not addressed. As observed by Gummow and Hayne JJ in *Travel Compensation Fund v Tambree*:

> "In the present case, where one of the claims made … was a statutory claim, 'notions of "cause" as involved in [that] statutory regime are to be understood by reference to the statutory subject, scope and purpose'."[40]

[57] At [35], Gleeson CJ stated:

> "The answer to the problem of causation in the present case is to be found, not in a value judgment, but in an accurate identification of the nature of the risk against which the appellant sought protection and of the loss it suffered, considered in the light of the kind of wrongful conduct in which the first and second respondents engaged."

[58] The MFR Policy identified its objectives as being to "promote financially viable businesses and foster professional business practices in the Queensland building industry".[41] The plaintiffs submit that "the purpose of an Accepted Independent Accountant was to protect the licensee against incurring liabilities to its creditors which the licensee might not be able to meet".[42] They further submit that:

> "To attribute the knowledge of [Ms Murphy] that the MFR Reports were false or misleading to the plaintiffs in the context of a claim by the plaintiffs against the defendants so as to provide the defendants with an illegality defence would denude the duty of the first defendant to protect the plaintiffs against the incurring of liabilities to creditors which might not be able to be paid."[43]

[59] It is unnecessary to resolve these issues on a strikeout application. It is sufficient to note that whether the conduct and knowledge of either Mr Murphy or Ms Murphy can be attributed to each of the plaintiff companies will, to use the words of Lord Neuberger PSC in *Bilta,* "depend on the nature and factual context of the claim in question". Therefore, the claim should not be struck out on ground 6.

(d) Grounds 7 & 8

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40 (2005) 224 CLR 627, [49].
41 Plaintiffs' Outline of Argument, paragraph 21.
42 Plaintiffs' Outline of Argument, paragraph 22.
43 Plaintiffs' Outline of Argument, paragraph 23.

[60] On their seventh ground, the defendants' complaint is that the essential elements of breach of contract are not pleaded. For the reasons identified in paragraph 36 of the plaintiffs' outline of argument, there is no substance to this complaint. The statement of claim pleads the making of the contracts between the relevant plaintiff and the first defendant to act as the Accepted Independent Accountant for the purposes of preparing the MFR Reports.[44] It is further pleaded as an implied term of those contracts that the first defendant, when reviewing and signing the MFR Reports, would exercise such reasonable care, skill and diligence as one would expect of a reasonably competent independent auditor or reasonably competent independent practising accountant. Paragraphs 205 to 210 plead a breach of that duty and paragraphs 211 to 214 plead the consequences of that breach.

[61] As to the eighth ground, the defendants submit that this claim does not plead the essential elements of negligence against the second defendant at all. Paragraph 11(e) of the statement of claim, however, pleads that the first defendant provided his services in respect of the MFR Reports to the plaintiffs "as an employee or agent of the second defendant". The plaintiffs submit that there is no need to allege further that the first defendant was the second defendant's agent as well as its employee:

> "As Professor Dal Pont notes in *Law of Agency,* fourth edition, LexisNexis (2020), at [2.19], 'there is little need to characterise the employee as an agent because the boundaries of the law of vicarious liability correspond to those of principals' liability for agents' acts or omissions – namely whether an act or omission was within the scope of the agency or employment relationship'."[45]

[62] The plaintiffs further submit, and I accept, that the second defendant is liable for acts or omissions of the first defendant and, as such, it is not necessary for the plaintiffs to plead the elements of negligence against the second defendant.[46]

[63] The complaints raised in grounds 7 and 8 do not constitute a basis for striking out the statement of claim or summarily dismissing the proceeding.

Disposition

1. The application is dismissed.

2. I will hear the parties as to costs.

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44 Statement of Claim, paragraphs 36, 63, 86, 108, 136 and 176.
45 Plaintiffs' Outline of Argument, paragraph 39.
46 Plaintiffs' Outline of Argument, paragraph 40.