SUPREME COURT OF QUEENSLAND

CITATION:	*Palmer Street Developments Pty Limited & Anor v J & E Vanjak Pty Ltd & Anor* [2018] QCA 111
PARTIES:	**PALMER STREET DEVELOPMENTS PTY LIMITED** ACN 147 843 650 (under external administration) (first appellant) **NEVILLE WILLIAM PARTON** (second appellant) **v** **J & E VANJAK PTY LTD** ACN 158 539 943 (first respondent) **YUE HUANG** (second respondent)
FILE NO/S:	Appeal No 737 of 2018 DC No 187 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville – [2017] QDC 311
DELIVERED ON:	5 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2018
JUDGES:	Morrison and Philippides JJA and Henry J
ORDERS:	**1. The first appellant's appeal is dismissed.** **2. The first appellant pay the respondents' costs of the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – DEPARTURE – where the first respondent was incorporated subsequently after representations were made by the appellants to representatives of the first respondent – where the primary court judge found that the first respondent could recover damages and other relief for misleading or deceptive conduct – where counsel for the appellants submitted that this finding "does not accord with the terms of the pleadings" – whether even if relief might flow to a corporation after the event, pursuant to the principles in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526, that relief was outside the pleadings

Bankruptcy Act 1966 (Cth), s 60
Corporations Act 2001 (Cth), s 437(A)(1)(a)

Ford Motor Co of Australia Ltd v Arrowcrest Group Pty Ltd (2003) 134 FCR 522; [2003] FCAFC 313, cited
Janssen-Cilag Pty Ltd v Pfizer Pty Ltd (1992) 37 FCR 526; [1992] FCA 437, cited

COUNSEL: R O'Hair for the appellants
Y Huang for the first respondent and on her own behalf

SOLICITORS: Access Legal for the appellants
Y Huang for the first respondent and on her own behalf

[1] **MORRISON JA:** The Notice of Appeal in this case was filed on 19 January 2018. It seeks to challenge the findings of the learned primary judge in *J & E Vanjak Pty Ltd v Palmer St Developments Pty Ltd*.[1] His Honour's judgment was at the end of a trial where the plaintiffs alleged misleading and deceptive conduct on the part of the defendants (the appellants) in respect of a sale of shares in a company operating in business.

[2] The judgment below was that the defendants pay the first plaintiff the sum of $408,314.40, including interest of $108,314.40, and that the relevant share sale agreement was declared to be void. Costs orders were also made.

[3] The decision of the learned primary judge was on a re-trial ordered by this court.[2] This court's orders as to costs were that the current respondents pay the appellants' costs of the appeal, but that the costs of the first trial were reserved to the judge who dealt with the re-trial.

[4] Two outlines have been filed on behalf of the second appellant (**Parton**). The first was on 15 March 2018 and noted that it had been filed on behalf of Parton as the first appellant (Palmer St Developments Pty Ltd) had gone into administration.[3] The second outline was filed on 28 May 2018 and commences with this paragraph:

> "[**Subsequent events & note:** the matter in issue between the parties comes down to the costs of the first trial and the trial from which this appeal proceeds, because the first appellant is in administration and the second appellant has had his Personal Insolvency Agreement accepted by creditors on 17 May 2018…]"

[5] No outline has been filed on behalf of the first appellant which, as was noted on 15 March 2018, had gone into administration. Once a company goes into administration the administrator has control of the company's business, property and affairs: s 437A(1)(a) of the *Corporations Act* 2001 (Cth). Further, during the administration of a company, "a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except … with the administrator's written consent": s 440D(1)(a) of the *Corporations Act*.

[6] On the hearing of the appeal Dr O'Hair of Counsel appeared on behalf of both appellants. In respect of the first appellant he informed the court that a Deed of

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1 [2017] QDC 311.
2 *Palmer St Developments Pty Ltd and Anor v J & E Vanjak Pty Ltd and Anor* [2016] QCA 138.
3 Outline dated 15 March 2018 para 1.

Administration had been executed and its effect was to return control of the company to Parton. Therefore, he advised, he was instructed to continue the appeal on behalf of the first appellant.

[7] The note at the commencement of Parton's outline raises difficulties in respect of his appeal. The note recorded that his Personal Insolvency Agreement was accepted by his creditors on 17 May 2018. What follows from that is this:

(a) a debtor who desires that his or her affairs be dealt with under Part X of the *Bankruptcy Act* 1966 (Cth), without the estate being sequestrated, may sign an authority under s 188(1), authorising a registered trustee to call a meeting of the debtor's creditors, "and to take control of the debtor's property";

(b) such a proposal must include a draft Personal Insolvency Agreement: s 188(2E);

(c) an authority under s 188 is not revocable: s 188(3);

(d) when an authority becomes effective, the person authorised by it becomes the controlling trustee of the debtor's property: s 188(6);

(e) when an authority given under s 188 becomes effective "the property of the debtor becomes subject control under this Division",[4] and a debtor whose property is subject to control "shall not … dispose of or deal with any of his or her property except with the consent of the controlling trustee": s 189(1) and (2)(a);

(f) the controlling trustee is empowered to take immediate control of the property and affairs of the debtor: s 190(2)(a);

(g) section 60 of the *Bankruptcy Act* applies in relation to a Personal Insolvency Agreement, once executed: s 231(3).

[8] The effect of the application of s 60 is that as if a sequestration order had been made against the debtor on the day that the agreement was executed, and the trustee under the agreement was the trustee in bankruptcy: s 231(3) of the *Bankruptcy Act*.

[9] The importance of the application of s 60 of the *Bankruptcy Act* is that an action commenced by a person who becomes bankrupt is stayed until the trustee makes an election, in writing, to prosecute or discontinue the action: s 60(2) of the *Bankruptcy Act*. For that purpose the term "action" means any civil proceeding.

[10] Dr O'Hair conceded that s 60 applied and Parton's appeal was therefore stayed.

[11] Dr O'Hair accepted that the contention advanced on behalf of Parton in his appeal, relating to the finding that he was knowingly concerned in the contraventions found by the learned trial judge, was not available to the first appellant. He therefore advanced only ground 3 of the Notice of Appeal, namely that the finding that the first respondent could recover damages and other relief for misleading or deceptive conduct, "does not accord with the terms of the pleadings".

Submissions

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4 Being a reference to Division 2 of Part X of the *Bankruptcy Act*.

[12] Dr O'Hair submitted that a proper reading of the relevant pleading[5] demonstrates that the pleaded case was that the plaintiff company existed at the time of the representations. In fact, it was said, the case run at trial was that the plaintiff was incorporated subsequently to the representations. Therefore, even if relief might flow to a corporation which has been incorporated after the event, pursuant to the principles in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd*,[6] that was not the pleaded case.

[13] It was submitted that even though the learned trial judge considered whether relief might be granted to the plaintiff under the authority of *Janssen-Cilag*, his Honour erred because that relief was outside the pleadings.

Discussion

[14] The pleading upon which the trial was conducted advanced the claim in this way:

(a) the individuals (Huang and Vanjak) were representatives of the plaintiff: paragraphs 1(c)(iii) and 1(d);[7]

(b) on 1 June 2012 the plaintiff entered into a share sale agreement with the first defendant: paragraph 4;[8]

(c) during negotiations preceding the share sale agreement Parton met and had discussions with the plaintiff's representatives, Huang and Vanjak, who were acting as agents for the plaintiff: paragraphs 5(a) and (b);[9]

(d) the plaintiff and the defendant agreed that the plaintiff would purchase the business from the first defendant: paragraph 5(d);[10]

(e) prior to entering into the share sale agreement, Parton represented to the plaintiff that the best way to bring about the sale of the business was to buy the shares in the first defendant: paragraph 6;[11]

(f) Parton represented (to the plaintiff) various matters as to net profits, liabilities and that if the plaintiff purchased the business the first defendant would pay off all outstanding liabilities: paragraph 7;[12]

(g) the representations were made to the plaintiff, through its representatives, Huang and Vanjak: paragraphs 9 and 11;[13]

(h) the representations were made in circumstances where the defendants, and any reasonable person, would know that the plaintiff would rely upon them: paragraph 13;[14]

(i) the representations were made with the intention of inducing the plaintiff to enter into the share sale agreement: paragraph 14;[15]

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5 The Further Further Amended Statement of Claim, Appeal Book (**AB**) 269.
6 (1992) 37 FCR 526.
7 AB 269-270.
8 AB 270.
9 AB 272.
10 AB 273.
11 AB 273.
12 AB 274.
13 AB 274.
14 AB 275.
15 AB 275.

(j) in reliance on the representations the plaintiff entered into the share sale agreement: paragraph 15;[16]

(k) the plaintiff paid $300,000 under the share sale agreement: paragraph 23;[17]

(l) the plaintiff suffered loss and damage: paragraph 25.[18]

[15] The defendants admitted that at all material times Huang and Vanjak were representatives of the plaintiff: paragraph 1 of the relevant defence.[19] Notwithstanding that admission the defendants did not admit that discussions were held with Huang and Vanjak as representatives of the plaintiff, because Huang and Vanjak "were not representatives of the Plaintiff as at the time of the negotiations the Plaintiff Company was not registered": paragraph 5(a) of the defence.[20]

[16] The fact that the plaintiff "was not registered" was also pleaded in response to the alleged agency between the plaintiff and Huang and Vanjak: paragraphs 5(b) and 9 of the defence.[21]

[17] Interestingly, the defendants pleaded a chronology of events: negotiations started on 9 May 2012, concluded on 21 May 2012, the plaintiff was incorporated on 24 May 2012, and the share sale agreement was signed on 1 June 2012: paragraph 9 of the defence.

[18] Therefore, on the defendants' own case the step taken by the plaintiff in reliance upon the representations occurred after they were made, and after its incorporation.

[19] The allegations in paragraph 13 of the statement of claim, that the defendants knew, and any reasonable person would know, that the plaintiff would rely on the representations, was denied: paragraph 13 of the defence.[22]

[20] The non-existence of the plaintiff was pleaded in response to the plea that the share sale agreement was signed in reliance on the representations: paragraph 15 of the defence.[23]

[21] During the trial there was no factual dispute as to the plaintiff's registration on 24 May 2012. The learned trial judge adverted to the legal issues that arose flowing from that, noting that he was "conscious of the significance of that point"[24]

[22] In the plaintiff's reply and answer it was admitted that the plaintiff was incorporated after the representations were made, and for the purpose of the share sale agreement.

[23] On day five the learned trial judge, in the course of discussing addresses, adverted to the significance of the plaintiff not being incorporated until after the representations.[25] His Honour referred to it as a "matter that I see does arise … on the pleadings". His Honour referred both sides to a passage in *Miller's Australian Competition and Consumer Law*, and to several authorities that might be relevant.

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16 AB 275.
17 AB 278.
18 AB 278.
19 Further Further Amended Defence and Amended Counterclaim, AB 282.
20 AB 283.
21 AB 283, 284.
22 AB 285-286.
23 AB 286.
24 AB 144-145, 145 l 41.
25 AB 398-399.

His Honour said that he was referring to them so that the parties could make submissions about the point, if they wished.

[24] The defendants did not contend that such a claim was outside the pleadings, either then or in submissions.

[25] In his Honour's reasons for judgment, the contention that the relevant representations were made prior to the plaintiff's incorporation was expressly adverted to.[26]

[26] Ms Huang's evidence at the trial was that Parton was told on about 17 May 2012 that a new company was being incorporated for the transaction, and he agreed to that course.[27]

[27] The learned trial judge found that at the time of the representations Huang and Vanjak were neither representatives nor agents of the plaintiff, as it was not then in existence.[28] For that reason, his Honour also held that any representations as alleged in paragraph 7 of the pleading were not made to the plaintiff.[29]

[28] In paragraphs [117]-[123] of the Reasons below, the learned trial judge dealt with the question whether the plaintiff could recover notwithstanding that it was not in existence at the time of the representations. As his Honour said the issue was "… whether a cause of action can arise under the *Competition and Consumer Act* 2010 in favour of a company which, when entering into a transaction, is under the control of a person or persons to whom a representation which amounted to misleading or deceptive conduct was made when the company was not then in existence, and that person or those persons in reliance on that representation caused the company to enter into the transaction".[30]

[29] The learned trial judge held the plaintiff could recover, making these findings:

(a) what is required to be shown is that the loss or damage has been brought about by the contravening conduct;

(b) section 82 of the *Trade Practices Act* 1974 (Cth) applies where the person suffering the loss or damage is not the person who relies on the contravening conduct, but can be independent of that person;[31]

(c) it is sufficient if there is reliance on the misleading or deceptive conduct by someone even if it is not the plaintiff, so long as the plaintiff has suffered loss and damage and there is a causal connection between the contravening conduct and the loss and damage.[32]

[30] The learned trial judge held:[33]

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26 Reasons [10], [11], [12], [15], [91], [93], [117]-[123], and [154].
27 Reasons [25].
28 Reasons [91].
29 Reasons [96].
30 Reasons [117].
31 Referring to *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at [18] and [19].
32 Reasons [120], referring to *Ford Motor Co of Australia Ltd v Arrowcrest Group Pty Ltd* [2003] FCAFC 313.
33 Reasons [121] and [123].

> "[121] …In the present case, if the plaintiff entered into the contract because Mr Vanjak and Ms Huang decided to go ahead with the transaction because they relied on the representations, and once the plaintiff was incorporated they caused the plaintiff to enter into the contract, Exhibit 1, in order to give effect to that decision, then, if the plaintiff suffered loss or damage by entering into the contract and the representations amounted to a contravention of relevant parts of the *Australian Consumer Law*, the plaintiff is entitled to claim damages under s 236.
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> …
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> [123] Accordingly, in my opinion, it does not matter for the purposes of the plaintiff's claim for damages or other relief in the present case that it was not in existence at the time the misleading or deceptive conduct relied on occurred, or that the persons to whom the representations were made … were not at that time agents of the plaintiff. All that is required is that those persons relied on those representations, and that because of that reliance the plaintiff entered into Exhibit 1 and as a result suffered loss or damage."

[31] Finally, the learned trial judge found that the plaintiff did rely on the representations when it entered into the share sale agreement.[34]

[32] Was that claim within the pleading? In my view it was. There are a number of reasons for that conclusion.

[33] Firstly, the pleading was done by a non-lawyer self-represented party. Therefore it was reasonable to construe the pleading with a degree of latitude compared to pleadings done by legal representatives.

[34] Secondly, in so far as paragraphs 1, 5, 7 and 9 of the statement of claim alleged that at the time of the representations Huang and Vanjak were representatives or agents of the plaintiff, that could not have been so as a matter of law, as the learned trial judge held. However, those paragraphs nonetheless alleged that the relevant representations were made to Huang and Vanjak. To insist that they can only be read so as to perpetrate a legal impossibility is perverse. The paragraphs alleged two relevant things: (i) that representations were made to Huang and Vanjak; and (ii) at the time they were representatives or agents of the plaintiff. Even if the second was wrong, it did not negate the first point.

[35] Thirdly, paragraph 13 alleged that the representations were made in circumstances where the defendants knew the plaintiff would rely on them. That was still the case between when the plaintiff was incorporated on 24 May and the signing of the share sale agreement six days later. The same applies to paragraph 14, which alleged that the representations were made with the intention that the plaintiff rely on them.

[36] Fourthly, paragraphs 15 and 25 alleged that the plaintiff did rely upon the representations, entered into the share sale agreement, and thereby suffered loss.

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34 Reasons [155].

[37] It is, in my view, plain that the pleading contended that contravening representations were made to Huang and Vanjak, with the intention that they be relied upon, and they were relied upon by the plaintiff when it (caused by Huang and Vanjak) entered into the share sale agreement, and it thereby suffered loss and damage. That is the case found by the learned trial judge. The claim by the plaintiff was within the pleading.

[38] There being no merit in this ground, the first appellant's appeal should be dismissed, with costs. I propose the following orders:

1. The first appellant's appeal is dismissed.

2. The first appellant pay the respondents' costs of the appeal.

[39] **PHILIPPIDES JA:** I agree that the orders proposed by Morrison JA should be made for the reasons stated by his Honour.

[40] **HENRY J:** I have read the reasons of Morrison JA. I agree with those reasons and the orders proposed.