

SUPREME COURT OF QUEENSLAND

CITATION: *Port Ballidu Pty Ltd v Frews Lawyers & Ors* [2018] QCA 110

PARTIES: **PORT BALLIDU PTY LTD**
ACN 010 820 185
(appellant)
v
FREWS LAWYERS
(first respondent)
NATHANIEL BRUCE GRANT
(second respondent)
MULLINS LAWYERS
(third respondent)

FILE NO/S: Appeal No 3047 of 2017
SC No 7459 of 2015

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2017] QSC 19

DELIVERED ON: 5 June 2018

DELIVERED AT: Brisbane

HEARING DATE: 6 September 2017

JUDGES: Fraser and McMurdo JJA and Boddice J

ORDERS: **The appeal should be dismissed with costs.**

CATCHWORDS: LIMITATION OF ACTIONS – GENERAL MATTERS – where the appellant claimed equitable compensation for being knowingly involved in a company director’s breach of duty as a director – where the appellant also brought claims for compensation pursuant to the *Australian Consumer Law* and damages for negligence – where the claim under the *Australian Consumer Law* was statute barred and the claim for damages for negligence was similarly barred by the *Limitation of Actions Act 1974* (Qld) – where the primary judge held the claim for equitable compensation was barred by analogy with an action that the appellant could have brought under the *Corporations Act 2001* (Cth) – where the comparable action under the *Corporations Act 2001* (Cth) would be time barred by s 1317K – where the facts which gave rise to the claim for equitable compensation were known to the appellant more than six years before the claim was commenced – whether the primary judge erred by applying a limitation period by analogy to the claim for

equitable compensation

Corporations Act 2001 (Cth), s 185, s 1317K
Limitation of Actions Act 1974 (Qld)

Barnes v Addy (1874) 9 Ch App 244, cited
Gerace v Auzhair Supplies Pty Ltd (in liq) (2014)
87 NSWLR 435; [2014] NSWCA 181, cited
Re Auzhair Supplies Pty Ltd (in liq) (2013) 272 FLR 304;
[2013] NSWSC 1, applied

COUNSEL: D A Savage QC, with I A Erskine, for the appellant
D G Clothier QC for the respondent

SOLICITORS: Creagh Weightmann for the appellant
Barry Nilsson Lawyers for the respondent

- [1] **FRASER JA:** This is an appeal against a decision to give summary judgment for the respondents upon the appellant’s claim against them.

Background

- [2] In 2006, O’Rourke, one of the appellant’s three directors, purportedly acting on behalf of the appellant but in fact without the appellant’s consent, executed a mortgage of land owned by the appellant in favour of a third party. The mortgage secured the repayment by O’Rourke, his wife, and the appellant, of a loan of \$445,000. O’Rourke’s name and a reference to his office as director were typed below his signature on the mortgage. Below that appeared the handwritten words “its duly constituted attorney under power of attorney No 709812208”. That power of attorney had been executed about nine years earlier. The other directors knew nothing about the loan or the mortgage. O’Rourke used the money for his own benefit. He was subsequently bankrupted.
- [3] In 2015 the appellant sued a firm of solicitors (the third defendant) who had represented the appellant in earlier proceedings arising out of these events, and the different firm of solicitors and the solicitor who had acted for the lender in the original transaction (the first and second defendants). The present controversy concerns only the appellant’s equitable claim against the first and second defendants, who are the respondents to this appeal. The appellants made three claims against the respondents: a claim for equitable compensation for the respondents’ alleged knowing participation in a dishonest breach of equitable duties by O’Rourke as a director of the appellant (a claim that the respondents were liable under what is known as the second limb of the rule in *Barnes v Addy*¹), a claim for compensation pursuant to the *Australian Consumer Law*² for the respondents’ allegedly being knowingly concerned in O’Rourke’s misleading and deceptive conduct in contravention of that statute, and a claim for damages for negligence.

The primary judge’s decision

¹ (1874) 9 Ch App 244, 251-252. It is convenient to refer to “the rule in *Barnes v Addy*” although that description is inaccurate.

² *Competition and Consumer Act 2010 (Cth)*, sch 2 (‘Australian Consumer Law’).

- [4] The appellant's proceeding was commenced more than six years after the appellant incurred loss allegedly caused by the respondents' conduct. The primary judge concluded that the claim against the respondents for their alleged involvement in O'Rourke's misleading and deceptive conduct was barred by the six year limitation period in the *Australian Consumer Law* and the appellant's claim for negligence was barred by the six year limitation period in the *Limitation of Actions Act 1974* (Qld). The appellant does not challenge those conclusions.
- [5] The primary judge also held that although no statutory limitation period directly applied to the appellant's equitable claim, that claim was barred by analogy with the time bar in section 1317K of the *Corporations Act 2001* (Cth), which requires a claim for compensation for a contravention of certain provisions of that Act to be commenced within six years of the contravention. The primary judge applied the equitable principle articulated by Meagher JA (with whom Beazley P and Emmett JA agreed) in *Gerace v Auzhair Supplies Pty Ltd (in liq)*:³

“The authorities referred to above, and in particular *R v McNeil*, show that in purely equitable proceedings, where there is a corresponding remedy at law in respect of the same matter and that remedy is the subject of a statutory bar, equity will apply the bar by analogy unless there exists a ground which justifies its not doing so because reliance by the defendant on the statute would in the circumstances be unconscionable. They do not support the proposition that equity retains any broader discretion whether to apply the bar.

...

In applying the statute by analogy, equity gives effect to the maxim that it follows the law and acts on the basis that “laches is presumable in cases where it is positively declared at law”: J Story, *Commentaries on Equity Jurisprudence* (First English Edition by W Grigsby, 1884, London, Stevens and Haynes) at [64a].

...

The distinction, referred to by Isaacs J in *R v McNeil*, between equity applying its own doctrine of laches and adopting, in analogous cases, the measure of time fixed by statute unless there is a “greater equity”, is one of substance. The circumstances in which such an equity arises include where fraudulent conduct of the defendant has denied the plaintiff the opportunity to sue within the statutory period. That equity is satisfied by preventing the defendant from taking advantage of the plaintiff's omission to do so.”

- [6] The primary judge outlined the pleaded bases of the claims against the respondents:

“The solicitor's firm and the solicitor who acted for the lender in the transaction (the first and second defendants) are alleged to have been knowingly concerned in O'Rourke's misconduct. The solicitor:

- (a) registered an old, general power of attorney;

³ (2014) 87 NSWLR 435 at [70]-[73].

- (b) altered the already executed mortgage in registrable form by hand to recognise execution by an attorney; and
- (c) lodged the altered document for registration.

Because of the registration of the mortgage, the plaintiff suffered loss, including:

- (a) payments made pursuant to the mortgage;
- (b) legal costs in litigation commenced by the lender; and
- (c) its liability under the mortgage (which had the protection of indefeasibility).

...

Their pleaded case, under both equitable and statutory claims, relies on essentially the same facts:

- (a) a duty O'Rourke was subject to as a director, which arose both as a fiduciary duty under the general law and as a statutory duty under the *Corporations Act 2001* (Cth);
- (b) his breach of those duties;
- (c) that the first and second defendants were concerned in and aided and abetted O'Rourke in his breach of his director's duties;
- (d) that the conduct of O'Rourke which amounted to a breach of his director's duties constituted misleading and deceptive conduct, in contravention of statute;
- (e) that the conduct of the first and second defendants, relied upon in (c), meant that they aided and abetted, or otherwise were knowingly concerned in O'Rourke's contravention of statute;
- (f) as a result of O'Rourke's breach of duty and contravening conduct, and also the first and second defendants' knowing involvement in that conduct, the plaintiff suffered loss and damage."

[7] The primary judge concluded that the appellant's claim for equitable compensation under the second limb of the rule in *Barnes v Addy* closely resembled a corresponding claim upon the same factual basis the appellant could have made for compensation pursuant to the *Corporations Act* for being knowingly concerned in O'Rourke's breaches of duty as a director under sections 181 and 182 of that Act. In that respect the primary judge found that:

- (a) There is a close resemblance between the facts underlying the appellant's claims for breach of fiduciary duty by O'Rourke and the respondents' knowing involvement in it and the facts underlying the time-barred cause of action under the *Corporations Act* for compensation in respect of breach of director's duty by O'Rourke and the first and second defendants being "knowingly concerned" in it.

- (b) The appellant pleaded the same content of O'Rourke's fiduciary duty as a company director and his statutory duty as a company director.
 - (c) If the appellant had claimed under the *Corporations Act* for a breach of O'Rourke's statutory duties as a director and for the respondents being knowingly concerned in those breaches, the conduct the appellant pleaded as constituting a breach of O'Rourke's fiduciary duty would have been conduct in breach of his statutory duties as a director.
 - (d) The pleaded conduct of the respondents alleged to have amounted to their being knowingly involved in O'Rourke's breach of fiduciary duty also would have amounted to their being knowingly concerned in O'Rourke's contravention of the *Corporations Act*.
 - (e) The loss caused by the conduct for which the appellants sought equitable compensation was the same as the loss the appellant could have recovered under the *Corporations Act* for the same conduct if characterised as the respondents being knowingly concerned in O'Rourke's breach of his statutory duties as a director.
- [8] The primary judge concluded that, unless it would be unconscionable or unconscientious for the respondents to rely upon a six year limitation period in respect of the claim for equitable compensation, the statutory limitation period of six years under section 1317K of the *Corporations Act* should be applied by analogy. The primary judge found that it would not be unconscionable or unconscientious for the defendants to rely upon such a limitation period. An important consideration in that respect was the primary judge's finding of fact that more than six years before the appellant commenced the proceedings it knew of the conduct of O'Rourke and the respondents which founded its claim for equitable compensation against the respondents.
- [9] The primary judge therefore held that the application by analogy of the statutory limitation period of six years to the appellants' claim for equitable compensation against the respondents resulted in that claim being statute-barred. The primary judge acknowledged that the power to order summary judgement should be exercised with great care and only if the court was satisfied that the plaintiff had no real prospect of succeeding on all or part of its claim and there was no need for a trial of the claim or a part of the claim. In that respect the primary judge observed that the relevant facts were not disputed and, applying the principle stated in *Gerace*, the appellant had no real prospects of succeeding and there was no need for a trial.

The appeal

- [10] The appellants' notice of appeal states four grounds:
- “1. The learned primary judge erred in law in finding that the plaintiff's action was statute barred by analogy.
 - 2. The learned primary judge erred in law in finding that there was a sufficient correspondence between a “remedy in equity” and a “remedy in law” to apply a statutory limitation period by analogy.

3. The learned primary judge erred in finding no residual discretion in equity's exclusive jurisdiction not to apply a statute of limitations whether or not one would otherwise have been applied.
4. The learned primary judge erred in finding there was no or no other formulation of the plaintiff's complaint within the proceeding which was either immune from a "limitations" defence or which ought not to have been tried on facts found prior to dismissing the proceedings."

[11] At the hearing of the appeal the appellant abandoned grounds 1, 3 and 4 and confined ground 2 to the contention that section 185 of the *Corporations Act* precludes the application to the appellant's equitable claim of the time bar in section 1317K of the *Corporations Act*. As a result, there is no challenge to any aspect of the primary judge's analysis. The issue in the appeal involves only the construction of section 185. The respondents urged the Court to resolve that issue. In the circumstances it is appropriate to do so even though it was not argued before the primary judge. The fact that the issue arises in the context of an application for summary judgment also does not make it inappropriate for the Court to decide it in this case. The appellant ultimately did not press an argument that the Court should not do so.

[12] Before discussing the issue it is useful to set out section 185 of the *Corporations Act* and to refer to other relevant provisions of that Act. Section 185 provides:

“Sections 180 to 184:

- (a) have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
- (b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

This section does not apply to subsections 180(2) and (3) to the extent to which they operate on the duties at common law and in equity that are equivalent to the requirements of subsection 180(1).”

[13] Section 180 imposes duties of care and diligence upon directors and other officers of a corporation. The equitable claim was not referable to any similar duty. The concluding sentence of section 185 has no relevant application in this case. Sections 181 to 183 impose duties: (section 181(1)) upon a director or other officer of a corporation, to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose; (section 182(1)) upon a director, secretary, other officer or employee of a corporation, not to improperly use their position to gain an advantage for themselves or someone else or cause detriment to the corporation; and (section 183(1)) upon persons, not to improperly use information obtained because they are, or have been, a director or other officer or employee of a corporation, to gain an advantage for themselves or someone else or cause detriment to the corporation. Subsection (2) of each of sections 181, 182, and 183 provides that a person who is involved in a contravention of subsection (1) contravenes subsection (2). Section 184 creates certain offences by present and past

directors, other officers and employees of a corporation. The most relevant provisions in this case are sections 181 and 182, particularly subsection 2 of each of those sections.

- [14] The Court’s power to order compensation and the corporation’s right to bring proceedings for compensation for a contravention of the relevant provisions of the *Corporations Act* (including section 181(2) and section 182(2)) are created and regulated by section 1317H (which relevantly empowers a Court to order a person to compensate a corporation for damage it suffers if the person has contravened the provision), section 1317J (which relevantly empowers the corporation to apply for a compensation order in such a case), and section 1317K (which, as I have mentioned, prescribes a six year period within which such a proceeding must be commenced). It has been held that section 1317K extinguishes the right to compensation for the contravention after expiry of the six year time limit.⁴
- [15] The appellant argued that each of paragraphs (a) and (b) of section 185 precludes the application of section 1317K, with reference to any of sections 180 to 184, as a bar to its claim for compensation under the relevant “rule of law” (the second limb of the rule in *Barnes v Addy*). In relation to section 185(a), the appellant argued that any such application would amount to a derogation of the second limb of the rule in *Barnes v Addy* which, at least in the context of the present case, should be regarded as a rule of law relating to the duty or liability of O’Rourke because of his office or employment in relation to the appellant corporation. In relation to section 185(b), the appellant argued that any such application would prevent the commencement of the appellant’s equitable claim which, the appellant argued, is a civil proceeding in respect of the liability of O’Rourke because of his office or employment in relation to the appellant.
- [16] The appellant acknowledged that the only case directly upon this point, *Re Auzhair Supplies Pty Ltd (in liq)*,⁵ is inconsistent with the appellant’s argument. (An appeal from the decision in *Re Auzhair* was allowed in *Gerace v Auzhair Supplies Pty Ltd (in liq)* but the present point was not in issue in the appeal or discussed by the New South Wales Court of Appeal.) In *Re Auzhair Supplies Pty Ltd (in liq)*, Brereton J gave the following reasons for rejecting the argument now advanced by the appellant:

“Section 185 plainly preserves the general law duties, and the entitlement of a plaintiff to commence civil proceedings for a breach of a general law duty, notwithstanding the introduction of the statutory duties – as did its predecessors, before the introduction of any limitation period for the statutory causes of action. This permits the incremental development of the general law, unconstrained by a statutory straightjacket. But in my view this does not exclude the application by analogy of the statutory limitation period. Apart from the potential impact of the limitation period, the plaintiff remained entitled to sue for equitable remedies for breach of the general law duties instead of or in addition to statutory remedies for breach of the corresponding statutory duties. Application by analogy of the

⁴ *Austrstructures Pty Ltd v Makin* (2014) 290 FLR 153 at [27]-[30]. See also *Newtronics Pty Ltd v Gjergja & Anor* (2008) 219 FLR 1 at [79]-[81] per Dodds-Stretton JA and *David Grant 7 Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-277.

⁵ (2013) 272 FLR 304.

statutory limitation period imposed by s 1317K does not involve prevention by anything in ss 180 to 184 of the commencement of proceedings; such prevention flows if at all from s 1317K – and then only by analogy – and not from ss 180 to 184. It would be application of the equitable doctrine of laches, albeit informed by s 1317K, that would have the effect of preventing the commencement of proceedings.

To hold that the limitation provision of s 1317K could not be applied by analogy in cases of breaches directors' duties at general law would circumvent its object – since it is difficult to conceive of a case of a contravention of ss 180 to 183 that would not also be a contravention of a director's general law duties – and thus practically deprive s 1317K of effect, since whenever it would operate, it could otherwise always be outflanked by framing the claim as one for breach of the (identical) equitable duties rather than of the statutory duties...”⁶

- [17] The appellant argued that, contrary to Brereton J’s conclusion, application by analogy of the statutory limitation period in section 1317K involves sections 182 and 183⁷ operating to prevent the commencement of civil proceedings under the second limb of the rule in *Barnes v Addy*. The appellant acknowledged that the derogation described in section 185(a) and the prevention described in section 185(b) would directly flow from section 1317K, but the appellant argued that they should also be regarded as flowing from sections 182 and 183. The argument was that to apply section 1317K by analogy would mean that sections 182 and 183 operate in derogation of the equitable claim contrary to section 185 because sections 182 and 183 create rights that are delimited by time under section 1317K. To apply the limitation period to the equitable claim would be to delimit the corporation’s equitable right by the introduction of sections 182 and 183. The effect of section 185 was submitted to be that the enactment of sections 180 to 184 cannot result in the erosion of a plaintiff’s entitlement, as it existed before the enactment, to bring an equitable claim corresponding with a claim that might have been brought under any of those sections.
- [18] The appellant’s arguments require a substantial and unjustifiable departure from the statutory language. Congruently with section 185(a), sections 180, 182(1), 182(1), 183(1) and 184, impose duties and liabilities upon persons because of their office or employment in relation to a corporation, and subsection 2 of each of sections 181 to 183 also provides that a person involved in a contravention of the section contravenes the section. The right to bring proceedings for compensation for a contravention is instead created and regulated by other provisions, including section 1317K. The application of the time bar in section 1317K by analogy to extinguish an equitable claim may be said both to derogate from what otherwise would be the liability in equity of a person under the second limb in *Barnes v Addy* and to prevent the commencement of proceedings to enforce such a claim. But it is the equitable principle itself that requires the application of the time bar. It is not section 1317K, much less any of sections 180 to 184, which applies the time bar.

⁶ (2013) 272 FLR 304 at 327-328 [80]-[81].

⁷ The primary judge considered that the appellant’s equitable claim was analogous with a claim for compensation for contravention of sections 181 and 182. The appellant referred instead to section 182 and 183, but its argument is equally applicable to section 181.

Section 185 concerns only the effect of sections 180 to 184. In my respectful opinion the effect of section 185 was accurately described in paragraph 80 of Brereton J's reasons in *Re Auzhair*.

- [19] Accordingly section 185 is not inconsistent with the primary judge's conclusion that the appellant's equitable claim is barred by the application by analogy of the time bar in section 1317K.
- [20] The respondents argued that there is another reason why section 185 does not preclude the application of the time bar to the appellant's proceeding. Although it is not strictly necessary to consider this argument I will express my tentative view. It is a necessary step in the appellant's argument that "the rule of law" mentioned in section 185(a) (in this case, the second limb of the rule *Barnes v Addy*) may be a rule that imposes liability upon a person (the respondents) other than the person (O'Rourke) who is liable because of that person's office or employment. The effect of the respondents' additional argument is that section 185(a) is more naturally understood as referring to a rule of law concerning the duty or liability of a person because of their office or employment in relation to a corporation. If so, the suggested result is that section 185 would not operate against an alleged accessory under the second limb of the rule in *Barnes v Addy*, because that rule imposes liability only upon strangers to a fiduciary relationship (including the fiduciary relationship between a corporation and its officers and employees). Although that may be the most natural interpretation of the text, I am inclined to think that it is not the proper construction of the section. It would result in section 185 failing to fulfil what seems to be its intended function as a legislative fiat that all of the sections mentioned in it, including subsection 2 of each of sections 181 to 183, add to and do not derogate from the closely analogous duties and liabilities under the general law and do not prevent the commencement of civil proceedings for or in respect of such general law duties and liabilities.

Proposed order

- [21] The appeal should be dismissed with costs.
- [22] **McMURDO JA:** I agree with Fraser JA.
- [23] **BODDICE J:** I agree with Fraser JA.