SUPREME COURT OF QUEENSLAND

CITATION:	*Hookey & Anor v Manthey & Ors* [2018] QSC 207
PARTIES:	**SCOTT GREGORY HOOKEY** (first applicant) AND **MARETTI AUSTRALIA PTY LTD ACN 619 520 115** (second applicant) **V** **STEVEN CHARLES MANTHEY** (first respondent) AND **MICHAEL MANTHEY** (second respondent) AND **MICHAEL JOHNSTON** (third respondent) AND **BRENDA MANTHEY** (fourth respondent) AND **SC MANTHEY PTY LTD** (fifth respondent)
FILE NO/S:	BS No 7639 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2018

JUDGE: Brown J

ORDER: **The order of the Court is that upon the applicants providing undertakings in the form of paragraphs (1) to (6) of the order of 18 July 2018 that an order be made until trial or earlier order in the form of paragraph 7, 10 and 11 of his Honour's orders. I further order that there be liberty to apply. The parties are to provide an order in the appropriate form.**

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO PREVENT ABUSE OF PROCESS – GENERALLY – where the first applicant and the first respondent discussed a commercial arrangement in relation to a proposal to commercialise and develop a revolutionary type of combustion engine invented by the first and second respondents – where the exact nature of that arrangement is the subject of controversy – where on 18 July 2018, the Court made an order freezing the assets of the first, second, fourth and fifth respondents – where the applicants seek a continuation of the order until a trial or earlier order – whether the Court should order that the freezing order continue, having regard to: whether the applicant has a good arguable case, whether there is a real risk of steps being taken which would have the effect of frustrating the prospective Court processes of execution and enforcement; and, the interests of justice.

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DETENTION, INSPECTION AND PRESERVATION – FREEZING ORDERS – whether the Court should exercise its discretion to order that the freezing order continue, having regard to: whether the applicant has a good arguable case, whether there is a real risk of steps being taken which would have the effect of frustrating the prospective Court processes of execution and enforcement; and, the interests of justice.

Uniform Civil Procedure Rules 1999 (Qld), r 260, r 260A, r 260B, r 260D

Brookes v Ralph & Ors [2009] QSC 416
Cardile v LED Builders Pty Ltd (1999) 198 CLR 380
Graham & Linda Huddy Nominees Pty Ltd v Byrne [2016] QSC 211
Parbery & Ors v QNI Metals Pty Ltd & Ors [2018] QSC 107

Palaris Mining Pty Ltd v Short & Anor [2012] QSC 224
United Dominions Corporations Limited v Brian Pty Ltd (1985) 157 CLR 1
Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd [2012] QSC 143

COUNSEL: M Martin QC with G Radcliff for the applicants
N Derrington for the first, second, fourth and fifth respondents

SOLICITORS: Radcliffs for the applicants
Holman Webb Lawyers for the first, second, fourth and fifth respondents

[1] On 18 July 2018, an urgent *ex parte* order was made by Jackson J, freezing assets of the first, second, fourth and fifth respondents. The order was extended until 21 August 2018 after the applicants were ordered to file a statement of claim by 16 August 2018. The applicants seek a continuation of the order until trial or earlier order.

Background

[2] The first applicant, Mr Scott Hookey, and the first respondent, Mr Steven Manthey, met at an exotic car rally at the end of 2015. Mr Steven Manthey told Mr Hookey about a revolutionary type of combustion engine that he had invented with his son, Mr Michael Manthey, the second respondent. It is uncontroversial that Mr Steven Manthey and Mr Hookey subsequently met, including with Mr Michael Johnston, and discussed a potential commercial arrangement which was to involve an American company which would be used to commercialise and develop the engine. The exact nature of that arrangement is a matter which is the subject of controversy in the present proceeding.

[3] In very simple terms, the applicants claim that there is a joint venture between Mr Hookey and Mr Steven Manthey which is alleged to have arisen out of discussions which occurred in November 2015 and by the provision of a draft share option agreement, a voting agreement for shares and a purported executed assignment deed to Mr Hookey. It is alleged that under the joint venture Mr Steven Manthey and Mr Hookey would each hold a 40 percent interest which was to be represented by a shareholding in Advanced Engine Dynamics Corporation ("**AEDC**"), which would be used to commercialise and develop the engine in the United States.[1] Mr Hookey was to contribute funds as required to the joint venture for the purposes of developing and commercialising the engine. It is alleged in the alternative that the funds would be treated as an acquisition by Mr Hookey in the shares of AEDC. Under that agreement the joint venture was to own the engine and the commensurate intellectual property. It is

[1] Other parties including the second and third respondents were also shareholders. 2% of the shareholding was to be sold to investors to raise funds.

alleged that the agreement subsequently changed to permit a corporate entity in Australia to develop and commercialise the engine and the second respondent would change the design of the engine. The applicants also allege that representations were made to Mr Hookey as to the intellectual property relating to the engine and that it was free of litigation and capable of development, which they contend were false. Those representations are the basis of a claim in misleading and deceptive conduct.

[4] Mr Steven Manthey has the engine or at least control of the engine, which the applicants claim is an asset of the joint venture. The applicants contend that there is evidence that Mr Steven Manthey is intending to develop the engine using his own assets to the exclusion of the applicants, which may result in him dissipating his assets and not being able to meet any judgment in the applicants' favour. Mr Hookey claims that as the engine has not been developed or commercialised in America or Australia, the money which he has invested has been lost either as a result of alleged breaches of the joint venture agreement said to exist or the misrepresentations made. Allegations are also made that money has been misappropriated in breach of fiduciary duties by a payment made to the fifth respondent for transfer of the engine to AEDC which never occurred or, if it did, the engine was of no value. Complaints are also made about some other payments to the fifth respondent.

[5] The respondents contend that there is no joint venture agreement and that the evidence shows that the discussions principally between Mr Steven Manthey and Mr Hookey led to an agreement whereby SG Hookey LLC had an option to acquire shares in AEDC as reflected in a share option deed executed by Mr Manthey. They contend that a number of those shares were on-sold at a considerable profit. Any other payments made by Mr Hookey which do not relate to the acquisition of shares are, according to the respondents', loans.

[6] The first, second, fourth and fifth respondents seek to have the orders made on 18 July 2018 discharged on the basis that the applicants have not shown a *prima facie* case in respect of the case now pleaded in the statement of claim, entitling them to the relief sought. Alternatively, they claim that the applicants' case is a weak case with many inconsistencies in the evidence and where there is a lack of evidence that there is a real risk of dissipation. They also raise a number of matters relevant to the exercise of the Court's discretion such as a lack of expedition in the prosecution of the proceedings and contend that there was a failure to make proper disclosure at the *ex parte* application all of which are factors which weigh against making an order.

[7] The respondents' evidence disputes many of the factual matters relied upon by the applicants and the legal characterisation of those facts. This is not the forum to determine those factual disputes. Indeed, given that a significant amount of the factual dispute relates to the content of discussions which occurred, it would be impossible to do so. However, that evidence is relevant in assessing the strength of the applicants' case.

[8] The second applicant is alleged to have made a payment of $225,000 as a result of the alleged misrepresentations for which it seeks damages but does raise any further claims.

Legal Principles

[9] The principles with respect to freezing orders have recently been thoroughly discussed by Bond J in the case of *Parbery & Ors v QNI Metals Pty Ltd & Ors*.[2] The parties are agreed that that decision correctly sets out the relevant legal principles. I agree with and adopt his Honour's analysis of the legal principles.

[10] His Honour summarised the three broad considerations which inform the exercise of the inherent jurisdiction to make a freezing order as follows:[3]

(a) First, whether the plaintiff has a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Court believes to have a better than 50 percent chance of success;

(b) Second, whether there is a real risk of steps being taken which would have the effect of frustrating the prospective Court processes of execution and enforcement in respect of any judgment in the plaintiff's favour;

(c) Third, whether it is in the interests of justice that the power be exercised, in particular bearing in mind that the jurisdiction must be exercised with a high degree of caution and with proper consideration for the nature of the impact on the persons affected.

[11] In *Parbery*, his Honour discussed r 26OA of the *Uniform Civil Procedure Rules* 1999 (Qld) ("**the *UCPR***") and analysed r 26OA, r 26OB and r 26OD, as well as the inherent jurisdiction of the Court. His Honour stated that the overall question governing the exercise of the power under r 26OA was whether a freezing order is necessary for the purpose of preventing frustration or inhibition of the Court's processes by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied. In seeking to answer that question, his Honour considered that the Court should address the three considerations which have been identified as relevant to the granting of freezing orders in the exercise of the Court's inherent jurisdiction.[4] As to the rule in r 260D of the *UCPR*, his Honour noted that it confers a power on the Court to make freezing orders which is specifically constrained by the requirements that the applicant has a good arguable case (r 260D(2)) and that the Court is satisfied having regard to all the circumstances of the matters referred to in r 260D(3). His Honour noted that those matters cover the same ground as the first two considerations relevant to the exercise of the inherent jurisdiction. As his Honour stated, while the interests of justice are not referred to, those matters would be clearly relevant to the exercise of the Court's discretion.[5]

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2 [2018] QSC 107.

3 See discussion at [45] to [49].

4 At [62].

5 At [63].

[12] In relation to the second consideration identified, the relevant risk is the risk posed to the process of execution and enforcement of any judgment. An applicant need not prove that the risk will actually come to pass and it is not necessary for an applicant to prove any particular purpose or motivation of a respondent.[6] Evidence of a positive intention to frustrate a judgment will however be relevant and a mere assertion of the existence of a risk is not sufficient.[7] The evidence which establishes the underlying strength of an applicant's case may have a bearing on the assessment of the risk which exists to the integrity of the Court processes. The conclusion that there is a real risk of steps being taken which would have the effect of frustrating the prospective Court processes of execution and enforcement in respect of any favourable judgment to the applicant is often a matter of inference rather than direct proof. There must be facts from which a prudent, sensible commercial person could properly infer the existence of the relevant risk of frustration.[8]

[13] The interests of justice bring into play a number of discretionary considerations. Discretionary considerations include:[9]

(a) The degree of expedition with which the plaintiffs have proceeded;

(b) Whether an undertaking to ensure the due expedition of the proceeding is offered;

(c) The availability of alternative proceedings or remedies;

(d) The potential damaging effect which the order might have on the defendant's reputation or business; and

(e) The effect of the proposed orders on innocent third parties.

[14] As his Honour emphasised, the judicial exercise of inherent jurisdiction to make freezing or ancillary orders does not involve merely a mechanical exercise of sequentially enquiring whether the applicants have established each of the three matters identified. The strength of the applicants' case, the danger of frustration of a prospective judgment, the interests of justice and any other relevant discretionary factors are all considered together.

[15] A freezing order is an onerous order, which requires the exercise of a high degree of caution with proper consideration for the nature of the impact on the persons affected. The onus of proof is on the party seeking the order or as in this case the continuation of order.[10]

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6 *Parbery* at [31] and [34].

7 *Parbery* at [36] and [37].

8 *Parbery* at [39].

9 *Parbery* at [43].

10 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [50] to [51], per Gaudron, McHugh, Gummow and Callinan JJ.

[16] In determining whether or not to grant a freezing order, the Court is not undertaking a preliminary trial. The task of the Court is to have regard to all of the evidence and determine whether the applicants have sufficiently discharged their burden on the matters requisite to making the orders sought.

[17] The original order was made *ex parte*. The respondents contend that full disclosure was not made to Jackson J and the orders should be discharged on that basis. The duty of disclosure requires that an applicant make full and fair disclosure of all the material facts and to make all proper inquiries before making the application. The applicant must identify any likely defences and material facts that would be relied upon by the absent defendant in defence of the application.[11] I will consider this in the context of the interests of justice.

***Prima facie* case**

[18] The applicants plead three causes of action in the statement of claim:

(a) First, an action seeking damages for breaches of a joint venture agreement, or alternatively breaches of fiduciary duties and other relief such as an account of profits and appointment of a receiver to the assets of the joint venture;

(b) Secondly, damages pursuant to s 236 of the *Australian Consumer Law* or the equivalent in the *Australian Securities and Investments Commission Act* 2001 (Cth) ("***ASIC* Act**") for misleading and deceptive conduct by reason of false representations having been made to Mr Hookey;

(c) Thirdly, a declaration that a sum of $1,000,000 together with a further sum of $186,450 is held on trust by the fifth respondent for the joint venture between the first applicant, first respondent, second respondent and third defendant.

[19] According to the respondents, the applicants originally claimed that they had a *prima facie* case in deceit or fraud against the first respondent and fifth respondent and a proprietary claim entitling the second applicant to possession of the engine developed by AEDC, where the alleged damage was said to be $4,169,094.34. Those claims have been abandoned. The applicants contend that the change of the legal claims relied upon are of little significance given that cases can change as lawyers have greater time to consider them and that Mr Hookey's evidence remains the same.

[20] The change of case is relevant to assessing the extent to which the applicants can place any weight upon the fact that Jackson J was previously satisfied that a freezing order should be made. Little weight can be attached to the fact Jackson J was prepared to make an *ex parte* order given that it was made urgently, the applicants' case was framed differently and his Honour did not have the benefit of evidence or legal submissions from the respondent.

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[11] *Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd* [2012] QSC 143; *Siporex Trade SA v Comdel Commodities Ltd* referred to by Applegarth J in *Palaris Mining Pty Ltd v Short & Anor* [2012] QSC 224 at [18].

(i) Joint Venture Agreement

[21] The applicants plead in the SOC various conversations and conduct and on the basis of those matters plead that a joint venture agreement was concluded between Mr Hookey, Mr Steven Manthey, Mr Michael Manthey and Mr Michael Johnston. The terms of the joint venture are pleaded in [12] of the Statement of Claim ("**SOC**") filed 17 August 2018. No acceptance by the respondents or assent by conduct or otherwise by the parties adopting the terms of the agreement is pleaded.

[22] The respondents raise a number of matters which they contend demonstrate that there is no *prima facie* case pleaded or at the very least, it is so weak that a freezing order should not continue.

[23] The respondents contend that the first applicant, Mr Hookey, is not a proper plaintiff in the proceedings because the company SG Hookey LLC is the correct party if there is any claim at all, and that the evidence does not support any agreement resulting from the discussions between Mr Hookey and Mr Steven Manthey being characterised as a joint venture agreement. As to the first matter, they rely on evidence which shows that a share option agreement between SC Manthey LLC and SG Hookey LLC was executed by Mr Steven Manthey and represents the agreement reached between the parties in respect of the engine. A copy of a share option agreement was annexed to Mr Hookey's affidavit which was executed by Mr Steven Manthey, the first respondent.[12] The applicants have previously submitted in this Court that such an agreement was executed by Mr Hookey. It is unclear whether the agreement executed by Mr Steven Manthey is the same agreement which Mr Hookey is said to have signed.

[24] By reference to the share option agreement executed by Mr Steven Manthey, the respondents submit that it contains a number of relevant terms which support the fact that the parties did not agree to a joint venture agreement as alleged by the applicants. Clause 1 of the share option agreement states that this agreement has been executed and delivered and the option shares have been granted hereunder in connection with and as part of a business plan of AEDC and to commercialise the technology owned by AEDC. The agreement (together with a voting rights agreement), is said to constitute the entire agreement between the parties.[13] Further, clause 4(i) states that nothing contained in this agreement shall be deemed or construed as creating a partnership or joint venture between or among the parties.

[25] In support of the fact that the agreement made between the parties was the share option agreement in AEDC, the respondents also point to evidence given at a public examination by Mr Hookey in the following terms:[14]

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[12] Affidavit of S Hookey, CFI 2, SGH-17.

[13] Clause 4(c).

[14] Affidavit of C Radcliff, CFI 18, CR-1, p 36 and 37.

> "All right. Well, so just in terms of this deal where you were going to get these options: was it your American company, SG Hookey LLC, which was to acquire the options – the option to acquire ---?--- I believe so.
>
> --- these shares? --- Yes. I believe so.
>
> All right. Did that company ever --- ? --- Privilege.
>
> --- in fact acquire any shares under this deal? --- I'm not exactly sure how it all worked, but basically, I think – privileged, of course – I believe that as people were shown the engine by Mr Manthey and the interest was created that they then, basically, bought them off me who bought them off him simultaneously, so I never actually owned anything, and I still don't."

[26] The respondents also point to the fact that Mr Hookey's affidavit states that Mr Manthey proposed that he was to hold a forty per cent through share options.[15] Mr Hookey however, states that that was part of an offer to enter into a business partnership with Mr Steven Manthey and makes further reference to Mr Steven Manthey stating that he would need a guarantee of $30,000 per month to raise capital until they could sell 2 percent of the company shares.[16] His evidence does not address how that was resolved between him and Mr Manthey. Mr Hookey does refer to being provided with the share option agreement and states that he directed his solicitors to amend it to set out representations made in relation to what is referred to as the Redmond Manthey litigation,[17] which is consistent with the share option agreement representing the agreement between them.

[27] Paragraph [12] of the SOC pleads that terms of the joint venture included:

(a) the first plaintiff would have a 40 percent interest in the joint venture;

(b) that the percentage interest of the party shares in the joint venture would be represented by shares in AEDC; and

(c) that the first plaintiff would contribute funds as required to the joint venture for the purposes of developing and commercialising the engine or alternatively whatever the funds the first plaintiff contributed to the joint venture would be treated by an acquisition by the first plaintiff of shares in AEDC.[18]

[28] The respondent contends that none those terms are unsupported by Mr Hookey's evidence or the conversations pleaded in paragraphs 3 to 5 of the SOC. That is correct, save that paragraph 4 of the SOC pleads a conversation said to have taken place with the third respondent which refers to Mr Steven Manthey telling Mr Hookey that he

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15 Affidavit of S Hookey, CFI 2 at [13].

16 Affidavit of S Hookey CFI 2 at [14].

17 Affidavit of S Hookey CFI2 at [88].

18 Statement of Claim, CFI 25 at [12].

wanted him to take a percent interest in the entity to be incorporated to develop an engine. That conversation was not the subject of Mr Hookey's affidavit.

[29] The respondents also point to transcript evidence of a public examination,[19] which was not put before Jackson J on 18 July 2018, as supporting the fact that there was no joint venture agreement by which Mr Hookey acquired shares in AEDC. That related to a public examination in the matter of Manthey Redmond (Aust) Pty Ltd (in liquidation). In giving evidence, Mr Hookey described the assistance he gave to Mr Steven Manthey as being on the basis of friendship and a financial loan.[20] He stated that he had helped Mr Steven Manthey out and they had a "handshake deal. It's that simple". In response to questions about the engine that he and Mr Steven Manthey had been talking about for the last 18 months, he had stated, "Steve and I are personal friends. I've helped him out financially. I'm not a director of the company. I'm not even a shareholder of the company. I have nothing to do with it" and stated that he has no interest.[21]

[30] On its face, that evidence is contrary to the pleading and is inconsistent with paragraph 40 of Mr Hookey's affidavit affirmed on 5 June 2018.[22]

[31] The respondents submit that the weight of evidence supports Mr Hookey having an option to purchase forty percent of the shares in AEDC in return for money he paid as reflected in the share option agreement which appears to have been entered into and acted upon. They state that reflects an investment arrangement rather than a joint venture. The fact that Mr Hookey was to have an option to buy shares is supported by the affidavit evidence of Mr Steven Manthey.

[32] The respondents also submit that the fact that Mr Hookey asserts that it was agreed that he could exercise his options to purchase shares to on-sell them to a third party for a personal profit and that he did so is inconsistent with the notion that the parties had entered into a joint venture. Mr Steven Manthey, however, disputes that he said that Mr Hookey could sell his share options in AEDC to other people.

[33] The respondents do not challenge that there was an agreement between the parties nor that Mr Hookey paid money, however, they submit that none of the evidence supports the allegation that it was a term of the agreement that Mr Hookey would contribute funds as required to the joint venture for the purpose of developing and commercialising the engine. The respondents submit that the evidence is limited to suggesting that the scope of any agreement was that in return for money invested by Mr Hookey, he acquired options to purchase shares at twenty cents per share, which he then sold at a profit. In relation to payments made by Mr Hookey said to be for work done by an entity called FEV, the respondents submit that was a loan, and consistent with that it

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[19] Affidavit of M Johnston, CFI 22 – Ex MJ-06.

[20] Affidavit of M Johnston, CFI 22 – Ex MJ-06, p 357.

[21] Affidavit of M Johnston, CFI 22 – Ex MJ-06, p 356

[22] Affidavit of S Hookey, CFI 2.

was referred to as a loan by Mr Hookey in documents prepared by AIC exhibited to his affidavit. Mr Hookey, however, denies that any payments he made were loans to AEDC.

[34] The respondents also submit that even if there was a joint venture agreement, there is nothing to support the notion that the relationship between the joint venturers is a fiduciary one.[23] Certainly the SOC does not plead any material facts to support a fiduciary relationship, save that one of the matters in the myriad of paragraphs relied upon is that there was a joint venture agreement. A joint venture agreement may or may not give rise to a fiduciary relationship. Although there does not need to be a formal agreement, it will depend on the content of the obligations which the parties to it have undertaken.[24]

[35] The applicants submit that the nature of the joint venture agreement is one which is an overarching agreement between Mr Hookey and the first, second and third respondents agreed in the series of conversations pleaded in the SOC and that Mr Hookey is the proper plaintiff. They contend that the share option agreement is simply a mechanism by which one part of that overarching joint venture agreement was put into effect.

[36] The applicants rely on *Brookes v Ralph & Ors*[25] decided by White J. In that case, her Honour found that while the parties used a corporate structure and a trust to advance their project, they were very like partners. Their enterprise was a commercial one with a view to profit which was to constitute their superannuation fund. The relationship between the participants was based on mutual confidence that they would develop the project for their joint advantage.[26] Her Honour found that each participant owed fiduciary duties to the other in relation to the venture. In particular, each participant owed a fiduciary duty to refrain from pursuing, obtaining or retaining any collateral advantage for themselves without the knowledge and informed assent of other participants.[27] The applicants also rely on the reference by the High Court in *United Dominions* to support the fact that if a joint venture is confined to an undertaking such as a partnership rather than a continuing relationship, fiduciary duties are owed in relation to the property the subject of the undertaking,[28] which in this case they contend is the engine.

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[23] *United Dominions Corporations Limited v Brian Pty Ltd* (1985) 157 CLR 1 at 11 to 12.

[24] *United Dominions Corporations Limited v Brian Pty Ltd* (1985) 157 CLR 1 at 11 to 12.

[25] [2009] QSC 416.

[26] [2009] QSC 416 at [90].

[27] At [90].

[28] At [12].

[37] A joint venture is typically understood to be an association of persons for the purpose of a particular commercial undertaking with a view to mutual profit, with each participant usually contributing monies, property or skill.[29]

[38] The case of *Brookes v Ralph & Ors* does support the fact that there can be overarching agreement between individuals who may contribute money, property or skill, which may be put into effect using a corporate vehicle, even in the absence of a written agreement.

[39] The applicants ironically placed considerable reliance on the evidence of Mr Steven Manthey in [14] to [17] of his affidavit as supporting the fact that there is an agreement between the parties in the nature of a joint venture. In particular, they point to paragraph 17 of Mr Steven Manthey's affidavit which refers to him stating his belief that "if Mr Hookey held up his end of the deal, that the engine would be commercialised to the benefit of both of us,"[30] as supporting the fact that there was an agreement in the nature of a joint venture based on mutual trust and confidence giving rise to fiduciary obligations.

[40] The applicants also rely on the fact that Mr Manthey does make reference to discussing the payments sought from Mr Hookey as being to keep the doors of the factory open to allow the development of the engine to continue as being consistent with the joint venture agreement as they allege. Mr Steven Manthey's evidence is that he told Mr Hookey that he would need about $35,000 per month to keep the doors open and carry out engineering works at the factory but denies that he said that he needed $300,000 upfront. He states that he offered him an option to buy up to 40 percent of the company's shares if he guaranteed the $35,000 payment. He agrees that he said that they were looking to sell 2 percent as quickly as possible and raise a further $2,000,000.[31]

[41] Mr Hookey's evidence bears some similarity to Mr Manthey's in this regard. He deposes that Mr Steven Manthey stated that he would need about $300,000 and a guarantee of $30,000 per month to raise capital until they sold around 2 percent of the company shares. The applicants also rely on the fact that payments were made by Mr Hookey to Mr Steven Manthey and the fifth respondent and AEDC. That provides some support to their characterisation of the arrangement between the parties although it is not a matter of any significant weight.

[42] As discussed above however Mr Steven Manthey deposes that he and Mr Hookey discussed the provision of an option to acquire 40 percent of shares consistent with the share option agreement which he signed and he said formalised the agreement.

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[29] *United Dominions Corporations Limited v Brian Pty Ltd* (1985) 157 CLR 1 at 10.

[30] Affidavit of M Manthey, CFI 21, [17].

[31] Affidavit of M Manthey, CFI 21 at [14], [16] and [18].

[43] The applicants seek to draw a distinction between the fact that Mr Hookey could purchase shares through the share option agreement to on-sell them for a profit for himself as being permissible under the terms of the share option agreement, as opposed to the remainder of an agreement between the parties to develop the engine through a corporate entity in the United States of America and then Australia with Mr Hookey contributing financially. The applicants also rely on the fact that the commercialisation of the engine was agreed to take place not only through AEDC but then in Australia with the assistance of the entity AIC. The continuing relationship beyond the American venture to Australia in respect of the commercialisation of the engine does suggest a broader agreement as contended for by the applicants.

[44] The Court is not required to engage in a fact finding exercise in relation to an application such as this however it must have regard to the evidence in order to evaluate the strength of the applicants' case and whether it has discharged its evidential burden.

[45] There are significant deficiencies in the case as pleaded by the applicants and the criticisms by the respondents are well founded in that regard. The evidence supporting a joint venture agreement as pleaded is tenuous. The evidence of Mr Steven Manthey and the reference to Mr Steven Manthey's belief that "if Mr Hookey held up his end, that the engine would be commercialised to the benefit of both of us," does suggest a joint undertaking but it is fairly equivocal. That statement could equally support the agreement advanced by the respondents with Mr Hookey benefitting if he chose to keep the shares he acquired.

[46] Mr Hookey's evidence and the share option agreement tends to favour an agreement in the nature of that advanced by the respondents, that Mr Hookey would, in relation to monies paid, receive options to acquire shares at the nominated price which he could on-sell for a personal profit as was agreed and provided for in a share option agreement. The fact that the agreement was such that Mr Hookey could acquire shares and sell them to third parties for a personal profit is difficult to reconcile with the contention that there is a joint venture agreement and that fiduciary duties were owed.

[47] The pleading that the fiduciary duties were owed is also presently vague without any proper supporting material facts, save for relying on that the fact that there is a joint venture agreement. The nature of the joint venture undertaking asserted by the applicants and the statement by Mr Manthey in paragraph 17 of his affidavit provides some evidence that may imply that there was a fiduciary relationship.

[48] On the present material, the case pleaded in the SOC, which is largely unparticularised, cannot be described as a strong one and there is significant evidence suggesting that the agreement was that, in return for monies invested, Mr Hookey would acquire options to purchase shares. However, the issue is whether the applicants have a good arguable case, even if there is a less than 50 percent chance of success. Based on the above analysis I consider that there is just enough evidence to support the pleaded case such that it is slightly stronger than barely capable of serious argument.

[49] There is some evidence supporting the contention that Mr Hookey and Mr Steven Manthey agreed to a joint undertaking to develop and commercialise the engine for the benefit of all participants with Mr Hookey contributing money to fund overheads which would entitle him to acquire shares in the corporate vehicle used to commercialise the engine using a corporate vehicle himself arising out of their oral conversations if accepted. For example, the evidence of Mr Hookey that Steven Manthey stated that he wanted to enter into a "business partnership". The fact that Mr Hookey and Mr Manthey continued to seek to commercialise the engine in Australia after the American venture failed with the assistance of AIC is the strongest evidence supporting the fact that there may have been a joint venture agreement, given it shows a continuing relationship between Mr Hookey and the first and second respondents directed to the commercialisation of the engine.[32] The Australian venture was not based on a share option agreement although again, corporate entities were intended to be used.[33]

[50] I consider however that in light of the pleading and the evidence, there is presently enough to support the joint venture agreement advanced by the applicants and that the nature of the joint undertaking could give rise to fiduciary duties, such that there is a *prima facie* case, albeit that it can only presently be regarded as a fairly weak case.

[51] The respondents accept that if fiduciary duties were found to be owed in the terms pleaded, the matters pleaded in [20(a)] to [20(c)] of the SOC were arguably inconsistent with those duties. The respondents however attack the pleaded case as to loss and contend that the applicants have not established a *prima facie* case, even if one assumes that the alleged joint venture agreement and fiduciary duties can be established.

[52] The applicants claim that as a result of the alleged breaches they have suffered a loss of commercial opportunity and $2,604,645, which is the amount of money Mr Hookey is alleged to have paid in respect of the joint venture agreement.

[53] First, the respondents attack the claim for the loss of opportunity to develop and commercialise the engine on the basis that no proper claim for the loss is pleaded.[34] No particulars are provided at all of the loss of opportunity case, and the applicants contend that it is liable to be struck out. While the applicants contend that the lack of disclosure at this stage prevents them from pleading the claim with any particularity, the fact is that there is a total absence of any particulars. There is a bare claim for loss on the basis of commercial opportunity and the contention that it is not adequately particularised and liable to be struck out has considerable merit.[35] Moreover, the unparticularised claim for damages raises the difficulty that the applicants have no basis for asserting the

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[32] Albeit reference was made in the AIC document to Mr Hookey being a funder but also to him having provided loans in respect of the payments to FEV.

[33] Affidavit of S Hookey, CFI 2, [108] to [136]; Affidavit of M Manthey, CFI 21, [38] to [45].

[34] SOC, CFI 25, at [21(b)].

[35] As to which see *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 211 at [50].

maximum amount for which they could obtain judgment and which should be frozen as required by the relevant practice direction.[36]

[54] As submitted by the respondents, the claim for the loss based on lost expenditure is therefore a claim for reliance damages. In order to make such a claim the agreement is required to be terminated. The pleading presently fails to plead that the agreement was terminated and that the expenditure was wasted, in order to claim such damages.

[55] In response, the applicants state that the conduct of the respondents could be characterised as a repudiation of the agreement, or alternatively the agreement could be regarded as having been abandoned. That however is not pleaded but given these proceedings, the lack of pleading that the joint venture agreement has been terminated is not of great significance and could be overcome, notwithstanding the inconsistent claim for relief seeking the appointment of a receiver.

[56] Further, the respondents contend that the applicants' case fails to delineate monies that went to pay contractual expenses which are said to be wasted as opposed to monies paid that resulted in the acquiring of shares in AEDC which were then sold at a profit.

[57] The applicants contend the whole amount of the payments were wasted and the shares acquired by Mr Hookey were worthless as a result of the lack of commercialisation of the engine which will not now occur because it has been taken out of the joint venture. The applicants contend that Mr Hookey was, even on Mr Steven Manthey's evidence, to pay $35,000 to keep the factory going to develop the engine and in return he would be entitled to acquire shares in the entity that commercialised the engine. The engine was to be the property of and developed by the joint venture and once taken by one of the respondents, the entire investment of $2.6 million was lost.

[58] The respondents submit that there is no evidence that the payments made were for expenses, with the evidence showing the payments are not monthly amounts of $35,000. They also claim that money injected by direct investors in the sum of $2.3 million exceeds the amount that would have been paid if $35,000 was paid per month. That does not necessarily negate the fact that some of the money paid by Mr Hookey was in respect of expenses of the joint venture but is casts doubt that that money was paid in order to keep the factory going particularly in the absence of any evidence.

[59] The respondents further submit that some of the money paid by Mr Hookey was used to acquire shares which he on-sold for a profit,[37] in which case even assuming the money paid was in respect of the $35,000, there is no basis to say that the whole of the investment was wasted. An email from Mr Hookey to Mr Steven Manthey demonstrates that he had sold approximately 14,500 shares in respect of which he said he owed Mr Steven Manthey some $2.9 million based on the price of 20 cents per share, and that he

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[36] Practice Direction No. 1 of 2007 at [6].

[37] T1-22/9-24.

had paid some $3.3 million.[38] The claim is now that he paid $2.6 million not $3.3 million.

[60] Counsel for the applicants accepted that there was evidence that Mr Hookey had on-sold shares and made money but submitted that that does not show he has not suffered a loss and directed the Court to the fact that Mr Hookey paid $700,000 to FEV and $500,000 to Mr Johnston, which they say was pursuant to the joint venture. Assuming that is the case, that shows that $1.2 million was paid which may be said to be wasted expenditure but the evidence does not support a good arguable or *prima facie* case that $2.6 million in its entirety was lost.

[61] An alternative characterisation of the loss as the value of the applicants' share of the engine does not advance the case any further given that there is no evidence that $2.6 million equates to the value of the applicants' share in the engine.

[62] The respondents also point to emails attaching spreadsheets showing payments to FEV and an email of Mr Hookey to various people of 19 October 2016 stating that they had a very positive result at FEV as demonstrating that the monies paid towards commercialisation were not wasted. If the joint venture agreement was that the parties agreed to develop and commercialise the engine and the engine has now been taken away from the joint venture before it was actually commercialised, the fact that some work was done towards successfully commercialising the engine does not mean that the payments made in that regard have not been wasted. A claim may be made for wasted expenditure where a party cannot assess what the outcome would have been if the contract had be performed,[39] which in the present case is because the engine was not commercialised.

[63] While the question of the loss suffered may be more readily ascertained in the future with the benefit of disclosure, the evidence does not permit me to conclude that there is a *prima facie* case that the loss suffered by Mr Hookey is $2.6 million, in the absence of evidence as to the delineation of those payments and how much resulted in the acquiring of shares which were on-sold for profits.

[64] As to the claim in paragraph 20(d) of the SOC that in breach of their fiduciary duty, the first and second respondents paid money from the bank account of AEDC to which they were not entitled or not for the purposes of the joint venture, that claim is unparticularised and presently unsubstantiated by any evidence. While Mr Hookey asserts that those misappropriations have been found by Capital Performance Pty Ltd and were evident on the face of the AEDC bank statements and financial reports, the two exhibits relied upon, SGH-33 and SGH-34 to the affidavit of Mr Hookey,[40] do not evidence those misappropriations. In any event, the basis upon which the applicants

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[38] Affidavit of S Manthey, SCM- 02, p 30.

[39] See discussion in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 85 to 89.

[40] CFI 2 at [138] to [139]

could claim such a loss which appears to be a loss of the company AEDC has not been articulated in the pleading or in submissions, save for the applicants submitting AEDC has been deregistered or suggesting the possibility of a derivative action. Neither matter is sufficient to support a *prima facie* case.

[65] While there is clear evidence of payments having been made by Mr Hookey, the pleading as to actual loss is clearly deficient given there is presently not the evidence to show that the money paid was for the performance of the contract as opposed to the acquisition of shares. Obviously, the applicants' case is at a very early stage, and without the benefit of disclosure, but it is apparent that there are considerable problems with the case as to damages that has been pleaded, and other than the fact of payments having been made, there is insufficient evidence to support the claimed loss of $2.6 million even on Mr Hookey's own evidence. Based on the present evidence at best there is evidence which supports a loss of $1.2 million.

(ii) Misleading and Deceptive Conduct

[66] The respondents also contend that there is no *prima facie* case for misleading and deceptive conduct in respect of the pleaded cause of action which relies on three different representations: the patent representation, the litigation representation and the development representation.

[67] In relation to the patent representation, it is alleged that the first and second respondents falsely represented to the first applicant that there was a patent for the engine. In support of that case the applicants rely on statements made by Mr Steven Manthey to Mr Hookey that no patent was held in respect of the engine.[41] Mr Manthey refutes making those statements.[42]

[68] The respondents point to evidence that there was a provisional patent held by AEDC in relation to the engine which listed Mr Steven Manthey and Mr Michael Manthey as the inventors and AEDC as the applicant, annexed to the affidavit of Mr Hookey.[43] The evidence indicates that it was lodged on 4 January 2016. Further on 5 January 2016, there is evidence that rights in the invention were formally assigned to AEDC in writing, for consideration, again by reference to the affidavit of Mr Hookey.[44] The respondents contend therefore that there is no evidence to support the falsity of the representation. The documents annexed to Mr Hookey's affidavit on their face indicate a provisional patent had been applied for and that there was a purported assignment of the application for the patent by Steven and Michael Manthey to AEDC.[45] Mr Steven Manthey in his affidavit deposes to him and his son having assigned a provisional

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41 Affidavit of S Hookey, CFI 2 at [97].

42 Affidavit of S Manthey CFI 21 at [67]

43 Affidavit of S Hookey, CFI 4, SGH-12, p 173.

44 Affidavit of S Hookey, CFI 2, SGH-7, p 20.

45 Affidavit of S Hookey, CFI 2, SGH-7; [37].

patent application to AEDC that related to the engine parts that he had shown Mr Hookey.[46] Mr Hookey's affidavit also deposes to a WIPO search revealing that there were patents registered for the engine technology for AEDC and also for other companies.[47] However Mr Steven Manthey states that no final patent for the engine had been applied for pending completion of research.[48]

[69] There are real questions as to whether the representation can be proven to be false given the patent application and the assignment purporting to be to AEDC. The applicants' case presently would appear to turn on the status of the application for the patent and the assignment. The applicants' reliance on Mr Steven Manthey's statements which he denies, even if admissible, is scant evidence in support of the falsity of the representation which will depend on whether as matter of fact there was or was not a patent.

[70] The applicants contend that a representation was made to Mr Hookey that there was no prior litigation involving the first or second defendants in relation to the engine. Mr Manthey refutes what Mr Hookey states he said to him.

[71] In relation to the litigation representation, the respondents concede that if the alleged representation was found to have been made, there is evidence of litigation in the Supreme Court in which Geoffrey Redmond was claiming rights to the engine technology, which is the basis pleaded to assert the representation was not true. There is presently sufficient evidence based on the conversations to which Mr Hookey deposes and his solicitors' exchanges with Mr Johnston, that the representations were made. The respondents submit however that there is no evidence to suggest that the subject of that proceeding is the same version of the engine to establish its falsity. The applicants however rely on statements made by Mr Steven Manthey to Mr Hookey deposed to by Mr Hookey[49] and particularly statements by Mr Steven Manthey that he needed to remove his name from the engine technology, that it was not protected by a patent, that the engine looks similar to the Redmond engine and that he admitted to Mr Hookey at a later time that he had lied to Mr Hookey about the fact that there was no litigation.[50] Assuming that that evidence is admissible, it does not establish as a matter of fact that the litigation related to the same engine discussed with Mr Hookey. At best, the evidence may be capable of establishing an inference that that is the case.

[72] The respondents also contend that the evidence shows that the development representation, that the first and second respondents had developed a revolutionary combustion engine which was capable of development and commercialisation in the

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46 Affidavit of S Manthey, CFI 21, [21].

47 Affidavit of S Hookey, CFI 4 at SGH-12.

48 Affidavit of S Manthey CFI 21 at [67]

49 Affidavit of S Hookey, CFI 2, [97].

50 Affidavit of S Hookey, CFI 2, [105].

United States of America, was not false and is otherwise unsupported by evidence. They contend that, if anything, the evidence shows that the engine was being commercialised in the United States of America. In that regard, they rely on evidence both of Mr Hookey and Mr Manthey. Certainly Mr Hookey himself gives evidence of trips to the Unites States of America to assist in the commercialisation and marketability of the engine and to continue to progress the engine technology. He deposes to having commissioned consultants to provide a report on the new engine design which cost him $700,000, after it was agreed that the engine should be redesigned to differentiate it from the Redmond engine and agreed that they should set up a new company for the new engine design. Mr Steven Manthey, however, refused to adopt the recommendations of that report.[51] The applicants contend that if there is no patent and the engine was the subject of litigation with Redmond Manthey,[52] that is sufficient to support the allegation that the representation was false. That provides a basis for pleading the allegation but little more. That said the evidence of commercialisation referred to by the respondents does not establish that the engine could be developed and commercialised if in fact it was not protected by a patent and was the subject of litigation.

[73] The respondents also assert that the case of reliance on the litigation representation is very weak. That is by reason of the fact that Mr Hookey in his affidavit states that he discovered the existence of the Redmond litigation in February 2016, following which he alleges that Mr Steven Manthey made further representations that he was about to win the litigation as a result of which he directed his solicitors to restate the representation in the share option agreement.[53] That is supported by the exchange of documents between Mr Radcliff's firm and Mr Johnston and the fact that a clause in the share option agreement did appear to be relevantly amended.[54] Further, in his second affidavit, Mr Hookey deposed to having learned that Mr Redmond was claiming rights to the engine technology in about March 2016.

[74] The respondents assert that most of the money allegedly contributed by the first applicant, Mr Hookey was paid after March 2016, as is evident from the payments pleaded in the SOC.[55] The applicants had no ready answer for this submission other than to argue that it could not be a matter that could be determined until evidence was given at trial as to the basis upon which such payments were made. While that may be true, evidence of the payments made after February or March 2016 significantly weaken any case as to reliance and any loss said to be suffered.

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[51] Affidavit of S Hookey CFI 2, [108] to [113].

[52] SOC, CFI 25 at [25].

[53] Affidavit of S Hookey, CFI 2, [82] to [88].

[54] Affidavit of C Radcliff CFI 7 CR-1 p 7; Affidavit of S Hookey, CFI 2, SGH-17.

[55] At [16].

[75] The respondents also contend that there is no *prima facie* case of misleading and deceptive conduct because it fails to plead a causal connection between the representations and the loss, pleading only that Mr Hookey made or caused the second applicant to make payments pleaded to have been made pursuant to a joint venture agreement and that the loss suffered was the amount of the payments made. I accept that this of itself does not establish that Mr Hookey suffered loss. The fact that the engine was not commercialised does not prove that loss occurred because of the misrepresentations. The respondents contend that if the loss claimed is on the basis of a no transaction case, the loss claimed is not substantiated by the evidence which shows that payments made by Mr Hookey resulted in him acquiring shares which were on-sold at a profit. That profit would have to be taken into account, given that would not have been made had Mr Hookey not entered into the transaction.[56] That clearly appears to be the case. The applicants state that while there was some profit made from the share options, the question is how much money that was paid, needs to be assigned to the shares and what is to be assigned to something else and point to the money paid to FEV and to Mr Johnston in the sum of $700,000 and $500,000 respectively. The respondents point out that while some losses on the applicant's case may not relate to shares in respect of the payment of $700,000 and $500,000, Mr Hookey's own ledger of sales of shares would suggest a profit was made on the sale of shares in the sum of approximately $5.3 million[57] and he would still make a profit even if the sum of $1.2 million was set off against it. I consider the respondents are correct and that the applicants have failed to establish a *prima facie* case in respect of the loss claimed to have been suffered in the sum of some $2.6 million arising out of the misrepresentations.

(iii) Misappropriation

[76] The applicant pleads that on 22 March 2016 the first or third respondent caused the sum of $1 million to be paid from the bank account of AEDC to the fifth respondent which was for the transfer of the title in the engine from the fifth respondent to AEDC. The applicant pleads that AEDC never received the title of the engine or alternatively state that it was worthless. In that regard, the applicants rely on the matters relied upon to establish the falsity of the representations in the misleading and deceptive conduct case.[58] It is said that the payment made from the AEDC account constituted a breach of duty by the first or third respondent. The SOC alleges other unauthorised payments in the sum of $186,450.

[77] The respondents attack the claim for breach of fiduciary duty (accepting it was owed) first because it pleads a payment having been made from AEDC on 22 March 2016,

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[56] A plaintiff in a no transaction case must show how much worse off he or she is as a result of having entered into the transaction: *Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2001] ATPR 41-845 at [14] to [15].

[57] Affidavit of S Hookey, CFI 3, SGH-5, p 79.

[58] SOC, CFI 25 at [37] to [40].

which was when AEDC did not have a bank account.[59] Secondly, they point to documents which show that the money was paid from a trust account in the name of Mr Hookey held by his solicitors.[60] This is consistent with the evidence that Mr Hookey signed a resolution authorising the payment. Thirdly, they submit that there is no evidence that AEDC did not obtain the title to the prototype nor that it was of no value.

[78] The respondents assert that while there is some evidence from the solicitor acting on behalf of Mr Hookey that the payments were made in the sum of $186,450 as pleaded, that evidence is deficient as Mr Radcliff only deposes on information and belief to Mr Hookey's belief that payments were unauthorised.

[79] Having regard to the present state of the evidence, I consider that the case is barely arguable.

Credibility of the applicants' evidence

[80] The respondents also submit that the applicants' evidence lacks overall credibility of the affidavit material, in particular as a result of inconsistencies in the evidence of Mr Hookey. First the respondents point to the fact that he states in his affidavit that he has never made loans to AEDC or the Marretti companies, but such a loan is evidenced in an unsigned memorandum of understanding which Mr Hookey described in his affidavit as containing the parties' intentions.[61] The applicants' counsel, however, submits that this is of little significance given it is evidence of a lay person and depends how the payment is classified and submits that there were separate loan payments to the joint venture. I do not regard the inconsistency as of significance.

[81] The respondents also point to the inconsistency between Mr Hookey's affidavit evidence where on one hand he states that he was supposed to be a director of AEDC,[62] and on the other gave evidence in a public examination that he was not a director of AEDC.[63] While the former reference appears to have been critical of the respondents and the latter appears to suggest that he was distancing himself from responsibility, the fact appears to be that he was supposed to be a director but was not. Again I attach little weight to the inconsistency.

[82] Further, while Mr Hookey deposes to having ceased selling shares once he learned that the Redmond litigation involved the Redmond engine, in late 2016,[64] he made further

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[59] CFI 21.

[60] *Cf* Affidavit of S Hookey CFI 2 at [139] and SGH-34 which is not bank statements or financial reports showing the matters stated.

[61] Affidavit of S Hookey, CFI 2 at [145]-[146], *cf* 116; SGH-23, p 163.

[62] Affidavit of S Hookey, CFI 2 at [40].

[63] Affidavit of M Johnston, CFI 22, MJ-06, p 356, 33-44.

[64] Although there is evidence he was aware earlier than that date.

payments in the sum of $1.45 million after that date.[65] While the applicants submit it is of little relevance, I consider that given it is apparent on the documents attached to Mr Hookey's own affidavit that it was not true, it does raise an issue as to the credibility of his evidence. It is not a matter however which I can resolve in this forum.

[83] The matter of greater significance is Mr Hookey's denial in the public examination that he had any interest in AEDC, which is contrary to what is now pleaded, and his statements that he was helping out Mr Steven Manthey because they were friends. That evidence is inconsistent with the case now pleaded and does raise serious issues as to the credibility of the case pleaded. However, without explanation, in light of the discussion above, the inconsistency is not sufficient for me to conclude that the applicants have failed to establish a *prima facie* case that there is a joint venture agreement. It does however raise questions as to the disclosure made by the applicants on the *ex parte* application which I discuss below.

[84] I accept that there are inconsistencies in terms of the evidence that was put before his Honour on 18 July 2018 which were not apparently pointed out to his Honour. Those inconsistencies in some respects bring into question the strength of the case sought to be made by the applicants against the respondents.

Is there a prima facie case sufficient to support a freezing order?

[85] As is evident from the above analysis, there are a number of defects in the pleaded case and weaknesses in the supporting evidence in relation to each cause of action. The question is whether the first applicant has shown that he has a case which is more than barely capable of serious argument and yet not necessarily one which a judge believes to have more than a 50 percent chance of success.

[86] On the basis of the present state of the evidence I consider that there is a *prima facie* case that there was a joint venture agreement to develop and commercialise the engine of Mr Steven Manthey and his son, and that there was a breach of the agreement based on the analysis set out above. While the first applicant, Mr Hookey, may be able to recover reliance damages based on wasted expenditure, given it is accepted that at least some of that money was used to acquire shares which were on-sold for a profit[66] and the lack of evidence supporting that the payments were in respect of performance of the agreement, I consider that the evidence does not establish is not a *prima facie* case that the loss is some $2.6 million. There is however some evidence as to payments said to have been made to Michael Johnston and an entity FEV which could constitute such a loss.

[87] The applicants have not, in my view, established a *prima facie* case or good arguable case that the first and second respondents have engaged in misleading and deceptive conduct. While there is a *prima facie* case that the litigation representations were made,

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[65] Affidavit of S Hookey, CFI 2 at [93]; CFI 3, p 88.

[66] Which affects the presumption in respect of reliance damages.

the case as to reliance is very weak. The evidence supporting the falsity of the patent representation and litigation representation is very weak. The case as to the development representation relies on the falsity of the other two representations and the evidence presently supports a contrary position insofar as there is evidence that it was capable of being developed. In relation to all of the alleged representations the applicants' have failed to properly plead or provide evidence supporting loss said to have been caused by the alleged conduct. That is not to say that they will not be able to do so in the future, but I have to address the evidence before me presently.

[88] As to the misappropriation case based on a breach of fiduciary duty I consider that it is barely capable of serious argument. No material facts have been pleaded in support of it and the evidence supports a contrary position.

Risk of dissipation

[89] It is submitted on behalf of Mr Hookey that the only assets of Mr Steven Manthey are expensive motor vehicles, which he intends to sell to further develop the engine to the exclusion of Mr Hookey.

[90] Mr Steven Manthey is alleged to have discussed that with Mr Nikolovski[67] and Mr Arratoon,[68] in April 2018. Both Mr Nikolovski and Mr Arratoon invested in shares in the AEDC. According to the evidence of Mr Nikolovski,[69] Mr Steven Manthey indicated that he did not wish to have anything to do with Mr Hookey and, "no matter what Hookey does, he is dead to me" and "I will find a way to complete the engine myself, even if I have to sell some cars or other assets, I'll do it on my own." He further stated, "I intend to raise further capital, including selling vehicles and assets that I own to fund the engine technology moving forward." While Mr Arratoon's recollection is slightly different to Mr Nikolovski's, it generally corroborates his version of the conversation which occurred.

[91] Mr Steven Manthey's evidence in response does not directly deal with each passage in the alleged conversation. His evidence is that:[70]

> "… I did not say that I would sell cars and assets in order to achieve this, rather, Mr Arratoon and Mr Nikolovski suggested to me that I do this. Had that been something that I wanted to do, AEDC would not have been in the position of running out of funds I would have done so already. However, I was of the view, and still am, that I have spent more than I am capable of personally spending on developing the engine technology, and unless further investments can be located, I cannot go ahead."

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67 CFI 5.

68 CFI 6.

69 CFI 5 at [42].

70 CFI 21 at [54b].

[92] Mr Steven Manthey further states that while the engine is on the cusp of commercialisation he has no present plans for that to occur.[71] He further states that he has no intention of dissipating his assets now that the proceedings are on foot, nor has he taken any steps to do so. Mr Steven Manthey does not dispute that he owns expensive vehicles. He states however that other than the sale of a Lamborghini that Mr Hookey orchestrated Mr Manthey do in order to further fund the company and for which he wasn't fully paid,[72] the only other assets that he has sold in the last two years are a Mustang boat in February 2018 and a H2 Hummer in mid-2017.

[93] Mr Manthey states that he has not taken steps to quarantine his assets to prevent recovery in the proceedings, and that his wife is, and has been since 2005, the owner of their home where they reside.[73]

[94] The evidence of the process server Mr Burch is as to what he observed when he went to serve the respondents with the documents and Court order of 18 July 2018. According to him Mr Steven Manthey had a conversation with Michael Featherstone in his presence, where he stated that, *inter alia*, he and his son were working on commercialising the engine "right now" and referred to the entity FEV. He states that he also heard Mr Manthey state that the engine was secure and that it would be difficult for anyone including the applicants to locate it and told Michael Featherstone not to disclose what he had said to the applicants. Mr Burch deposes to having observed a number of vehicles such as a Ferrari Testarossa.

[95] At best what Mr Burch states he overheard is some evidence that the respondents are working on commercialising the engine somewhere to the exclusion of the applicants.

[96] Mr Manthey does not deny that he had a conversation with Michael Featherstone but states that Mr Burch's recollection is not accurate. Mr Manthey states that he had a conversation with Michael Featherstone on an unrelated matter which he asked Mr Featherstone not to discuss. He states that he had told Mr Featherstone when asked that they had been trying to commercialise the engine but not that they were working on the engine now. He states that he had said to Mr Featherstone that they had FEV testing the engine in the past and Mr Featherstone responded about FEV.[74] He stated that Michael Featherstone asked if he could see the engine, and Mr Manthey told him that there was no engine to show him.

[97] While I do not have the benefit of cross-examination, the version of events as stated by Mr Manthey of the conversation with the process server is more credible. He knew Mr Featherstone and even on Mr Burch's version of events, had stated that he had been intending on calling him consistent with the fact he said he had a private conversation

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71 CFI 21 at [54c].

72 CFI 21 at [63].

73 CFI 21 at [68] to [71].

74 CFI 21 at [55] to [57].

with Mr Featherstone and asked him not to repeat it. It is unlikely that he would have had a conversation with Mr Featherstone about his intentions in respect of the engine in front of Mr Burch, a person it is not suggested that he knew and who was serving Court documents upon him, which he did not wish the applicants to be told.

[98] Solid evidence is required to justify the conclusion that the first respondent may take steps to frustrate any potential judgment which may be obtained against him. That is usually a matter of inference rather than direct proof.[75]

[99] The applicants submit that the first respondent has sworn an affidavit which merely highlights the factual dispute and which, they submit, does not dispute the conversations referred to in the affidavits of Messrs Nikolovski and Arratoon.

[100] While the responsive evidence of Mr Steven Manthey is not in direct form as one would expect at trial, in my view, the applicants' submission overstates the position. Mr Steven Manthey does dispute the conversations that occurred, although the context which he provides does not sit easily with the fact that AEDC was deregistered in December 2017.

[101] The applicants also emphasise that no evidence is given by Mr Steven Manthey as to where the engine is located or as to his assets. While the latter would be relevant to any prejudice that may arise as a result of the order, there is nothing obliging him to give such evidence. While the respondents' counsel submits that the location of the engine is not a material issue arising from the pleading, paragraph 20(b) of the SOC asserts that the first and second respondents removed the engine to a location which they refused to disclose to the first applicant. The respondents however submit that that the location is not material to the allegation and further that the SOC was received after the affidavit evidence had been provided. Mr Steven Manthey does not give evidence that he is not intending to deal with the engine but states that "whilst the engine is on the cusp of commercialisation, I have no present plans for that to occur". An inference may be reasonably drawn from Mr Steven Manthey's evidence that he has possession or control of the engine which is the subject of the proceedings. That did not appear to be a matter of controversy.

[102] While the applicants submit I should have regard to the fact that the evidence was sufficient justification for Jackson J to grant the freezing order on 18 July 2018. That submission is of little assistance cannot be given great weight. His Honour made such an order in urgent circumstances on an *ex parte* basis without the benefit of either the evidence that has been provided by the respondents, or of the pleadings. In the proceedings before his Honour, a different case was alleged based on dishonesty. It was contended that Mr Steven Manthey and SC Manthey Pty Ltd were liable for deceit or fraud on the basis that Mr Steven Manthey had fraudulently represented to Mr Hookey an intention to develop an engine as the property of a United States Company, AEDC, and that Mr Hookey had suffered loss because he had made investments as a result of

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[75] *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 107 at [39].

that in a company which it was contended Mr Steven Manthey has deregistered.[76] I have to make a determination based on the evidence and SOC now before me.

[103] The statements made to Mr Nikolvoski and Mr Arratoon, even accepting their version, refer to Mr Steven Manthey using his own assets to commercialise the engine, not to frustrate the Court's processes or any judgment,[77] although it may have that effect[78] if the commercialisation is unsuccessful. Conversely, if the commercialisation was successful, the applicants can if successful, seek an account of profits from the respondents, which is included in their prayer for relief.

[104] There is no evidence to support that there has been any quarantining of assets given the uncontested evidence that Mr Steven Manthey's wife has owned their home since 2005, according to Mr Steven Manthey. The extent of Mr Steven Manthey's assets is unknown, although there is evidence that he has exotic cars, which is not disputed. I accept that they would appear to be assets which may be reasonably easily disposed of, although I have no evidence as to the market for such cars or the liquidity of that market. Mr Steven Manthey deposes to having disposed of one asset in February 2018 which is since the parties have been in dispute but before any proceedings issued, namely a Mustang boat for $70,000. A Hummer vehicle was sold in mid-2017.

[105] In *Parbery*, Bond J in discussing risk relevantly stated that:

> "[28] The particular type of risk to the integrity of the Court's processes with which freezing orders are concerned is the risk posed to the prospective Court processes of execution and enforcement in respect of any judgment in the plaintiff's favour.
>
> [29] Accordingly, what is generally at issue is whether there is a danger that steps might be taken with the result that the Court's execution and enforcement process would be frustrated, in the sense that any judgment of the court will be wholly or partly unsatisfied. In *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319, Gleeson CJ (with whom Meagher JA and Rogers A-JA broadly agreed) said as follows (at 321–322, emphasis added):
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> > '[A] plaintiff will need to establish … a danger that, by reason of the defendant's absconding, or of assets being removed from the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied.'

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[76] CFI 19 at [2].

[77] *Cf Ausbro Forex Pty Ltd v Mare* (1986) 4 NSWLR 419.

[78] The applicants only need to establish that the effect of the respondents' conduct occurring or apprehended which would prevent the recovery of the amount of any judgment not that that was the purpose of such conduct.

> [30] The latter observation (namely "or otherwise dealt with in some fashion") is significant. The exercise of the jurisdiction is not limited to the simplistic case in which evidence suggests there is a risk of a defendant absconding or taking assets offshore."

[106] In cases where the question of whether there is a real risk of steps being taken which would have the effect of frustrating the prospective Court processes of execution and enforcement in respect of any judgment in the applicants' favour is a matter of inference, there must be facts from which a prudent, sensible commercial person could properly infer the existence of the relevant risk of frustration. [79]

[107] I do not consider that a prudent, sensible commercial person could infer the existence of the relevant risk of frustration of prospective Court processes of execution and enforcement on the basis that he has stated an intention of using his assets to commercialise the engine himself. At the time of his discussions with Mr Hookey he was not willing to do so and when the prospect of commercialising the engine in Australia was investigated it was on the basis of AIC providing funds and obtaining other investments to develop and commercialise the engine. There is no evidence that he has disposed of any assets to commercialise the engine to date. He has deposed to having sold a Mustang boat and a hummer a considerable time apart in circumstances where there is nothing to suggest that the sales were out of the ordinary. Accepting that he made statements to Mr Nikolovski and Mr Arratoon about utilising his assets to commercialise the engine that could equally enhance the value of the engine. There is no evidence that he has quarantined his assets.

[108] A prudent, sensible commercial person could properly infer the existence of the relevant risk of frustration in respect of the engine (treating it as Mr Steven Manthey's asset) if his statements made to Mr Burch are true. However I can place little weight on his evidence for the reasons stated above. While the onus is on the applicants and not on the respondents the absence of any evidence particularly from Mr Manthey as to the present status of the engine and the fact that it is uncontroversial that he has been looking to commercialise the engine and attract investors to do so for some time and that he has stated he wishes to do so in the future to the exclusion of the applicant could lead a prudent sensible commercial person to properly infer that there is a risk that he may seek to involve a third party in the development of the engine and seek to transfer it to a corporate entity as had been done with AEDC, thus having the effect of removing the engine and potential profits from the reach of the applicants.

The interests of justice

[109] I must consider whether it is in the interests of justice that the power to make a freezing order be exercised. The parties have raised a number of matters relevant to that consideration.

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[79] *Parbery* at [39]

[110] The respondents contend that the applicants have failed to act with expedition, and that no undertaking as to expedition has been offered. The conversations said to give rise to a risk of dissipation occurred in April 2018. The order was made on 18 July 2018. The delay in commencing the application for the freezing order is not of great significance given that his Honour considered that he should make such an order. Given the nature and the extent of the freezing order, one would have expected that a statement of claim should have been produced prior to 9 August 2018, although no orders were made to that effect. The delay in producing a statement of claim is significant in the present case where the case articulated is quite different from that previously relied upon to obtain the order. No other prejudice has been deposed to by Mr Steven Manthey or any of the respondents as a result of the delay or the making of the order. However, it is evident that the respondents have been forced to ascertain the basis of the case made against them and respond to it prior to the SOC being provided which was largely a wasted effort given the reformulation of the claim. While the affidavit evidence provided by the applicants largely did not change, it is difficult to discern what evidence is relied upon on the face of those affidavits given the nature of the case that was originally sought to be articulated.

[111] There is no evidence that any undertaking to ensure due expedition was sought. The applicants' counsel stated that they consented to the matter being placed on the commercial list to ensure that the matter is expedited. I do not consider that this is a matter which weighs against the continuation of the freezing order.

[112] Neither Mr Steven Manthey nor any of the other respondents have deposed to any potentially damaging effect which the order might have on the respondents' reputation or business. I accept that any freezing order will impose some level of burden on the respondents but, in the absence of any evidence, it is difficult to make any proper judgment of that burden.

[113] The applicants contend that while the continuation of the order might prevent the first respondent from selling his assets to further develop the engine, he is not otherwise precluded from raising money from other investors. While that may strictly be the case, given the terms of paragraph 7 of the freezing order it is unlikely that the respondents could seek investors given the evidence that further work needs to be done to commercialise the engine. They also contend that Mr Hookey has sworn an affidavit that his net assets are $28 million and that under the terms of the order he will have to pay any loss occasioned by the granting and continuation of the freezing orders.

[114] The respondents also claim that the affidavit of Mr Hookey[80] deposing as to his assets, which are said to be worth some $28 million, is perfunctory on the basis that it does not mention an apparent tax liability he may have, arising out of a decision of the AAT, or the existence of a caveat over a number of his properties. He was not, however, cross-examined on his affidavit. The significance of the tax decision and whether it will give

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[80] CFI 17.

rise to a tax liability which must be met is not evident on the face of the decision.[81] As to the caveat, the extent of the estate or interest in land is not described in the caveat.[82] Whether those matters are liabilities within "Existing mortgages" or "Other Debt" in the table in Mr Hookey's affidavit is unknown.

[115] While I consider that the affidavit provided by Mr Hookey is scant in detail substantiating the financial position stated, I am not able to conclude that he has misstated his financial position or his asset position such that he would not be in a position to meet any judgment or loss occasioned by the continuation of freezing orders.

[116] The respondents also raised five instances where the applicants did not raise matters with the Court at the *ex parte* hearing, or obvious inconsistencies in the material relied upon or facts which were within the knowledge of the applicant. I have addressed some of those inconsistencies above.

[117] Mr Hookey gave evidence in the public examination that he was not a director of the company, not a shareholder of the company and has nothing to do with it, and in respect of any repayment that there was only a handshake deal that "he [Mr Manthey] will help me out if and when the engine gets commercialised". There is no dispute that that evidence was not brought to Jackson J's attention, notwithstanding Mr Hookey's affidavit evidence that he thought he was a director and had an interest in the company to sell shares to a third party.[83] The applicants' Counsel submits that the instructing solicitors had not been aware of the evidence in the public examination and that Mr Steven Manthey's evidence as to the discussions with Mr Hookey when seeking to have him invest has overtaken that evidence such that it is not material.

[118] The obligations upon parties in the context of *ex parte* applications are onerous. Dalton J in *Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd*[84] set out the relevant principles in terms of the duty of disclosure and the consequence that a court should attach to any failure to comply with the duty to make full and frank disclosure. While that obligation to make full and fair disclosure is of all material facts, those include facts which ought to have been known and extends to any additional facts that could have been discovered on making proper enquiries. Applegarth J in *Palaris Mining Pty Ltd v Short & Anor*[85] also addressed in detail the principle governing duty of disclosure on an *ex parte* application and the fact that the party inducing the Court to act in the absence of the other party fails in his obligation unless he supplies the place of the

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[81] Affidavit of S Marsh, SPM-13.

[82] Affidavit of S Marsh, SPM-12.

[83] CFI 2 at [40].

[84] [2012] QSC 143.

[85] [2012] QSC 224.

absent party to the extent of bringing forward all of the material facts which that party would presumably have brought forward in his defence to the application.[86]

[119] The fact that Mr Hookey's lawyers were not aware of the evidence given by Mr Steven Manthey at the public examination does not matter as Mr Hookey knew of the evidence that he had given in the public examination. It was inconsistent with his affidavit and should have been disclosed. No satisfactory explanation has been provided as to why it was not disclosed at the time this matter was brought before his Honour. While I do not consider that the orders should be discharged on the basis of that alone, it is a factor which weighs against the continuation of the order, particularly given I regarded it as weakening the case relied upon by the applicants.

Conclusion

[120] The applicants submit that this is a complex matter and that many of the matters raised by the respondents are matters for trial. They submit however that they meet the evidential threshold required to justify the continuation of a freezing order. The respondents contend that the applicants' case does not satisfy the threshold requirements for the continuation of the freezing order nor does it make the disclosure required to obtain the *ex parte* orders. They contend that the orders should be discharged. Alternatively, they contend that in any balancing exercise the applicants' case is weak, the pleaded agreement is so inconsistent with the affidavit evidence as to not be credible and the pleaded case is so different from that which was the subject of the affidavit evidence relied upon before his Honour on 18 July 2018 that it does not now address the matters in issue.

[121] As I have discussed above, on the present statement of claim and the present state of the evidence, the applicants' case is not a strong case. I have found that only the case that there was a breach of a joint venture agreement is sufficiently supported on the evidence to reach the threshold of a *prima facie* case required for applications such as this one. I am not, however, satisfied that the loss which is said to result from the breach of contract reaches the threshold of being a *prima facie* case. I accept, however, there is some evidence to support a potential loss of $1.2 million. I accept that the litigation is at a very early stage. However the onus is on the applicants to provide evidence that can persuade the Court that a freezing order should in this case be continued. A freezing order is an order which places considerable burdens and restrictions upon a respondent and is not to be granted or maintained unless the Court is satisfied that the evidence supporting the three considerations is sufficient to justify such an order. In weighing up whether to continue such an order, I must exercise due caution and have regard to the onerous nature of such an order.

[122] The analysis of the risk of frustration to the Court's processes in terms of the execution and enforcement of any judgment that may be granted in the applicants' favour has been set out above. I am not satisfied on that evidence that there is a risk that the

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[86] [2012] QSC 224 at [19] by reference to Isaacs J and *Thomas A Edison Limited v Bullock* (1912) 15 CLR 679.

respondents, particularly the first respondent, will dispose of his assets or seek to remove them from the jurisdiction or otherwise deal with them in a manner that will have the effect that he would not be able to satisfy any potential judgment save in respect of the engine, which is the subject of the alleged joint venture undertaking. In considering the appropriate order to make, if any, I am conscious of the fact that the applicants may seek an account of profits if the engine is commercialised successfully and they are successful in proving their case. However, that does not protect the applicants against what I have found to be a real risk that the first respondent may seek to place the engine under the control of a third party such that it would not be an available asset to meet any judgment. Further, an account of profits may be unavailable if the engine is placed in the hands of a third party. Any freezing order must be moulded to the exigencies of a case. I must weigh what I regard as being the real risk of the dissipation of the engine against the weakness of the case that I have found to be the *prima facie* case and which takes account of the fact that the applicants failed to fully disclose their position to Jackson J at the time the *ex parte* order was granted. In particular, notwithstanding the time that has passed since the making of the original order, the case articulated is a weak one. I do not consider that a freezing order should be continued in terms of paragraph 6 of the *ex parte* order, particularly given the lack of evidence as to any loss suffered by the applicants and the weakness of the case as it is presently presented and that I have not found there is a real risk that the respondents would dissipate their assets, save in respect of the engine. I do consider that paragraph 7 of his Honour's orders should be continued subject to the undertakings that the applicant provided in relation to those orders being given. I do not consider that paragraphs 8 and 9 should be maintained, and paragraph 10 and 11 of the order should be continued.

[123] I am prepared to entertain submissions from the parties as to whether an order would be appropriate in the nature of a notification order as discussed by Bond J in *Parbery*,[87] which may permit the engine to continue to be commercialised but on appropriate conditions to protect any judgment that the applicant may obtain. I am also prepared to entertain a submission that the first and second respondents should provide an affidavit stating where the engine is located. The parties may provide submissions in relation to these matters and in respect of the form of the order, together with any submissions as to costs within 14 days of today's date.

Orders

[124] I order that upon the applicants providing undertakings in the form of paragraphs (1) to (6) of the order of 18 July 2018 that an order be made until trial or earlier order in the form of paragraph 7, 10 and 11 of his Honour's orders. I further order that there be liberty to apply. The parties are to provide an order in the appropriate form.

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[87] At [55].