SUPREME COURT OF QUEENSLAND

CITATION:	*McCullough Robertson Lawyers (a firm) v Menegazzo* [2015] QSC 109
PARTIES:	**MCCULLOUGH ROBERTSON LAWYERS (A FIRM)** ABN 42 721 345 951 (applicant/seventh defendant) **PRICEWATERHOUSECOOPERS (A FIRM)** ABN 52 780 433 757 (first defendant/not a party to the application) **BRENDAN PETER MENEGAZZO** (second defendant/not a party to the application) **DEBRA LOUISE MENEGAZZO** (third defendant/not a party to the application) **DAVID ANGELO MENEGAZZO** (fourth defendant/not a party to the application) **JUTLAND PTY LTD** ACN 010 813 322 (fifth defendant/not a party to the application) **THYNNE & MACARTNEY (A FIRM)** ABN 79 763 953 991 (sixth defendant/not a party to the application) **v** **MARK JOHN MENEGAZZO** (plaintiff/respondent)
FILE NO/S:	SC No 10502 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	21 April 2015
JUDGE:	Philip McMurdo J
ORDER:	**It is ordered that:** **1. Pursuant to r 135 of the UCPR, the seventh defendant have leave to bring this application.** **2. Pursuant to r 171 of the UCPR, the amended statement of claim filed 30 March 2015 be struck out as against the seventh defendant.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – GENERALLY – where the seventh defendant sought leave to apply to strike out the plaintiff's statement of claim under r 135 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the defendant/applicant applied to strike out the plaintiff's pleading pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) on the basis that it disclosed no reasonable cause of action against it or had a tendency to prejudice or delay the fair trial of the proceeding – where the plaintiff alleged that valuation errors made by the first and fifth defendants resulted in the plaintiff selling its share of a network of companies at an undervalue – where the plaintiff alleged, *inter alia*, that the seventh defendant breached duties it allegedly owed to the plaintiff by failing to advise the plaintiff of the risk to the plaintiff associated with the first and fifth defendants being engaged to provide services for both sides of a transaction – where that risk did not eventuate – where the plaintiff's actual case was not that which was pleaded – where the plaintiff's intended case was that there was a risk of a different kind to that contained in its pleadings, namely, that an error was likely to go undetected where a single accountant and valuer was retained to act for all parties to the transaction – where the pleadings did not plead and prove the relevant risk central to the elements of an action in negligence – where the pleadings failed to inform the seventh defendant of the content of essential elements of the plaintiff's case and were struck out

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – application to strike out the plaintiff's statement of claim pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) on the basis that it disclosed no reasonable cause of action against it or had a tendency to prejudice or delay the fair trial of the proceeding – where the plaintiff's actual case was not that which was pleaded – where the plaintiff's intended case was that there was a risk of a different kind to that identified in its pleadings – where the pleadings failed to inform the seventh defendant of the content of essential elements of the plaintiff's case and were struck out

Uniform Civil Procedure Rules 1999 (Qld), r 135, r 171(1)(a), r 171(1)(b)

John Pfeiffer Pty Ltd v Canny (1981) 148 CLR 218, considered

Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd ("*The Wagon Mound*") *(No 1)* [1961] AC 388, cited
Sutherland Shire Council v Heyman (1985) 157 CLR 424, considered
Tame v New South Wales (2002) 211 CLR 317, considered

COUNSEL: R Jackson for the applicant/seventh defendant
P Dunning QC, with M Alexander for the respondent/plaintiff

SOLICITORS: Bartley Cohen for the applicant/seventh defendant
Emanate Legal for the respondent/plaintiff

[1] The seventh defendant, McCullough Robertson, applies to strike out the statement of claim against it. It argues that the pleading discloses no reasonable cause of action against it or has a tendency to prejudice or delay the fair trial of the proceeding: *Uniform Civil Procedure Rules* 1999 (Qld) r 171(1)(a), (b). To make this application, it requires the court's leave under r 135 of the UCPR because it has not filed a notice of intention to defend. It is agreed that such leave should be granted.

The plaintiff's case in outline

[2] Upon the sudden death of their parents in 2005, the plaintiff and his three siblings became the owners in equal shares of an extensive network of companies, entities and properties which are together described in the pleading as the Stanbroke Group. According to the pleading, disagreements arose between at least some of the siblings in relation to the management of the group and, in one respect, as to the beneficial ownership of two cattle stations. During 2006 and 2007, there were discussions between the four to resolve their differences and ultimately, a non-binding agreement was made at a mediation on 7 November 2007 whereby it was proposed that the plaintiff would sell his share to the others. This "in-principle agreement" reached at the mediation is described in the pleading as the "Exit Transaction" and the documents which were then signed are described as the "Exit Transaction Documents".

[3] By the time of the mediation, the fifth defendant, which I will call Jutland, had prepared what the pleading describes as the Family Pastoral Assets Valuation. Jutland there valued some eight properties of the Stanbroke Group in sums which totalled $329,595,000.

[4] Upon the basis of those valuations, the first defendant, which I will call PWC, prepared what the pleading describes as the "PWC Calculation" which was dated 7 November 2007 (the day of the mediation). According to the PWC Calculation, the value of the net assets of the Stanbroke Group and the then assets of the estate of the late Mr Menegazzo was $313,101,880. Upon that calculation, the plaintiff's one quarter interest was worth $78,275,470.

[5] On or about 31 December 2007, the in-principle agreement became a binding agreement. The effect of the binding agreement was that the plaintiff received the value of his one quarter interest, according to the PWC Calculation. In consequence, the plaintiff received, after tax, an amount of $64,753,474.

[6] But according to his pleading, the plaintiff should have received a further $40,028,042. He claims that amount against all defendants (save for Jutland against which he claims $17,202,500). The second, third and fourth defendants are his siblings against whom he claims that amount and other relief. As I have noted, PWC and Jutland are defendants. The sixth defendant is another firm of solicitors against which he claims that amount of $40,028,042.

[7] In essence, his case against his siblings is that they deceived him by not revealing that they had made what the pleading describes as a "Side Agreement", as to what should be the position between them (or some of them) and the Stanbroke Group in relation to their loan accounts. He says that had they not deceived him in this way, he would not have entered into the Exit Transaction and would not have sold his share for the agreed price. Against them he claims not only the amount of $40,028,042 but "the extent to which the true value of his interest in the Stanbroke Group at 7 December 2007 would have increased to the date of judgment if he had remained with that interest".[1]

[8] That alleged loss of $40,028,042 has effectively four components. Two are said to result from errors in the PWC Calculation and another from an error or errors in Jutland's valuation.

[9] In para 85, it is pleaded that the PWC Calculation:

> "(a) [included] a double counting of deferred tax liability included in the stock and property revaluations in the amount of … $13,432,080; and
>
> (b) overstated liabilities in the amount of … $7,780,987."

In paras 86 to 88, he alleges that the assets, which Jutland valued at $329,595,000, had a true value of $398,405,000. This "error in value" involved an understatement of $68,810,000, a consequence which the pleading describes as "the Valuation Error". The plaintiff claims his 25 per cent of that understatement, resulting in this third component of $17,202,500. This is the amount which the plaintiff claims from Jutland. But it is but one of four components of the claim pleaded against McCullough Robertson.

[10] The fourth component is a claim that a certain amount of duty became payable under the *Duties Act* "as a result of the Exit Transaction", being an amount of $1,612,475. Paragraph 90 pleads that the plaintiff became liable for 25 per cent of that amount. But the entirety of it is included as the fourth component of his claim for $40,028,042. During his oral submissions, the plaintiff's counsel not only conceded that error in the quantification of this component, but also that the component should not have been pleaded at all. In that way, the plaintiff's case is now limited to the first three components. Two of those are the result of alleged errors by PWC and the other is the result of the "Valuation Error" of Jutland. How then is McCullough Robertson said to be liable for these losses?

The pleaded case against McCullough Robertson

[11] The plaintiff alleges that "on or about 7 November 2007" he retained McCullough Robertson to act for him "in relation to the Exit Transaction and the Exit Transaction Documents". He retained the firm to:

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[1] Statement of Claim, para 54(b).

"(a) review all relevant Exit Transaction Documents …;

(b) advise him as to the meaning, advantages and disadvantages associated with each of the Exit Transaction Documents;

(c) advise him in relation to trust cloning issues, including Family Trust Election provisions and ATO announcements;

(d) advise him in relation to the Exit Transaction, specifically as to the advantages, disadvantages and risks associated with the transaction as they applied to him;

(e) advise him in relation to the importance of independent valuation advice being obtained by him in relation to the Family Pastoral Assets Valuation relevant to the Exit Transaction and the Exit Transaction Documents;

(f) advise him in relation to the importance of independent accounting advice being obtained by him in relation to the Exit Transaction and the Exit Transaction Documents;

(g) advise him generally in relation to the Exit Transaction such that his interests were properly protected;

(h) advise him in relation to the Exit Transaction Documents, specifically as to the advantages, disadvantages and risks associated with the transactions as they applied to him; and

(i) take all other steps which a reasonably competent solicitor … would take to ensure that the above mentioned advice was complete and accurate."

As will appear, the subject matter of only a few of those subparagraphs could be relevant to the plaintiff's case.

[12] Paragraph 68 pleads that by reason of that retainer, McCullough Robertson owed to the plaintiff duties (referred to as "MR's General Duties") as follows:

"(a) a duty to exercise due care, skill and diligence in and about the performance of the Retainer;

(b) a duty to ensure that advice provided to [the plaintiff] was:

(i) complete; and

(ii) accurate;

(c) a duty otherwise to take all steps which a reasonably competent firm of solicitors would take in respect of:

(i) carrying out [the plaintiff's] instructions;

(ii) performance of the Retainer;

(iii) ensuring that compliance was had with all applicable legislation, court procedures and practice; and

(iv) ensuring that [the plaintiff's] interests were protected to the fullest extent possible according to law."

[13] The alleged breaches of these duties is pleaded in para 84, which must be set out in full:

"84. In breach of MR's Duties, MR:

(a) failed to advise [the plaintiff] about the risks of PWC acting for all of the Menegazzo Siblings to the Exit Transactions and Exit Transaction Documents;

(b) failed to generally advise [the plaintiff] in respect of the Exit Transaction Documents;

(c) failed to advise [the plaintiff] of the importance of obtaining independent valuation and accounting advice; and

(d) failed to otherwise take all reasonable steps to ensure that [the plaintiff's] interests were protected so as to ensure that [the plaintiff] received his true entitlement."

[14] Paragraph 84(a) complains that the plaintiff was not advised of "the risks of PWC acting for all of the Menegazzo Siblings". But what were those alleged risks? They are not identified in para 84. Are they discernible elsewhere in the pleading, particularly in what is pleaded against PWC?

[15] Paragraph 55 alleges that PWC was retained by the plaintiff "to act for him in relation to the Proposed Exit Transaction, the Exit Transaction … and the Exit Transaction Documents" and in particular to "[p]repare the PWC Calculation" and to provide other services, including the provision of "legal, accounting and taxation advice in relation to the Exit Transactions".

[16] By para 59, the plaintiff alleges that PWC owed to him contractual and common law duties to exercise due care, skill and diligence and to provide complete and accurate advice. By para 60, he alleges that PWC was also subject to certain fiduciary duties owed to the plaintiff, including a duty to further the plaintiff's interests "to the exclusion of the interests of any other person" (including his siblings).

[17] In para 74, the plaintiff alleges that PWC breached those duties, including its fiduciary duties, in that it:

"(a) failed to advise [the plaintiff] as to the risks to him with PWC acting for all of the Menegazzo Siblings;

(b) placed [the plaintiff's] interests in conflict with those of [the plaintiff's siblings];

(c) failed to take all reasonable steps to obtain the correct Family Asset valuations;

(d) failed to advise [the plaintiff] about the methodologies that ought to have been adopted to value the Family Assets;

(e) failed to advise [the plaintiff] to obtain independent accounting, valuation, taxation and legal advice;

(f) erred in its calculations of the deferred taxation liabilities, as pleaded below;

(g) erred in overstating the liabilities as pleaded below;

(h) failed to take all reasonable steps to protect the interests of [the plaintiff] in respect of the Exit Transactions and Exit Transaction Documents so as to ensure that Mark received his true entitlement;

(i) failed to otherwise take all reasonable steps to ensure that [the plaintiff] received his true entitlement."

Then in para 75, he alleges that in breach of s 52 of *Trade Practices Act* 1974 (Cth), PWC "negligently misrepresented the value of the Family Assets".

[18] Returning to para 84(a), the alleged risks of PWC acting for all of the "Menegazzo Siblings" are not revealed by the pleaded case against PWC to which I have referred. Paragraph 74(a) pleads a case against PWC which corresponds with para 84(a). But again, it does not identify the alleged "risks" and, more particularly, the facts and circumstances from which there was a potential for damage to the plaintiff from PWC "acting for" all parties.

[19] There is no allegation that in breach of its fiduciary duties or otherwise, PWC did prefer the interests of the plaintiff's siblings to his interests. Nor is it alleged that the work done by PWC was, from the plaintiff's perspective, detrimentally affected by the circumstance that PWC was retained by both sides of the transaction. In particular, it is not alleged that either of the two errors made by PWC in the PWC Calculation was affected by that circumstance.

[20] Therefore, it is impossible to discern from other parts of the pleading what is meant by "the risks of PWC acting for all of the Menegazzo Siblings". And it is impossible to detect a case to the effect that one or more of those risks eventuated.

[21] It is convenient next to go to para 84(c), where it is alleged that McCullough Robertson failed to advise the plaintiff "of the importance of obtaining independent valuation and accounting advice". As the plaintiff did obtain valuation and accounting advice, the complaint appears to be that McCullough Robertson did not tell the plaintiff to obtain "independent" advice. In so far as accounting advice is concerned, this appears to be a similar allegation to that made in para 84(a). I will assume, although it is not clear, that "independent" is intended to mean advice directed only to the interests of the plaintiff and not all parties in the transaction. A failure to advise the plaintiff that it was important to obtain such independent accounting advice would seem to be essentially the same as a failure to advise of the risks of PWC acting for all parties.

[22] As to "independent valuation … advice", this is an apparent reference to the valuations provided by Jutland. It indicates an intended case to the effect that Jutland was not in some sense "independent". Yet that case is not pleaded against Jutland. And there is no allegation that Jutland was a fiduciary.

[23] Paragraph 56 pleads that the plaintiff retained Jutland "to act for him in relation to the Exit Transactions, and in particular to value the Family Pastoral Assets for the purposes of [the plaintiff's] Entitlements in relation to the Exit Transactions and Exit Transaction

Documents". Paragraph 63 pleads that Jutland owed contractual and common law duties to exercise due care, skill and diligence. Paragraph 82 pleads that in breach of those duties, "Jutland failed to calculate the true value, or in the alternative, a value on a 'walk-in-walk-out basis' of the Family Pastoral Assets Valuation as pleaded below". Therefore, there is no allegation that Jutland's valuation was other than "independent valuation … advice". Consequently, the pleading does not reveal how Jutland's alleged errors in undervaluing the assets resulted from some lack of independence. In that last respect, a further problem comes from the absence of any pleaded case as to what constituted the negligence of Jutland: all that is pleaded is that their valuations (or perhaps some of them) were not according to the true values.

[24] Paragraph 84(b) reveals nothing about the plaintiff's case. It does not reveal what advice should have been given by McCullough Robertson or even the subject matter of that advice. It is hardly sufficient to say that advice should have been given "in respect of the Exit Transaction Documents" without saying what it was about them which should have been the subject of advice and what that advice should have been.

[25] Similarly, paragraph 84(d) contains another allegation which is so general as to reveal nothing about the content of the plaintiff's case. In particular, it does not reveal what are the "steps" which McCullough Robertson should have taken.

[26] There are yet further difficulties with the pleading against McCullough Robertson. The plaintiff does not plead that it should have been aware of whatever were the risks of PWC acting for all of the siblings or of the importance of obtaining independent valuation and accounting advice. If such allegations are implied within para 84, still the plaintiff has not pleaded the facts and circumstances from which it is alleged that McCullough Robertson knew or should have known of those matters.

[27] There is also the defect that there is no allegation that had McCullough Robertson provided the advice referred to in para 84, the plaintiff would have taken a certain and different course. Paragraph 51 does allege that:

> "… [B]y reason of the matters pleaded herein in relation to PWC, [Thynne & Macartney], [McCullough Robertson] and Jutland, [the plaintiff's] interest in the Will and the Stanbroke Group was bought out at a substantial undervalue as a result of him entering into the Exit Transaction and the Exit Transaction Documents."

But that does not indicate the alternative course which the plaintiff would have taken had he been told that PWC and Jutland should not have been providing their services for the benefit of all parties.

The plaintiff's intended case

[28] In the course of the submissions for the plaintiff, it emerged that the case which the plaintiff has in mind is actually as follows. PWC should not have been the only accountant engaged to perform its task of the PWC Calculation. A different accountant should have been retained by each side of the transaction. Had that occurred, it is inherently probable that the errors made by PWC would not have been also made by the other accountant. In that way, the PWC errors would have been revealed and the plaintiff would not have contracted at a price which resulted from PWC's errors. Similarly, had a

different valuer been retained by each side of the transaction, Jutland's errors (whatever they were) would have been revealed by the work of the other valuer and again, the purchase price would not have been diminished by an error or errors. It is not that PWC and Jutland would have been more diligent, careful or accurate in their work, if they had been retained to serve the interests of the plaintiff. Rather, their errors would not have been causative of any loss, because those errors would have been revealed by the other accountant and valuer.

[29] The present pleading at least recognises, by the terms of para 84(a), the necessity to plead and prove a particular risk in a case of negligence. It is the same particular risk of damage to the plaintiff which is central to the elements of duty of care, breach of duty and damage. In *John Pfeiffer Pty Ltd v Canny*,[2] Brennan J said:

> "[A] duty of care is a thing written on the wind unless damage is caused by the breach of that duty; there is no actionable negligence unless duty, breach and consequential damage coincide (*Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* ("*The Wagon Mound*") [No 1].[3] For the purposes of determining liability in a given case, each element can be defined only in terms of the others."

That was explained by Brennan J by reference to the facts in that case as follows:[4]

> "The duty of care imposed by the general law is a duty to act reasonably to avoid the risk of causing foreseeable damage to another; and so, a person in control of a gun ought not to entrust it to an incompetent or untrustworthy person who is not unlikely to use the gun incompetently or in an untrustworthy manner and thereby cause injury or loss. If injury or loss is caused by his use of the gun incompetently or in an untrustworthy manner, the person who allowed him to use the gun is responsible because the risk against which the latter was bound to guard has materialized. But if the incompetence or untrustworthiness of the person who is allowed to use the gun plays no part in causing injury or loss, the risk against which the person who had control of the gun is bound to guard against does not materialize, and any injury or loss occasioned by its use is not causally related to a failure on the part of that person to take due care in allowing the other person to use it."

[30] The pleaded case is that there was a risk to the plaintiff from PWC and Jutland being engaged to provide their services for both sides of the transaction (although the pleading does not reveal the content of that risk). That risk did not eventuate, but according to the plaintiff's intended case, there was a risk of a different kind which did eventuate, namely that an error by the only accountant or valuer would be undetected and result in the plaintiff agreeing to accept too low a price. Whether such a case could be pleaded in a way which would survive an application under r 171(1)(a) is not the question to be answered here. It is sufficient to say that the intended case is not pleaded and that this fortifies my opinion that the present statement of claim against this defendant should be struck out.

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2 (1981) 148 CLR 218, 241-242, cited in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 487 (Brennan J) and *Tame v New South Wales* (2002) 211 CLR 317, 349 [90] (McHugh J).

3 [1961] AC 388, 425.

4 *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218, 241.

Orders

[31] The statement of claim should be struck out under r 171(1)(b). There could not be a fair trial of the proceeding against McCullough Robertson upon this pleading because it fails to inform that defendant of the content of essential elements of the plaintiff's case.

[32] It should be ordered that:

1. Pursuant to r 135 of the UCPR, the seventh defendant have leave to bring this application.

2. Pursuant to r 171 of the UCPR, the amended statement of claim filed 30 March 2015 be struck out as against the seventh defendant.