# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Nichols Constructions Pty Ltd v Mt Marlow Pty Ltd & Anor* [2016] QSC 1 |
| PARTIES: | **NICHOLS CONSTRUCTIONS PTY LTD**<br>**ACN 010 763 505**<br>(plaintiff/respondent)<br><br>v<br><br>**MT MARLOW PTY LTD**<br>**ACN 134 480 354**<br>(first defendant/first applicant)<br><br>AND<br><br>**LUTZ BERGER**<br>(second defendant/second applicant) |
| FILE NO/S: | BS5714/14 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| DELIVERED ON: | 15 January 2016 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 2 September 2015 |
| JUDGE: | Jackson J |
| ORDER: | **The order of the court is that:**<br><br>**1. Against the first defendant paragraph 15(b) of the amended statement of claim is struck out.**<br><br>**2. Against both defendants paragraph 26 of the amended statement of claim is struck out.**<br><br>**3. Paragraphs 2, 3, 8 and 9 of the claim for relief in the amended statement of claim are struck out.**<br><br>**4. The plaintiff has leave to file a further amended statement of claim.** |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the respondent entered into a loan agreement with a company – where the second defendant was the sole director and shareholder of the company – where the loan agreement was secured by a mortgage debenture given by the company to the respondent – where the second defendant also gave an irrevocable |

authority as to the disposition of proceeds of sale of properties being sold by the first defendant – where the company did not repay the loan – where the respondent commenced proceedings alleging breaches of contract by the defendants – where the statement of claim alleges misleading or deceptive conduct in making the irrevocable authority – where damages claimed are measured in the amount as if the proceeds of sale were received – where the applicants apply for summary judgment or alternatively a strikeout of relevant paragraphs in the amended statement of claim – whether summary judgment should be granted – whether the amended statement of claim should be struck out

*Uniform Civil Procedure Rules* 1999 (Qld), rr 171, 293

*Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41, followed
*Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353;
*Barnes v Forty Two International Pty Ltd* (2014) 316 ALR 408; [2014] FCAFC 152, cited
*Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; [2006] HCA 27, cited
*Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] 2 Qd R 202; [2009] QCA 135, followed
*Bond Corporation Pty Ltd & Ors v Thiess Contractors Pty Ltd* (1987) 14 FCR 215; (1987) 71 ALR 615, cited
*Haggarty v Wood (No 2)* [2015] QSC 244, referred to
*Jackson v Sterling Industries Ltd* (1987) 162 CLR 612; [1987] HCA 23, cited
*Jamieson v Westpac Banking Corporation* (2014) 98 ACSR 63; [2014] QSC 32, cited
*Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, cited
*Nichols Construction Pty Ltd v Mt Marlow & Ors* [2015] QSC 165, related
*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 1; [1998] HCA 30, cited
*PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36, cited
*Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259; [2002] QCA 224, cited
*RB Lease Pty Ltd v Heron* [2013] QCA 181, cited
*Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210, referred to
*Spencer v Commonwealth* (2010) 241 CLR 118; [2010] HCA 28, cited
*TRFCK Pty Ltd and Ors v O'Brien Holdings (Townsville) Pty Ltd & Ors* [2012] QSC 356, cited
*Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd* [2015] 1 Qd R 214; [2013] QSC 219, cited

| | |
|---|---|
| COUNSEL: | J Faulkner the first applicant/first defendant<br>P Hackett for the second applicant/second defendant<br>D Thomae for the respondent/plaintiff |
| SOLICITORS: | Evans Lawyers for the first applicant/first defendant<br>Roberts Law for the second defendant/second applicant<br>Parker Simmonds for the respondent/plaintiff |

[1] **Jackson J:** The first defendant applies for summary judgment against the plaintiff pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). In the alternative, the first defendant applies for an order striking out the amended statement of claim ("ASOC") under UCPR r 171. By leave granted on 2 September 2015, the second defendant applies for the same relief as the first defendant.

[2] For the reasons that follow, the defendants' applications for summary judgment should be dismissed but the alternative applications to strike-out the amended statement of claim should succeed in part.

**Background**

[3] The plaintiff is a construction company. In or about October 2012, the second defendant approached the plaintiff seeking funding for a construction project at Laidley. The second defendant was the sole director of the first defendant and the sole director and shareholder of Lake Laurel Pty Ltd ("Lake Laurel").

[4] The first defendant was a development company. In 2012, the first defendant was the owner of lots in a completed development but sales of the lots were not then completed. During 2012, the shares in the first defendant were held equally by Berger Brothers Pty Ltd ("Berger Brothers") and Riverstone Property Pty Ltd ("Riverstone"). Berger Brothers was a wholly owned subsidiary of Lake Laurel. Until October 2013, the sole director and shareholder of Riverstone Property Pty Ltd was Mr Russell Percival ("Russell").

[5] On 7 November 2012, the plaintiff and Lake Laurel entered into a loan agreement for the plaintiff to lend up to $1,400,000 to Lake Laurel. The second defendant guaranteed due repayment of the loan. The loan was secured by a mortgage debenture given by Lake Laurel to the plaintiff. As well, the second defendant gave an undertaking and irrevocable authority as to the disposition of proceeds of sale of some of the lots being sold by the first defendant, as described further below.

[6] Lake Laurel did not repay the loan when it became due.[1]

[7] On 20 June 2014, the plaintiff started this proceeding.

[8] On 22 June 2015, the statement of claim was struck out and the plaintiff was given leave to replead.[2]

---

1 I was informed during the hearing that there is a separate proceeding, BS3368/14, in this court in which the plaintiff counterclaims as defendant for the unpaid balance of the advance or advances made under the loan agreement from Lake Laurel Pty Ltd and the second defendant as defendants to the counterclaim.

2 *Nichols Construction Pty Ltd v Mt Marlow & Ors* [2015] QSC 165.

[9] On 10 July 2015, the plaintiff filed the ASOC.

**Amended statement of claim**

[10] By the ASOC, the plaintiff claims damages under s 236 or orders under s 243 of the *Australian Consumer Law* ("ACL"). The plaintiff no longer asserts a contractual basis for its claims. It alleges that the defendants engaged in misleading or deceptive conduct in contravention of s 18 of the ACL. Despite the re-pleading, a number of issues about the ASOC remain.[3]

[11] Relevant paragraphs of the ASOC are:

> "**The Loan Agreement**
>
> 2. On 10 October 2012 (sic), the solicitors for Lake Laurel and the Second Defendant sent an email to the solicitors for the Plaintiff stating inter alia that:
>
> (a) the parties had discussed security options for additional funding for Lake Laurel;
>
> (b) the solicitors for the First Defendant held releases of both the first and second mortgages for the Lots;
>
> (c) the second mortgage over the Lots is in place only to secure the 50% profit split as the other shareholder is not a director;
>
> Particulars
>
> Email from Roberts Law to Parker Simmonds dated 19 October 2012
>
> 3. On 24 October 2012, pursuant to the negotiations the solicitors for the First Defendant sent an email to the solicitors for the Plaintiff and the Second Defendant stating inter alia that:
>
> (a) the balance of lots to be sold by the First defendant are the Lots;
>
> (b) the agreement between the Second Defendant and Russell was that:
>
> (i) the amount of $152,600.00 from the net proceeds of sale from the sale of the next lot of the Lots was to be paid to Russell and any residual amount was to split between Russell and the Second Defendant;
>
> (ii) upon the sale of the remainder of the Lots the net proceeds were to be split between Russell and the Second Defendant;

---

[3] Among them, pars 23 and 24 of the ASOC allege that the second defendant was knowingly concerned in his own contraventions of s 18 of the ACL (as well as the contraventions of the first defendant). However, the second defendant did not challenge this obvious error, presumably because in bringing the application it sought to narrow its attack to questions of importance, consistently with the duty of a party under UCPR, r 5.

(c) the Second Defendant's balance of proceeds from the sale of the remaining Lots would be paid to the Plaintiff if the Advance proceeds;
(d) there was (sic) no monies owed by the First Defendant in respect of land tax and rates;

Particulars

Email from Evans Lawyers to Parker Simmonds Solicitors dated 24 October 2012

…

6. On 5 November 2012 the first Defendant's and Lake Laurel's solicitors sent an email to the Plaintiff's solicitors stating that:

(a) The Laidley project requires a capital injection in the amount of $1,400,000.00;
(b) The Second Defendant's partner in the Mt Marlow subdivision will not consent to the grant of any security over the subdivision or the First Defendant in favour of the Plaintiff;

Particulars

Email from RobertsLaw to Parker Simmonds dated 5 November 2012

…

12. The First Defendant was named as a party to the 2012 Loan Agreement and the Mortgage Debenture but was deleted by an agreement on or about 7 November 2012 between Les Nichols, director of the Plaintiff and the First and Second Defendants for the consideration of the Second Defendant entering into an irrevocable authority (**the Undertaking**) that states:

"I Louie Berger in both my individual capacity and in my capacity as sole director or (sic) Mt Marlow Pty Ltd hereby solemnly undertake to pay Nichols Constructions Pty Ltd the net proceeds of sale, to which I am entitled from my 50% interest therein from the sale by Mt Marlow Pty Ltd of the balance of its unsold lots.

I irrevocably authorise and direct my Solicitors Robertslaw Pty Ltd to pay such net proceeds to Nichols Constructions Pty Ltd or to the trust account of Parker Simmonds on the completion of each sale."

Particulars

Undertaking and direction from the First and Second Defendants to the Plaintiff dated 7 November 2012.

…

15. By reason of the First and Second Defendants conduct in paragraphs 2, 3, 6 and 12 herein the First and Second Defendants represented to the plaintiff that:

    (a) the Lots had no outstanding financial encumbrances and the Second Defendant was entitled to 50% of the net proceeds from the sale of the Lots without deduction and the Second Defendant's entitlement would be paid to the Plaintiff for the Plaintiff making the Advance (**the entitlement representation**);
    (b) the First Defendant would be bound by the Undertaking and would cause the First Defendant to pay the Plaintiff 50% of the net proceeds from the sale of the Lots (**the authority representation**);
    (c) the Second Defendant would not divest his interest in the First Defendant without the consent of the Plaintiff (**divestment representation**);

    …

18. The entitlement representation was, or was likely to be "misleading and deceptive" within the meaning of the (sic) section 18 of the ACL in that the First and Second Defendant (sic):

    (a) omitted to tell the Plaintiff that the sale of the lots was subject to an obligation to pay third parties, Lake Laurel and/or the Second Defendant for services;
    (b) have refused to acknowledge that the Undertaking is binding on them to cause the net proceeds of sale of the Lots without deduction to be paid to the Plaintiff.

    …

25. In reliance of (sic) the entitlement representation, the authority representation and the divestment representation the Plaintiff entered in to the 2012 Loan Agreement and the Mortgage Debenture without the First Defendant as a party.

26. By reason of the Contraventions the Plaintiff has suffered loss and damage in the amount presently calculated at $218,873.97.

Particulars

    (a) On or about 12 July 2013 the First Defendant sold Lot 15 Remington Close … with $66,517.55 of the net proceeds of sale being paid to Lake Laurel.

> (b) On or about 10 March 2014 the First Defendant sold Lot 13 Winchester Court … with $152,356.42 of the net proceeds of sale being paid to the Second Defendant."

**Summary judgment application**

[12] The principles applicable to whether a court should grant summary judgment under UCPR r 293 are well settled. The relevant inquiry is whether there is no real prospect of success and no need for a trial of the claim.[4] As observed by the plurality in *Agar v Hyde*:[5]

> "It is, of course, well accepted that a court whose jurisdiction is regularly invoked … should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[6]

[13] I have discussed elsewhere the overlapping aspect of the powers under r 293 and r 171 of the UCPR.[7]

[14] In my view, this case is not an appropriate case for summary judgment in favour of the defendants on the claim. The reasons will appear from the discussion that follows upon the application to strike out the ASOC.

**Strike-out application**

[15] Under r 171 of the UCPR, the court may strike out all or part of a pleading if the pleading discloses no reasonable cause of action. For the reasons that follow, some paragraphs of the ASOC referred to below should be struck out, but not the whole of the pleading.

**Entitlement representation – pars 15(a) and 18(a)**

[16] Paragraph 15(a) of the ASOC alleges in effect that the first defendant represented to the plaintiff that the second defendant was entitled to 50 per cent of the net proceeds from the sale of its lots without deduction and that the entitlement would be paid to the plaintiff in return for making the advance under the 2012 Loan.

---

4 *RB Lease Pty Ltd v Heron* [2013] QCA 181, [21] and [22]; *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] 2 Qd R 202, 206, 209, 217; *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259, 264; cf *Spencer v Commonwealth* (2010) 241 CLR 118, 139-141.

5 (2000) 201 CLR 552.

6 *Agar v Hyde* (2000) 201 CLR 552, 575-576 [57]. See also *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 275 [46].

7 *Haggarty v Wood (No 2)* [2015] QSC 244 [62]-[82]; see also *TRFCK Pty Ltd and Ors v O'Brien Holdings (Townsville) Pty Ltd & Ors* [2012] QSC 356 [19]-[30].

[17] The first defendant submitted that the email from Evans Lawyers to Parker Simmonds Solicitors dated 24 October 2012 referred to in par 3 of the ASOC does nothing more than pass on the first defendants solicitor's understanding as advised by the second defendant regarding his share of the sale proceeds.

[18] The plaintiff submitted that the email represents what Russell, as director of Riverstone, and the second defendant had agreed about the proceeds of sale, presumably as representatives of all the shareholders of the first defendant with the second defendant as sole director of the first defendant to give effect to the agreement.

[19] In my view, the first defendant's submission should be rejected because it is reasonably arguable that the plaintiff's characterisation is correct. Evans Lawyers were communicating their client's instructions. Paragraphs 3, 4, and 6 of the ASOC allege that they were solicitors for the first defendant. The sending email is alleged to be conduct by the first defendant, presumably because Evans Lawyers were acting as solicitors (and as agent) for the first defendant and were acting with the agreement of Russell.

[20] The first defendant further submitted that there is no causal connection between the representation alleged in par 15(a) and the undertaking alleged in par 12 of the ASOC, because the plaintiff had sought another undertaking from Riverstone first. It is convenient to set out some of the relevant correspondence.

[21] On 24 October 2012, at 8:18am, the plaintiff's solicitors sent an email to the first defendant's solicitors:

> "Hello, Please have Riverstone confirm that they irrevocably agree to the information below".

[22] In a reply email at 1:49pm, the first defendant's solicitors wrote:

> "Your statement was:-
>
> ***Please have Riverstone confirm that they irrevocably agree to the information below.***
>
> Are you now seeking execution of an "Irrevocable Authority"?
>
> Alternatively, I can have Russell confirm that he irrevocably agrees to the below by return email. Will this be acceptable?"

[23] At 2:16pm the plaintiff's solicitors sent a reply email to the first defendant's solicitors:

> "Maybe the solution is that Riverstone give you signed releases to be handed over on the agreed figure of 50% after basic costs. Proper details can be in a deed if this idea is agreeable".

[24] As events transpired, Riverstone gave no authority and entered into no deed. Instead the undertaking set out in par 12 of the ASOC was given. Nevertheless, in my view, the first defendant's submission that any causal connection between the loss or damage alleged to have been suffered by the plaintiff and the representation

alleged in par 15(a) was broken, so that the plaintiff has no real prospect of success on that claim, should be rejected. That neither Riverstone nor Mr Percival agreed to give personal binding obligations to the plaintiff is not a necessary break in the causal chain requiring that the plaintiff must fail in its allegation that it suffered loss or damage by the first defendant's alleged representation in par 15(a) of the ASOC.

[25] Next, the first defendant submitted that par 18(a) of the ASOC is pleaded by way of omission, inconsistently with par 15(a) of the ASOC which pleads a positive representation.

[26] It is true that r 154 of the UCPR provides that a party may make inconsistent allegations or claims in a pleading only if they are pleaded as alternatives. But, in my view, the first defendant has misunderstood the effect of par 18(a) of the ASOC.

[27] Paragraph 18 commences with the words "the entitlement representation was or was likely to be 'misleading and deceptive'…in that…". Nothing in these words suggests any inconsistent alternative cause of action. Paragraph 18(a) alleges a respect in which the representation alleged in par 15(a) was allegedly misleading or deceptive.

[28] Because of the reliance on s 4 of the ACL alleged in par 16(b) of the ASOC, one might have expected that par 18 would allege that the representation alleged in par 15(a) was "misleading"[8] (not and deceptive) because the first and second defendants did not have reasonable grounds for making the representation. Somewhat clumsily, par 21 of the ASOC expressly alleges absence of a reasonable basis in relation to each of the representations alleged in pars 15(a), 15(b) and 15(c), but does not do so in the alternative.

[29] Thus it appears that the plaintiff alleges that the conduct of the defendants alleged in par 15(a) was misleading or deceptive because the first and second defendants did not have reasonable grounds for making the representation because, inter alia, they omitted to tell the plaintiff the things alleged in par 18(a).

[30] But there is no inconsistency between par 15(a) and par 18(a) as such.

[31] The first defendant made further complaints about par 18(a), including that the amounts of the obligations to pay third parties, Lake Laurel or the second defendant are not alleged, that the omission is not alleged to be mere silence or contextual silence and that facts giving rise to a reasonable expectation of disclosure are not pleaded.

[32] In my view, the amounts of the obligations to pay third parties, Lake Laurel or the second defendant are not material facts absent which par 18(a) must be struck out. They can properly be made the subject of particulars.

[33] Equally, in my view, it is not a material fact to allege that conduct by omission comprising silence constituting misleading conduct is either "mere" silence or "contextual" silence. The first defendant's point was not that the omission alleged is not capable of constituting conduct within the meaning of s 2(2) of the ACL, so I do not pause to deal with that contention.

---

8 See *Australian Consumer Law*, s 4.

[34] As to contextual facts, giving rise to a reasonable expectation, par 12 of the ASOC alleges that the first defendant was originally named as a party to the draft loan agreement and mortgage debenture but was deleted by agreement in circumstances where on 7 November 2012 the second defendant expressly in his capacity as sole director of the first defendant stated that he was entitled to 50 per cent of the net proceeds of sale from the balance of the proceeds of sale of the first defendant's unsold lots.

[35] For these reasons, in my view, pars 15(a) and 18(a) should not be struck out. However, par 18 should be amended:

(a) to allege that the defendants' conduct was "misleading" (not or deceptive) because the first and second defendants did not have reasonable grounds for making the representation because they omitted to tell the plaintiff the things alleged in par 18(a);[9]
(b) to allege particulars of the obligations to pay third parties; and
(c) to delete par 18(b) which is irrelevant to whether the defendants engaged in misleading conduct in making the representation alleged in par 15(a) as it goes to the representation alleged in par 15(b).

**Authority representation – pars 12, 15(b) and 20**

[36] The first defendant submitted that there is no pleading of material facts to support the representation that the first defendant represented that it would be bound by the undertaking alleged in par 12 of the ASOC and that the consequential allegation in par 20 that it was misleading or deceptive for the first defendant to refuse to acknowledge that the undertaking is binding on it is inevitably unsustainable as well.

[37] The second defendant submitted that that the undertaking was (only) a personal undertaking by the second defendant in respect of his entitlement (if any) in the net proceeds of sale by the first defendant.

[38] The plaintiff submitted that the first defendant was a party to the undertaking and that the first defendant entered into the undertaking with the second defendant.

[39] In my view, the undertaking alleged in par 12 of the ASOC requires some unpacking for better analysis and must be read in the context of the surrounding circumstances in which it was made. Some of those circumstances are revealed by the exchanges of emails that were tendered as exhibits to affidavits read on the hearing of the application, but there is no suggestion that the full extent of the surrounding circumstances was covered. It would be an error, in that state of evidence, to generally reach any conclusions by way of findings of fact.

[40] However, some points seem clear for the purpose of the pleading analysis. First, from the exchange of emails, the undertaking alleged in paragraph 12 of the ASOC was given by the second defendant in circumstances where Riverstone and Russell had refused to bind themselves by contract to the plaintiff and the first defendant had likewise declined to bind itself by contract to the plaintiff.

---

9 If this is done for each of the representations, the clumsy allegation in par 21 might be removed.

[41] Second, the undertaking is expressed to be one by the second defendant to pay an amount to which he was entitled. On the face of it, that is not a promise by the first defendant to do anything.

[42] Third, the direction given to RobertsLaw to make the payments on the face of it was given to them as the second defendant's lawyers. Evans Lawyers were then acting as the first defendant's lawyers.

[43] Fourth, against that, the second defendant gave the undertaking in his capacity as sole director of the first defendant. It is reasonably arguable that his statement as to his entitlement to 50 per cent of the net proceeds was given in that capacity as well.

[44] For present purposes, the point to be decided is a relatively narrow one about the adequacy of the pleading. Was there a representation (promise) by the first defendant to be bound by the undertaking? Paragraph 15(b) of the ASOC shows some confused thinking. Among other things, it alleges a representation by the first defendant that the **first defendant** "would cause the first defendant to pay the plaintiff 50% of the net proceeds".

[45] In my view, it is not reasonably arguable that by the conduct alleged in the ASOC the first defendant made the representations alleged in par 15(b). Once that point is reached, in my view, the misleading conduct by the first defendant alleged in par 20 of the ASOC must also be struck out as against the first defendant.

**Divestment representation – pars 12, 13 and 15(c)**

[46] The first defendant submitted that pars 12 and 13 should be struck out.

[47] The second defendant submitted that it is not alleged that the second defendant had an interest in first defendant. This was a difficulty identified in the first strike-out application by Martin J.[10] However, I must deal with the present pleading according to its terms. The present context is that par 15(c) of the ASOC alleges the representation that the second defendant would not divest his "interest" in the first defendant without the consent of the plaintiff.

[48] The plaintiff submitted that it relied on the representation that the second defendant had an interest in the first defendant. Paragraph 25 alleges, inter alia, that the plaintiff relied on the representation that the second defendant would not divest his interest in the first defendant without the consent of the plaintiff. Paragraph 19 of the ASOC alleges that the second defendant did divest himself of his "interest" in the first defendant.

[49] Both the first and second defendants submitted that the allegation in par 13 of the ASOC that "[o]n or about 6 December 2013 the Second Defendant caused Berger Brothers to cease being a shareholder in the First Defendant" should be struck out. Paragraph 13 of the ASOC is in similar terms to par 8 of the statement of claim struck out by Martin J.

[50] The first defendant has not filed a defence to the ASOC. However, by par 8 of the defence to the statement of claim which was later struck out, the first defendant

---

10 *Nichols Construction Pty Ltd v Mt Marlow & Ors* [2015] QSC 165, [11], [14].

denied or did not admit that allegation. Paragraph 16 of the defence of the second defendant to the ASOC admits paragraph 13 of the ASOC.

[51] The "interest" of the second defendant in the first defendant referred to in the undertaking is not expressly identified. Nor is that "interest" particularised in the ASOC.

[52] However, the facts alleged in the ASOC make it appear that the second defendant was sole director of the first defendant and the sole director of Berger Brothers which was one of the equal shareholders in the first defendant. As well, Berger Brothers was a wholly owned subsidiary of Lake Laurel and the second defendant held the shares in Lake Laurel.

[53] Those legal interests would not have given the second defendant any legal entitlement to the net proceeds of sale of the first defendant's property. However, indirectly, it can be seen that Berger Brothers as shareholder might have become entitled to a dividend in an amount that corresponded to that amount and, depending on the circumstances, it might have been able to distribute such an amount to the second defendant.[11]

[54] In my view, pars 12 and 13 of the ASOC should not be struck out.

[55] Paragraph 12 supports par 15(a) of the ASOC against both defendants, par 15(b) of the ASOC against the second defendant and par 15(c) of the ASOC against both defendants. Neither of the defendants made a separate attack on par 15(c) as such.

[56] Paragraph 13 is relevant to the cause of action based on par 15(c) of the ASOC. As a result of Berger Brothers ceasing to be shareholder of the first defendant, at least arguably the second defendant's "interest" in the first defendant at the time of the representation alleged in par 15(c) of the ASOC changed. Whether that is enough to sustain a case of misleading conduct because there were no reasonable grounds for the alleged representation in par 15(c) was not a point ventilated by the defendants.

**Causation and loss or damage – pars 25 and 26**

[57] On the basis of the allegations of causation and loss or damage contained in pars 25 and 26 of the ASOC, the plaintiff seeks the following relief against the first defendant in the ASOC (the same relief is sought against the second defendant in pars 7, 8 and 9 of the claim for relief):

> "1. Damages and/or compensation pursuant to section 236 of the ACL.
>
> 2. An order under section 243 of the ACL that the First Defendant pays the Plaintiff 50% of the net proceeds of all its real property sold or to be sold.

---

[11] Or it might have been that the second defendant was a creditor of the first defendant, but that fact is not alleged.

> 3. Further and alternatively an injunction restraining the First Defendant from dealing with 50% of the net proceeds of sale from all of its real property sold or to be sold…"

[58] The defendants submitted that the plaintiff has not pleaded any causal connection between the alleged representations and the alleged loss or damage. By the particulars under par 26 of the ASOC, the plaintiff pleads a total loss of $218,873.97 comprising $66,517.55 and $152,356.42 from the sale of two of the Lots. The amounts were allegedly paid to Lake Laurel and the second defendant respectively.

[59] On the face of it, the loss claimed is measured in the same way as if the defendants had made contractual promises that the plaintiff would receive 50 per cent of the net proceeds of sale of the Lots in accordance with the undertaking.

[60] Under s 236 of the ACL, the requirement for a claim for damages is that "the person suffers loss or damage because of the conduct of another person"[12] but "the material facts establishing the necessary causal link should be pleaded".[13] The ASOC does not allege how the amounts claimed are loss or damage suffered by the plaintiff because of the contravening conduct alleged.

[61] In oral argument, the plaintiff accepted that it has not pleaded a "no transaction" case,[14] in the sense that but for the representations it would not have entered into the loan agreement.

[62] However, in oral argument, the plaintiff submitted that was the case that it wished to advance.

[63] The plaintiff has not pleaded how loss has been suffered because of the contravening conduct. Rule 150 of the UCPR provides that every type of damage is to be pleaded. Rule 155 of the UCPR states that:

> "(1) If damages are claimed in a pleading, the pleading must state the nature and amount of the damages claimed.
>
> (2) Without limiting rule 150(1)(b), a party claiming general damages must include the following particulars in the party's pleading—
>
> (a) the nature of the loss or damage suffered;
>
> (b) the exact circumstances in which the loss or damage was suffered;
>
> (c) the basis on which the amount claimed has been worked out or estimated.
>
> (3) If practicable, the party must also plead each type of general damages and state the nature of the damages claimed for each type.

---

12 *Competition and Consumer Act* 2010 (Cth), sch 2, *Australian Consumer Law*, s 236(1)(a).

13 *Bond Corporation Pty Ltd & Ors v Thiess Contractors Pty Ltd* (1987) 14 FCR 215; 71 ALR 615, 622; *Barnes v Forty Two International Pty Ltd* (2014) 316 ALR 408, [120]-[122].

14 *Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd* [2015] 1 Qd R 214, [52]; *Jamieson v Westpac Banking Corporation* (2014) 98 ACSR 63, [106]-[107].

> (4) In addition, a party claiming damages must specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise."

[64] The plaintiff submits that the measure of loss is unable to be decided until after the other proceeding, BS3368/14, is determined. The logic seems to be that the plaintiff may yet recover the amounts of the advance or advances from Lake Laurel or the second defendant, for which credit would have to be given in measuring the loss or damage for any judgment for damages against the defendants on the present claims.

[65] I interpolate that the ultimate value of the plaintiff's rights against Lake Laurel or the second defendant under the loan agreement, mortgage debenture and the guarantee are not matters which determine the measure of the plaintiff's loss as a matter of principle. And the suggested dependence of the amount of any recovery in the present proceeding upon the amount recovered in the other proceeding suggests that they should be dealt with together.

[66] Be that as it may, it does not cure the defect of the plaintiff's non-compliance with rr 150 and 155 of the UCPR.

[67] In my view, par 26 should be struck out.

[68] As set out above, the plaintiff also seeks an order in pars 2 and 8 of the claim for relief under s 243 of the ACL. There was a similar claim in the statement of claim that was struck out.[15] The only difference between the relief sought in that statement of claim and the ASOC is the insertion of the words "section 243 of" in pars 2 and 8 of the ASOC.

[69] However, as previously stated, the plaintiff no longer pleads a contractual basis for its claim. It is impossible to see what the logical connection is between the plaintiff's alleged causes of action and the relief sought in pars 2 and 8. However, nothing in these reasons should be interpreted as meaning that s 243 of the ACL should be accorded a restrictive interpretation.[16]

[70] Next, the plaintiff seeks final relief in pars 3 and 9 of the claim for relief in terms of what appears to be a *Mareva*[17] injunction. There is nothing in the ASOC which pleads the basis for the injunction. On the hearing of the application, the plaintiff's counsel was unable to state any legal basis for the injunction sought.

[71] In any event, the grant of perpetual final relief over the first defendant's proceeds of sale is illogical. As described by Lord Diplock in *Siskina (Cargo Owners) v Distos Compania Naviera SA*:[18]

> "A *Mareva* injunction is interlocutory, **not final**; it is ancillary to a substantive pecuniary claim for debt or damages; it is designed to

---

15 See *Nichols Construction Pty Ltd v Mt Marlow & Ors* [2015] QSC 165.

16 Section 243 of the ACL is drafted in similar terms to s 87 of the *Trade Practices Act* 1974 (Cth). See *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 364-367.

17 *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

18 [1979] AC 210. See also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 621; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 1, 33, 44.

> prevent the judgment against a foreign defendant for a sum of money being a mere brutum fulmen".[19] (emphasis added)

[72] I note that there is a power for the court to grant an injunction under s 232 of the ACL. However, no submissions were made by the parties in that regard. Nor were any submissions made about the court's inherent jurisdiction to grant an injunction.[20]

[73] In my view, the claims for relief numbered 2, 3, 8 and 9 in the ASOC should be struck out.

[74] I will hear the parties on the question of costs.

---

19 *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210, 253.

20 More recently, the High Court considered the inherent jurisdiction of a Supreme Court granting a freezing order in relation to a prospective foreign judgment, see *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36, [37]-[50], [64]-[78].