SUPREME COURT OF QUEENSLAND

CITATION:	*Pointon & Ors v Oaks Hotels & Resorts Limited & Ors* [2016] QSC 152
PARTIES:	**BRETT MITCHELL POINTON** (first plaintiff)
	ACCOM HOLDINGS NO. 1 PTY LTD AS TRUSTEE FOR THE ACCOM HOLDINGS NO. 1 TRUST (second plaintiff)
	ACCOM HOLDINGS PTY LTD AS TRUSTEE FOR THE ACCOM HOLDINGS TRUST (third plaintiff)
	WRAP MANAGEMENT PTY LTD ACN 168 483 789 (fourth plaintiff)
	WRAP MANAGEMENT PTY LTD ACN 168 483 798 (fifth plaintiff)
	WRAP LETTING PTY LTD ACN 168 481 061 (sixth plaintiff)
	v
	OAKS HOTELS & RESORTS LIMITED (first defendant)
	OAKS HOTELS & RESORTS OPERATOR (VIC) PTY LTD ACN 168 481 052 (second defendant)
	OAKS HOTELS & RESORTS OPERATOR (VIC) PTY LTD ACN 168 483 770 (third defendant)
	OAKS HOTELS & RESORTS (VIC) LETTING PTY LTD (fourth defendant)
	and
	OAKS HOTELS & RESORTS (MON KOMO) PTY LTD (first plaintiff by counterclaim)
	v
	WRAP NO. 1 PTY LTD ACN 168 469 494 (first defendant by counterclaim)
	WRAP NO. 2 PTY LTD ACN 168 469 681 (second defendant by counterclaim)
	ACCOM (VIC) PTY LTD

(third defendant by counterclaim)

BMP CORP PTY LTD
(fourth defendant by counterclaim)

COLLECTIONS ENTERPRISES PTY LTD AS TRUSTEE FOR COLLECTIONS ENTERPRISES TRUST
(fifth defendant by counterclaim)

FILE NO/S: SC No 10556 of 2015

DIVISION: Trial Division

PROCEEDING: Application for strike out

DELIVERED ON: 17 June 2016

DELIVERED AT: Brisbane

HEARING DATE: 17 June 2016

JUDGE: Bond J

ORDER: **Judgment delivered *ex tempore* on 17 June 2016:**

The orders of the Court are that:

1. **The application is dismissed.**

2. **The applicant plaintiffs pay the respondent defendants' costs of the application to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where first plaintiff was employee and former CEO of first defendant – where first plaintiff and first defendant entered into an incentive agreement – where entities associated with the first plaintiff and first defendant later entered into partnership agreement – where clause in partnership agreement stipulated conditions where entities associated with the first plaintiff would sell interest at "value" – where clause in incentive agreement stipulated conditions where first plaintiff would sell interest at "cost" – whether unarguable that clause in incentive agreement continued to operate

COUNSEL: R P Jackson QC, with P J McCafferty, for the plaintiffs and the defendants by counterclaim
D G Clothier QC, with M T Hickey, for the defendants and the first plaintiff by counterclaim

SOLICITORS: Bartley Cohen for the plaintiffs and the defendants by counterclaim
Baker & McKenzie for the defendants and the first plaintiff by counterclaim

[1] Mr Pointon was the founder and former CEO of Oaks Hotels & Resorts Ltd, which I will refer to as Oaks. Mr Pointon and entities associated with him are the plaintiffs in this proceeding. Oaks and entities associated with it are the defendants.

[2] On 13 March 2012, Mr Pointon entered into a contractual arrangement with his employer, Oaks. The agreement may be referred to as the incentive agreement or "IA". The contractual arrangement was contained in a letter to him from Oaks which was signed by both parties. It was headed "Incentive program" and provided in cl 1 a particular incentive intended to operate by way of supplementation to the bonus provisions in his service agreement.

[3] The terms presently causing controversy are found in cl 2, which provided as follows:

> New Projects: We will offer you an opportunity to take a 20% equity stake in new investment projects that you source and develop for Oaks, Our general target, subject to market conditions, will be to finance new investments on a 60% debt/40% equity basis. For avoidance of doubt, this 20% equity investment will require you to share a 20% portion of all acquisition and transaction costs (stamp duty, legal costs, arrangement fees, etc.).
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> Your 20% share equity investment and all acquisition and transaction costs (stamp duty, legal costs, arrangement fees, etc.) will be funded by Minor/Oaks pursuant to a term loan agreement containing standard, arms-length terms and with an offset right against other amounts owing to Minor/Oaks. The loan will bear interest at a rate equivalent to the effective rate of interest charged under Oaks' principal external financing facility (currently the ANZ facility) and interest on the loan will be payable annually. Until repaid in full, all dividends and distributions in respect of your 20% stake, save for an amount being a provision for tax at the prevailing company tax rate in respect of such 20% stake only which shall be released to you, will be applied to pay interest and repay principal and other amounts outstanding on the loan. The loan will be secured by a pledge of all shares/equity interest in all new investments/projects funded under this scheme until all amounts due under the loan and in respect of the project are repaid in full.
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> Any equity invested under this arrangement is required to be sold back to Minor/Oaks at cost as soon as practicable (and in any event within 30 days) if you resign your employment or are terminated for cause within five years from the date of this letter and and [sic] the funds received by you from such exercise are required to be used to repay amounts outstanding on all loans from Minor/Oaks, all of which shall become immediately due and payable. If you are terminated without cause you will not be subject to the foregoing forfeiture provisions and will remain eligible for the put option on the basis set forth in the following paragraph. Your eligibility to invest in new projects under this scheme will be cancelled and forfeited without compensation with effect from the time that you leave the employ of the company for any reason.
>
> Subject to the other provisions of this letter, for any project that you have invested in pursuant to the terms hereof, we will offer you a put option in respect the equity that you have actually invested in such project. Such put option will be exercisable at any time after the third full year of investment in such project (provided that you remain in the employment of the company) and on the condition that the funds received from such exercise are used to repay amounts outstanding on the loan extended to you in respect of such particular project. The price for such put option will be determined by an independent valuation expert selected by the company and using generally-accepted valuation methodologies.

[4] The letter concluded with these terms:

> We are pleased to offer these incentives to you and are confident they will align our respective interests towards driving the growth of Oaks. We are committed to a long-term partnership with you and I hope that you will see that reflected in the terms set out above. Please kindly sign below to indicate you acceptance of these terms.

[5] It may be observed that the letter was not intended exhaustively to govern the relationship of employer/employee. Obviously enough, some part of that relationship was governed by the service agreement to which reference was made in cl 1.

[6] However, the IA did contain terms that the parties evidently intended were important for the regulation of their relationship, and they were terms which were intended to operate over the long term. It may be inferred that one interest which the employer, Oaks, had in relation to the employee, Mr Pointon, was to encourage the employee to comply with the terms of his employment contract. One way which that was done was forfeiture, where there was

termination for "cause", and a disadvantage which might attend that was that the IA required the sale back to the employer of the interest that had been obtained at "cost". Presumably that meant that Mr Pointon, in those circumstances, would lose any value which had been gained beyond cost.

[7] Mr Pointon was offered the opportunity to take the contemplated equity stake in at least 18 projects. Individual agreements (described by the parties as 80/20 Partnership Agreements) in relation to individual investments, were executed between special purpose corporate vehicles on behalf of Mr Pointon on the one hand, Mr Pointon personally as guarantor on the other and special purpose corporate vehicles on behalf of Oaks. Oaks was not a party to the agreements.

[8] They were each executed after the IA with the first one of them being executed shortly after the IA. For present purposes it is necessary to focus only on one, namely, the partnership agreement for the Mon Komo project. The partnership agreement, referred to on its face as a "partnership and management deed", was executed by the parties to it between 25 May and 4 June 2012. It may be referred to as the "PA".

[9] The parties to that agreement were referred to as partners. They were identified in the schedule and comprise a proprietary limited company which may be referred to as Oaks Mon Komo, which was Oaks' special purpose corporate vehicle, and Collections Enterprises Pty Ltd, which was Mr Pointon's special purpose corporate vehicle. Mr Pointon was the guarantor.

[10] The following observations may be made about the provisions of the PA. The recitals identified that, on a commencement date, the two partners agreed to participate in a partnership to conduct the business. The business was defined, ultimately, by cross-reference to an item in the schedule as:

> The business of conducting the caretaking and the letting and sales of lots at 'Oaks Mon Komo' situated at 101 Marine Parade, Redcliffe, Qld in accordance with the Management Agreements and the Rules.

[11] The recitals went on to say that "the partners had agreed to appoint the manager as agent of the partners to conduct the business of the partnership". The manager was a company identified in the schedule and was a company the shares to which were held by the two partners.

[12] The recitals continued that the parties to the deed, being the three parties I have identified, had agreed to enter into it to govern the terms of their relationship and the operation of the business. Essentially, the PA provided that the two partners owned the shares in the company defined as the manager, and the manager would conduct the business. The partners owned the "assets" as well, which was a defined term.

[13] Clause 11 of the PA dealt with the general subject matter of the transfers of the interest which each party held in the shares in the manager, and in the interest in the partnership and the assets it owned in certain circumstances. Clause 11.7 provided:

> **Deemed Transfer Notice**
>
> If: a Minority Partner's Key Person:
>
> (a) dies or suffers a total and permanent disability; or
>
> (b) resigns from his office or employment with Oaks Hotel and Resorts Limited (and is not otherwise employed at the time of such resignation by any subsidiary or holding company of Oaks Hotels and Resorts Limited); or
>
> (c) is terminated from, or in any other manner ceases to be engaged in, his office or employment with Oaks Hotels and Resorts Limited (and is not otherwise employed at the time of such termination or cessation by any subsidiary or holding company of Oaks Hotels and Resorts Limited),

> then that Minority Partner is deemed to have given a Transfer Notice in accordance with clause 11.6 for the sale of the whole of the Minority Partner's Interest and Shares and for the purposes of the Transfer Notice, the price at which the Minority Partner wishes to sell their Interest will be the price equivalent to the Value of the Minority Partner's Interest and Shares.

[14] Notably, Mr Pointon was the Key Person, and his special purpose vehicle, Collections Enterprises, was the Minority Partner. Obviously enough, the clause provided for certain consequences in relation to the Minority Partner's interest and shares in the event of, amongst other things, Mr Pointon being terminated as employee of Oaks. The consequence was that Mr Pointon's special purpose vehicle would have to offer to sell its interest and shares at value to the Oaks special purpose vehicle.

[15] It will be noted immediately that there were differences between the clause in the IA and the clause in the PA concerning what would happen in the event that Mr Pointon's employment was terminated for cause. The former seemed calculated to give Oaks the right to acquire Mr Pointon's interest for cost. The latter seemed calculated to require Mr Pointon's special purpose vehicle to give Oaks' special purpose vehicle the right to acquire the interest held by Mr Pointon's special purpose vehicle but at a valuation, not at cost.

[16] In the events which happened, Mr Pointon's employment was terminated on 26 March 2015, which was within the 5 year period provided in the IA. By the counterclaim, Oaks alleges that Mr Pointon's employment was terminated for serious misconduct and, therefore, for cause within the meaning of the IA, and that it therefore became entitled to buy-back Mr Pointon's interest at cost.

[17] The claim is expressed in the Oaks counterclaim at paragraphs 90 to 96.

[18] Paragraph 90 pleaded the term of his employment agreement, which permitted immediate termination in the event of his becoming guilty of serious misconduct.

[19] Paragraph 91 pleaded that Mr Pointon was guilty of serious misconduct within the meaning of the term of the employment agreement and specified a number of particular instances about which it is not necessary to give further detail at this point.

[20] Paragraph 92 pleaded further aspects characterising the nature of those alleged breaches.

[21] Paragraph 93 pleaded that Oaks terminated Mr Pointon's conduct in a way which enlivened the right deriving under the IA, to which I have referred.

[22] It is appropriate to quote paragraphs 94 to 96, and I do so below.

> 94. In the premises of the matters pleaded in paragraph 93 above, pursuant to the Incentive Agreement:
>
> (a) From 26 March 2015 Mr Pointon was obliged to sell back to Oaks at cost, within 30 days:
>
> (i) "any equity invested" under the Incentive Agreement; and
>
> (ii) the interest controlled by him the Mon Komo 80/20 Investment; and
>
> (b) amounts outstanding on loans to Mr Pointon from Oaks became immediately due and payable.
>
> 95. Notwithstanding the matters pleaded in paragraph 94 Mr Pointon has failed to sell back to Oaks at cost his interest in the Mon Komo 80/20 Investment, despite a request that he do so.
>
> **Particulars**
>
> The request was made in a letter, dated 26 June 2015, to Mr Pointon from Mr Hoswell.
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> 96. Oaks has, at all times material since Mr Pointon's termination, been ready willing and able to buy back Mr Pointon's interests in the Mon Komo 80/20 Investments at cost, pursuant to the Incentive Agreement.

[23] In its claim for relief in the counterclaim Oaks sought an order:

(a) for specific performance of the first plaintiff's obligations under the IA to sell back to the first defendant his 20% equity investment in the 80/20 Properties; and

(b) that the first plaintiff execute all such documents and do all such acts as are necessary, including on behalf of the seventh to twenty-second plaintiffs, to transfer to the first defendant or its nominee his 20% equity investment in the 80/20 Properties.

[24] I should mention that the language of the claim for relief extends more broadly than the Mon Komo PA because it refers to transactions which have since settled. For present purposes the claim should be regarded as relating only to the investment in the Mon Komo PA.

[25] By their application today, the plaintiffs apply for an order striking out paragraphs 91 to 96 of the counterclaim. The basis for that contention is advanced in paragraph 46A of the further amended reply and answer to the defence and counterclaim of the defendants in these terms:

> 46A Further as to paragraphs 90 to 93 of the counterclaim, the plaintiffs say that whether or not the first plaintiff engaged in, or was guilty of serious misconduct so as to give rise to a right in the first defendant to terminate the first plaintiff's employment with Oaks for "cause" is irrelevant because on the proper construction of the Incentive Agreement and the 80/20 Partnership Agreements:
>
> (a) the relevant Pointon Partner's interest in any 80/20 investment was created pursuant to the relevant 80/20 Partnership Agreement and not the Incentive Agreement;
>
> (b) the relevant 80/20 Partnership Agreement defined the rights and obligations of the relevant Oaks Partner and the relevant Pointon Partner;
>
> (c) in the event the first plaintiff ceased to be engaged in his office or employment with the first defendant (for whatever reason), clauses 11.6, 11.7 and 11.9 of the 80/20 Partnership Agreements provided for the manner in which the relevant Oaks Partner might purchase the interest of the relevant Pointon Partner and the Incentive Agreement did not so provide;
>
> (d) in the premises, paragraphs 90 to 93 of the counterclaim and are liable to be struck out under rule 171 of the *Uniform Civil Procedure Rules* 1999 (UCPR) because they:
>
> (i) do not disclose a reasonable cause of action or defence;
>
> (ii) have a tendency to prejudice or delay the fair trial of the proceedings;
>
> (iii) are unnecessary.

[26] For their part, in a responsive pleading entitled "further amended reply to the answer to the counterclaim", Oaks contended as follows:

> 17. The Plaintiffs by Counterclaim deny as untrue the allegations in paragraph 46A of the Answer because:
>
> (a) at times the relevant Pointon Partner's interest in an 80/20 investment was created before the relevant 80/20 Partnership Agreement was executed;
>
> (b) the creation of the relevant Pointon Partner's interest in an 80/20 investment and the execution of the relevant 80/20 Partnership Agreement was pursuant to the New Projects incentive under the Incentive Agreement;
>
> (c) the creation of the relevant Pointon Partner's interest in an 80/20 investment constituted 'equity invested under this arrangement' within the meaning of the Incentive Agreement;
>
> (d) it was objectively intended that the creation of the relevant Pointon Partner's interest in an 80/20 investment and the execution of the relevant 80/20 Partnership Agreement would not derogate from the First Defendant's rights under the Incentive Agreement upon the First Plaintiff's resignation or termination for cause within 5 years from the date of the Incentive Agreement;
>
> (e) the objective intention referred to in paragraph (d) above is to be inferred from the following facts:

(i) the terms of the Incentive Agreement and the standard form of the 80/20 Partnership Agreement were negotiated concurrently or effectively concurrently;

(ii) during those negotiations, notwithstanding the standard form of the 80/20 Partnership Agreement containing the clauses pleaded in paragraph 46A(c), the First Plaintiff and the First Defendant agreed that upon the First Plaintiff's resignation or termination for cause within 5 years from the date of the Incentive Agreement, any equity invested in an 80/20 investment was required to be sold back at cost rather than value;

Particulars

(A) Draft version of the Incentive Agreement provided by the First Plaintiff to Lachlan Hoswell on behalf of the First Defendant on or about 9 March 2012, containing proposed changes by the First Plaintiff, including a proposal to the effect that any equity invested under the arrangement was subject to sale to Minor/Oaks at "value" in the event of the First Plaintiff's resignation or termination for cause within 5 years from the date of the Incentive Agreement.

(B) Email from Stephen Chojnacki on behalf of the First Defendant to the First Plaintiff sent on 9 March 2012, rejecting the First Plaintiff's proposed changes in relation to "value" and reinstating the requirement for any equity invested under the arrangement to be sold back to Minor/Oaks at "cost" in the event of the First Plaintiff's resignation or termination for cause within 5 years from the date of the Incentive Agreement.

(iii) the First Defendant is not a party to the 80/20 Partnership Agreements;

(iv) the Pointon Partners and the Oaks Partners are not parties to the Incentive Agreement;

(v) in the premises, it was not the objective intention that rights and obligations in respect of the 80/20 investments would be governed exclusively by the 80/20 Partnership Agreements;

(f) the rights and obligations under the Incentive Agreement in respect of the 80/20 Partnerships upon the First Plaintiff's resignation or termination for cause within 5 years from the date of the Incentive Agreement have not been abandoned by subsequent agreement or otherwise.

[27] The principles relating to the striking out of allegations in pleadings are not in dispute. Striking out is reserved for clear cases and, even if the Court is inclined to the view that a case is clear, the Court retains a discretion to enable the matter to proceed to trial. The likely saving of time and cost, including having regard to the prospect of an appeal, are particularly relevant to the discretion.

[28] The plaintiffs accept that, in order for them to succeed, they would have to persuade me that it was unarguable that the IA should continue to have an operation independent of cl 11.7 of the PA once the PA had been entered into. They accept that the moment that proposition becomes an arguable proposition the evidence proving the foundation of Oaks' argument of termination for cause becomes relevant to support Oaks' claim for relief pursuant to the provisions of the IA.

[29] In my view the question of what was the objective intention of the parties to the two instruments I have mentioned in relation to what would happen to the various interests held by them in the investment projects in the event that Mr Pointon's employment was terminated is sufficiently obscure to persuade me that I cannot reach the view that the plaintiffs invite me to reach about the case advanced by Oaks, namely, that I should form the view that it does not disclose a reasonable cause of action.

[30] Broadly speaking, the plaintiffs invite me to take the view that, once the IA had been implemented and the PA entered into, it must have been intended by the parties that cl 11.7 of the PA would apply to the exclusion of the paragraphs in the IA which Oaks now relies upon.

[31] The following considerations lead me to conclude that it is at last arguable that that is not so, and that it is at least arguable that the IA continued to confer on Oaks the right for which it contends:

(a) First, the rights conferred on Oaks were conferred by instrument to which it was party. It is at least arguable that the PA is not apposite to bring about an abandonment by Oaks of the right conferred by the IA or an exclusion of those rights, because Oaks was not party to the PA.

(b) Second, there is no express provision of the PA which purports to affect rights of Oaks. The recitals, the supremacy clause (cl 2.1) and the entire agreement clause (cl 22.6) are in unremarkable terms, confirming the intention of the parties to the PA that the PA would govern their rights and be the exclusive source of those rights. But there is no mention in those clauses that it was intended to be the exclusive source of the rights of anyone other than the parties. Given the fact that the parties to the PA must have known of the fact and the terms of the IA, it is arguable that if they had wanted the intention for which the plaintiffs contend they would have said so and they would have said so in a way that bound Oaks.

(c) Third, it is arguable that there are at least two indicia of the intention of at least the parties to the IA that the IA would have continued existence as a source of rights, even after one of the investment opportunities contemplated had been availed of and documented. The first is the put option conferred in the last paragraph of cl 2, for which there is no equivalent in the PA. The second is the fact that the IA covers wider interests than merely the investment interests of any one investment opportunity, because it governs the interests of employer and employee intended to extend over the long term.

[32] As those reasons are sufficient to persuade me against the plaintiff's contention that the Oaks' construction of the two instruments is unarguable, it is not necessary, or indeed helpful, further to deal with each of the arguments which were advanced before me by the very helpful submissions on each side as the reasons why theirs was the better view. I should also say that the observations which I have made should not be construed as the expression of a view one way or the other on the ultimate merits of either side's contention on this interesting point of construction. It will be apparent that I think that the question of what was the objective intention of the parties to the IA and the parties to the PA, in relation to what would happen to the various interests held by them in the event that Mr Pointon's employment was terminated, is obscure.

[33] Oaks has pleaded reference to extrinsic evidence which it would seek to adduce in aid of construction and adduced supporting material before me today without objection. Although I have reservations as to the correctness of the proposition that such material is admissible, I think that it is distinctly possible that there may be admissible extrinsic evidence at trial which sheds light on what I presently regard as an obscurity as to the parties' intention. At the least I would not presently take the view that the matter should not proceed to trial to enable that question to be explored. This is another reason to refuse the application.

[34] It remains to note that Oaks argued that there was no substantial utility in determining the application now, because other issues arise consequent upon parts of the pleadings which are not presently attacked, or likely will once Oaks has pleaded to a proposed further amended statement of claim, and those parts of the pleadings will permit Oaks to plead the fact of termination for cause. The proposition was essentially this:

(a) The plaintiffs plead an alternative case in relation to an investment known as the Wrap Investment, which proceeds on the basis that there is an entitlement to at least a 20% interest in reliance on the incentive agreement.

(b) The defendants respond to this case that, in that event, Oaks would have been entitled to buy-back the investment at cost because of the termination for cause.

(c) The plaintiffs do not directly seek to strike out this response, with the result that the termination for cause allegations would be litigated in any event.

[35] The proposition is true, but derived from the plaintiffs' oversight in not attacking that aspect of the defendant's responsive plea. If that had been the only problem with the application I would have invited the plaintiffs to amend their application to expand the attack. For reasons I have expressed, I have formed the view that there were other, more significant difficulties in my being persuaded as to the merits of the application. As it stands, however, the defendant's point is a reason, albeit a less weighty one, also to refuse the application as presently formulated.

[36] For the reasons I have expressed I will dismiss the application to strike out.

…

[37] I order the applicant plaintiffs to pay the respondent defendants' costs of the application, to be assessed on the standard basis.