

SUPREME COURT OF QUEENSLAND

CITATION: *Taylor & Anor v Hobson & Ors* [2017] QSC 139

PARTIES: **ALAN JOHN JEFFREY TAYLOR**
(first plaintiff)

WANDANI PTY LTD
(second plaintiff)

v

RICHARD HOBSON
(first defendant)

And

HOBSON INVESTMENTS (NQ) PTY LTD (ACN 102 617 050)
(second defendant)

And

ROBERTS NEHMER McKEE
(third defendant)

And

MALCOLM FISHER
(fourth defendant)

FILE NO/S: S15 of 2014

DIVISION: Trial Division

PROCEEDING: Interlocutory Application

ORIGINATING COURT: Supreme Court of Queensland at Mackay

DELIVERED ON: 23 June 2017

DELIVERED AT: Rockhampton

HEARING DATE: 5 June 2017

JUDGE: McMeekin J

ORDER:

- 1. The application is adjourned to a date to be fixed to be brought on the giving of seven days notice to the first and second defendants.**
- 2. The plaintiffs are directed to provide written submissions on the costs orders that ought to be made on or before 4 pm Friday 30 June 2017. The first and second defendants are directed to provide written submissions in response on or**

before 4pm Friday 7 July 2017.

CATCHWORDS: PROCEDURE - STAY OF PROCEEDINGS – IMPERMISSIBLE INTERMEDDLING - where the proceeding between the plaintiffs and the third and fourth defendants was settled – where the parties entered into a Deed of Settlement – where the effect of the terms of the Deed caused the proceedings as between the plaintiffs and the first and second defendants to be stayed – where the plaintiffs apply to have the stay lifted – whether the circumstances justifying the stay are no longer operative.

Trade Practices Act 1974 (Cth), s 52, 53A

Elfic Ltd v Macks [2003] 2 Qd R 125, applied

Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd [2005] NSWCA 83; (2005) 63 NSWLR 203, cited

Giles v Thompson [1993] 3 All ER 321, cited

Taylor & Anor v Hobson & Ors [2016] QSC 226, considered

COUNSEL: PJ McCafferty for the plaintiffs
KC Fleming QC for the first and second defendants

SOLICITORS: Bartley Cohen for the for the plaintiffs
Connolly Suthers for the first and second defendants

- [1] **McMeekin J:** On 6 October 2016 Boddice J ordered that the proceedings as between the plaintiffs and the first and second defendants (whom I will refer to as the “Hobson defendants”) be stayed: see [2016] QSC 226. The plaintiffs apply to have the stay lifted arguing that the circumstances justifying the stay are no longer operative.
- [2] The proceedings concern, inter alia, a claim for damages in the sum of over \$3.6 million. The plaintiffs allege that they entered into a sale of business agreement as a result of representations made by the Hobson defendants, on occasions in the presence of the third and fourth defendants, the Hobson defendants’ solicitors, and also as a result of representations by the third and fourth defendants. It was alleged the third and fourth defendants were knowingly concerned in the representations made by the Hobson defendants. It is claimed that the representations were made in contravention of sections 52 and 53A of the *Trade Practices Act 1974*.

- [3] In 2016 the proceeding between the plaintiffs and the third and fourth defendants was settled. The parties entered into a Deed of Settlement. It was the effect of the terms of the Deed that caused Boddice J to order the stay.
- [4] The Deed provided for the payment of \$450,000 to the plaintiffs by the third and fourth defendant's insurer, Lexon, on behalf of those defendants. The Deed also provided for Lexon to appoint its solicitors to undertake the further carriage of the proceeding for the plaintiffs against the first and second defendants. The Deed of Settlement relevantly provided:
- “5. In consideration of that payment [the settlement sum], the plaintiffs, if called upon by written notice by Lexon to them ... to do so, will:
- (a) at the cost of Lexon:
 - (i) continue the proceedings against the first and second defendants;
 - (ii) amend those proceedings in any manner reasonably required by Lexon;
 - (iii) conduct those proceedings against the first and second defendants as may reasonably and properly be directed by Lexon;
 - (iv) for the purposes of (i), (ii) and (iii), instruct solicitors and counsel nominated by Lexon;
 - (v) for the purposes of (i), (ii) and (iv), provide all necessary co-operation as may reasonably be required by Lexon;
 - (vi) if directed to do so by Lexon, at their sole discretion (which shall be exercised in good faith), settle or discontinue the proceedings against the first and second defendants on such terms as may be determined by Lexon.
6. The proceeds of any judgement [sic] or settlement against or with the first and/or second defendants shall be distributed as follows:
- (a) 50% to the plaintiffs and 50% to Lexon until, by that distribution, Lexon have recovered the settlement sum and all costs incurred by them in the proceedings;
 - (b) thereafter to the plaintiffs.
7. Lexon will indemnify the plaintiffs against any adverse costs order made against them in the proceedings provided they have acted in good faith on the direction of Lexon.
8. The plaintiffs will promptly execute all such pleadings, notices (including notices of discontinuance) or other documents as may be necessary or convenient for the performance of this deed and/or the conduct or termination of the proceedings; and to secure such performance and conduct, the plaintiffs hereby irrevocably appoint each of Lexon, any claims counsel of Lexon and any solicitor appointed by Lexon severally their attorney for that purpose in the event the plaintiffs fail to do so. The

plaintiffs will, at the request of Lexon, deliver to Lexon any document held by them relating to the proceedings.”

- [5] The first and second defendants sought a stay of the proceedings on the ground that a continuation of the proceedings would constitute an abuse of process or interfere with the administration of justice. After a review of the relevant principles and examining the effect of the Deed Boddice J determined:

“The continuation by the plaintiffs of the present proceedings against the first and second defendants, under the direction and authority of the insurer for the third and fourth defendants pursuant to the Deed of Settlement, gives rise to an impermissible intermeddling in the proceeding. The proceedings should be stayed for abuse of process whilst that intermeddling remains”¹

- [6] The plaintiffs have entered into a new Deed with Lexon. They contend that the potential for “impermissible intermeddling” that concerned Boddice J is no longer a legitimate concern and so the stay should be lifted.
- [7] The relevant terms of the new Deed are as follows:

“Conduct of the Proceedings

- 2 In consideration of receiving payment of the Settlement Sum and of Lexon’s continued funding of the Proceedings, the Plaintiffs will, at the cost of Lexon:
 - a) Subject to clause 4, continue the Proceedings against the Hobson Defendants;
 - b) Provide all necessary co-operation as may reasonably be required by Lexon;
 - c) Instruct solicitors and counsel nominated by Lexon to conduct the Proceedings; and
 - d) Conduct the Proceedings against the Hobson Defendants, including the making of any amendments to the pleadings, as agreed between them and Lexon with both parties to act reasonably and in good faith.

Ending the Proceedings

- 3 Any settlement, discontinuance or other resolution of the Proceedings will be agreed between the Plaintiffs and Lexon (**Decision to Resolve**).
- 4 In coming to a Decision to Resolve the Proceedings, the Plaintiffs are to act reasonably and in good faith.

Conflict Resolution

¹ *Taylor & Anor v Hobson & Ors* [2016] QSC 226 at [55]

- 5 In the event of a dispute between the Plaintiffs and Lexon regarding the operation of clauses 2, 3 and/or 4 of this Deed (**Dispute**), the Plaintiffs and Lexon agree
- a) To resolve the Dispute by the appointment of a lawyer admitted to practice in the State of Queensland, to be agreed by the Plaintiffs and Lexon, or if no agreement can be reached within a period of 14 days, appointed by the President of the Queensland Law society (**Nominated Lawyer**);
 - b) That the Nominated Lawyer is to act as an expert to resolve the Dispute between the Plaintiffs and Lexon;
 - c) To provide written submissions only to the Nominated Lawyer for the determination of the Dispute;
 - d) That the Nominated Lawyer's opinion regarding the Dispute be binding on Lexon and the Plaintiffs;
 - e) To act expeditiously and in good faith in the resolution of the Dispute; and
 - f) That Lexon will pay the costs of the Nominated Lawyer."

[8] To determine whether the new Deed has the effect the plaintiffs contend, it is necessary to understand the concerns that prompted the stay initially.

[9] Boddice J reasoned that the interests of the insurers did not coincide with the "plaintiffs' pleaded case". After pointing out that the insurer had the power to control the proceedings and direct any amendment to the pleadings his Honour held that those circumstances "gives rise to the very real possibility the insurer will impermissibly intermeddle in the conduct of the proceedings by the plaintiffs against the first and second defendants to protect the insurer's interests."

[10] His Honour explained (with my emphasis):

[39] That intermeddling arises in circumstances where the interests of the plaintiffs and of the insurer do not coincide in all material respects. There remains a live issue as to the causative effects of any representations said to have been made by the first and second defendants and the causative effects of the representations said to be made by the third and fourth defendants.

[40] It is in the insurer's interests to ensure the proceeding is prosecuted by the plaintiffs with an emphasis on the causative effects of the first and second defendants' representations because that will maximise the prospect of recovering the payment made by the insurer. **That emphasis, whilst in the insurer's interests, may not accord with the plaintiffs' pleaded case.**

[41] A power in the insurer to direct an amendment to the pleadings gives rise to the real possibility the plaintiffs will be required to amend their case **in order to pursue the insurer's interests, whether or not that amendment accords with the plaintiffs' previous pleaded case.**

[42] Further, **whilst the consequences of a direction to amend the proceedings so as to increase the causative effects of the representations made by the first and second defendants may benefit the plaintiffs, this benefit does not of necessity arise from a consideration of the plaintiffs' interests.** It arises as a result of a direction from the insurer to conduct the proceeding so as to benefit its interests.

[43] The possibility of the plaintiffs' pleaded case being amended to pursue the insurer's interests involves intermeddling with the proceeding which corrupts or is likely to corrupt the processes of the Court to a degree justifying a stay of the proceeding for abuse of process.

- [11] I think that there are two points to note. The first is that in paragraphs [40] and [41] his Honour was concerned with a comparison between the insurer's interests and the "plaintiff's pleaded case", not the plaintiff's interests. The second is that his Honour recognised in paragraph [42] that any amendment might be to the benefit of the plaintiff, by which I think his Honour means in their financial interests, but not arise from a consideration of their interests. I confess to being puzzled by that latter comparison. I think that it is fundamental that the Court here is not concerned to protect the plaintiff's interests but the Hobson defendants' interests in so far as they are aligned with the interests of justice: cf *Giles v Thompson* [1993] 3 All ER 321 at 326 per Steyn LJ; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 at 229 per Mason P. Given Boddice J's reasoning, the only legitimate interest those defendants have is in having the proceedings conducted as the plaintiffs would have done, absent the settlement.
- [12] Senior counsel for the Hobson defendants submitted that "[t]he very fact that the insurer may seek an amendment to give effect to its interests, rather than the plaintiffs' interests, remains an unacceptable meddling".² With respect, that is not what Boddice J said and that was not the concern that Boddice J acted on. Indeed I cannot discern what difference there is between the plaintiff's interests and Lexon's interests.
- [13] I enquired of the parties what practically the insurers could do to influence the proceedings, and in a way that the plaintiffs would not wish them to, but received no satisfactory response.
- [14] As best I can see, practically speaking, the plaintiffs' interests and Lexon's interests are now identical. The effect of the Deed is that the insurers receive the first \$450,000 of any eventual judgment and the costs expended on prosecuting the

² See paragraph 13 of the submissions

action. The plaintiffs receive nothing until that point is reached. They then share any excess equally with the insurers. Boddice J made it clear that he was concerned with the insurer placing emphasis on the causative effects of the first and second defendants' representations. That will assist them in recovering their \$450,000. But to obtain any monies over and above the settlement sum, the plaintiffs must also ensure that the tribunal of fact is convinced of the causative potency of the representations said to have been made by the first and second defendants. I assume from their pleaded loss of over \$3.6 million, the plaintiffs have an interest in doing so. So both Lexon and the plaintiffs now have an interest in maximising the causative effect of the Hobson defendants' alleged representations and minimising the effect of the third and fourth defendants' alleged representations.

- [15] It is true that the plaintiffs' interests may have changed as a result of the settlement but that, in the normal course, is a matter with which the justice system must cope. It can hardly be said to be inimical to the interests of justice to prevent a settlement between litigating parties. No one claims that here. The plaintiffs could have, if they wished, settled with Lexon, maintained control over the proceedings, and then pursued the first and second defendants with full vigour, amending their pleadings as they saw fit and calling what evidence suited their purposes. No complaint could be made. But here Lexon has control over the proceedings and that has given rise to the concerns that have prompted the imposition of the stay.
- [16] No doubt Boddice J was fully cognisant of these matters.
- [17] This is not an appeal from the decision of Boddice J. Davies JA said in relation to a like situation in *Elfic Ltd v Macks*:³

“[169] But in any such proceedings neither the learned primary judge nor this Court is concerned to question the correctness of the findings of fact, conclusions of law or exercises of discretion of Mansfield J. to the extent that they were based on matters before him. As the learned primary judge said, this was not an appeal from the decision of Mansfield J. The question now is whether, in the light of what has occurred since, including any newly disclosed facts, some relief should now be granted. That is no doubt what the learned primary judge had in mind when he said, in the passage criticised by Mr Keane, that the findings of fact and exercises of discretion by Mansfield J. must be accepted unless the appellants establish a proper basis for setting them aside.

[170] His Honour could also have added, correctly, that he would be disinclined to depart from the legal conclusions reached by Mansfield J. with respect to the application of the *Corporations Law* to those facts unless convinced that Mansfield J. had been plainly wrong.”

- [18] Applying those principles I therefore assume that the relevant comparisons drawn and distinctions made by Boddice J govern the case. I have endeavoured to identify

³ [2003] 2 Qd R 125 at 159-160

the risk that concerned his Honour. I take that risk to be the possibility of the case being conducted in a manner contrary to the way it would have been conducted absent the settlement. The issue then is whether the terms of the new Deed meet that risk. In my opinion the new Deed does not.

[19] As senior counsel for the Hobson defendants said, all that the new Deed does is push the issue sideways, onto the proposed nominated lawyer. The fact that each party is “to act reasonably and in good faith” in respect of any conflict, does not meet the problem. That lawyer is offered no guidance in the Deed as to how his or her discretion to resolve any dispute is to be exercised. That lawyer is not directed to determine any issue in the same way it would have been determined had the settlement not been entered into. There is no direction that the lawyer nominated is to be supplied with the decision of Boddice J and so even understand the concern that needs to be met by their decision. That lawyer is not directed to disregard the interests of the insurer and to prefer the interests of the plaintiffs (assuming that to be of relevant concern) should there be any conflict. Indeed there is no mechanism whereby the plaintiffs are even alerted to the need to trigger the operation of the conflict resolution clause. Nor can I see why they would, given the co-incidence of their interests and Lexon’s interests.

[20] Finally I note that submissions were made by senior counsel for the Hobson defendants concerning the position of the solicitors acting for the plaintiffs. Those latter solicitors are now in possession of the information formerly held by the third and fourth defendants in their capacity as solicitors for the Hobsons. It is said that that information can be used against the Hobson defendants. That is no doubt so. However these considerations are irrelevant to my present task. Boddice J was well aware of this issue and determined that he would not restrain the solicitors from acting. There has been no appeal. That is the end of the matter.

I do not think that the impermissible intermeddling that concerned Boddice J is beyond remedy. Given that the plaintiffs apparently are endeavouring to pursue their cause of action, which on the face of their pleadings is a perfectly good one, rather than dismiss the application I will adjourn it to a date to be fixed to be brought on on the giving of seven days notice to the Hobson defendants. The plaintiffs are directed to provide written submissions on the costs orders that ought to be made on or before 4 pm Friday 30 June 2017. The first and second defendants are directed to provide written submissions in response on or before 4pm Friday 7 July 2017.