DISTRICT COURT OF QUEENSLAND

CITATION:	*Higginbotham v Star Stone Corporate Capital Ltd & Ors* [2019] QDC 35
PARTIES:	**SCOTT HIGGINBOTHAM** (Plaintiff) **v** **STAR STONE CORPORATE CAPITAL LTD (ON ITS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE LLOYD'S SYNDICATE 1301)** (First Defendant) **and** **PSC INSURANCE BROKERS (AUST) PTY LTD** (Second Defendant) **and** **THE BLAZE AGENCY PTY LTD AS TRUSTEE OF THE BLAZE UNIT TRUST** (First Third Party) **and** **DAMIEN MCGREGOR-LOWNDES** (Second Third Party)
FILE NO/S:	303/18
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Qld, Brisbane
DELIVERED ON:	27 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2018
JUDGE:	Reid DCJ
ORDER:	**1. The third parties' application filed 30 October 2018 is dismissed;** **2. In relation to the second defendant's application filed 18 October 2018:** **(a) The second defendant be given leave to amend paragraph 1(a) of its application such that sub-paragraph (a) thereof shall read as follows:**

(i) "Paragraphs 7(b), 10(g), 10(h), 10(i), 10(j), 11(b), 12(b)(ii), 12(b)(iv)(5), 12(b)(iv)(6), 14(c), 27, 29, 30(d)(iv), 30(e)(ii), 31(a) and 38";

(b) Paragraphs 7(b), 11(b), 12(b)(ii), 12(b)(iv)(5), 12(b)(iv)(6), 14(c), 27, 29, 30(d)(iv), 30(e)(ii), 31(a) and 38 of the defence of the first and second third parties be struck out and the third parties be given leave to replead;

(c) The application in relation to paragraph 10 of the defence of the third parties is dismissed.

CATCHWORDS: Application to strike out paragraphs of a party's pleading – UCPR r 171 – allegation that conduct was prohibited by *Corporation Acts 2001* (Cth) s 911A – section requires a person who carries on a financial services business to hold a relevant license – no allegation third parties carried on such a business – whether third parties' pleading properly alleged a breach of the section – representation – allegation third parties' pleading does not properly allege reliance – failure to comprehend factual basis of third parties' pleading – pleading raises issues of reliance on presentation of second defendant relevant to relationship between it and third parties – allegation of foreseeable harm – defence denying pleading identifies any foreseeable risk – failure to disclose any reasonable defence – unresponsive pleading – allegation second defendant failed to comply with consumer protection provisions of *Corporations Act 2001* (Cth) – pleading an assertion of law – failure to plead relevant facts – irrelevant allegations

UCPR rr 149(2), 171

Corporations Act 2001 (Cth) ss 911A, 941A, 946A and 1012A

COUNSEL: N J Pearce for the second defendant
P K O'Higgins for the first third party and the second third party

SOLICITORS: HWL Ebsworth Lawyers for the second defendant
McCullough Robertson as town agents for Maddocks Lawyers for the first third party and second third party

Introduction

[1] Each of the second defendant on the one hand and the first and second third parties (hereinafter collectively the third parties) on the other hand have filed applications seeking to strike out part of the other party's pleadings.

[2] The proceedings arise out of an injury suffered by the plaintiff, a professional rugby union footballer. The second defendant is an insurance broker who arranged certain insurance cover for the plaintiff. It did so at the request of the third parties, who acted as the plaintiff's player agent.

[3] The third party proceedings are based on an alternate claim to the second defendant's primary contention raised in defence of the plaintiff's claim against the second defendant. Primarily the second defendant contends that the third parties are concurrent wrongdoers, a contention denied by the plaintiff.

[4] The second defendant pleads in the third party proceedings that, in the alternative, if the plaintiff's claim is not an apportionable one, the third parties are liable to indemnify or contribute to the second defendant's liability to the plaintiff. It is in respect to each party's pleading in that alternate third party claim that the two applications before me are made.

The applications

[5] It was at the commencement of the hearing before me agreed that the second defendant be given leave to amend para 1(a) of its application by altering some of the numbered paragraphs of the third parties defence which the second defendant seeks to strike out. The second defendant now seeks orders that, pursuant to r 171 of the *Uniform Civil Procedure Rules* (UCPR), paras 7(b), 10(g), (h), (i) and (j), 11(b),

12(b)(ii), 12(b)(iv)(4), (5), (6), 14(c), 27, 29, 30(d)(iv), 30(e)(ii), 31(a) and 38 of the third party's defence to the statement of claim of the second defendant be struck out. Ultimately the third parties concede that they should amend para 38, and it is unnecessary to further consider that paragraph. It is common ground that the second defendant's application raised common issues such that consideration of its application could be grouped as follows:

1. Paras 7(b), 11(b), 12(b)(ii), 14(c), 30(d)(iv), 30(e)(ii) and 31(a) of the defence of the third parties;
2. Paras 10(g), (h), (i) and (j) thereof;
3. Paras 27 and 29 thereof; and
4. Paras 12(b)(iv)(4), (5) and (6).

[6] The third party's application pursuant to r 171 UCPR to strike out parts of the second defendant's statement of claim can also be appropriately grouped collectively in relation to paras 27, 28 and 29 of that statement of claim. In the application, para 8 was also the subject of a strike out application but because, ultimately, the second defendant did not pursue further consideration of the third party's response to this paragraph of the statement of claim, that part of the third parties' application was not proceeded with.

Background

[7] In order to consider the applications it is necessary to first understand something of the background to the litigation and then to consider the pleadings, at least in respect of the paragraphs referred to above.

[8] The plaintiff played professional rugby for the Queensland Reds in the 2017 Super Rugby season. In April of that year he signed a contract to play in Japan at the end

of the Super Rugby season. He retained the second defendant, through the third parties, to obtain cover for loss he might sustain if the contract in Japan was cancelled in the event of his suffering injury sustained prior to taking up that contract. The second defendant recommended insurance with the first defendant. That insurance was effected.

[9] The player was in June 2017 injured playing for the Australian team, the Wallabies, in a test match.

[10] The insurer refuses to pay the sum insured because, it contends, the policy was restricted to injury when engaged in activities with the Queensland Reds and not with the Wallabies.

[11] That restrictive view of the policy is disputed by the plaintiff. The player further contends that the second defendant, being the insurance broker, breached its retainer or duty of care to him by failing to effect appropriate cover to ensure he was covered when playing for the Wallabies.

[12] In its defence the second defendant pleads that the players claim is an apportioned claim under part 2 of chapter 2 of the *Civil Liability Act* and that, by reason of the third party's failure to properly instruct the second defendant as to the plaintiff's requirements, the third parties are concurrent wrong doers within the meaning of s 30 of that Act. The second defendant alleges in its defence:

1. That it is not liable for the plaintiff's loss or damage;
2. Alternatively, it is liable only for the proportion of the plaintiff's loss the court considers just and equitable in accordance with s 31 of the *Civil Liability Act*.

[13] The second defendant obtained leave to join the third parties who are the plaintiff's player agents. It pleads in its claim against the third parties that if it is liable to the

plaintiff, and the claim is not an apportioned one, then it is entitled to indemnity or contribution from the third parties. It further pleads that the third parties owed the second defendant a duty of care not to cause harm to it as a result of misrepresenting the player's instructions or misrepresenting the player's understanding of the terms and conditions of the policy. In particular the second defendant alleges the third parties did not tell the second defendant that the plaintiff required cover for loss he might sustain from injury he might suffer playing for the Wallabies. It alleges the plaintiff's loss arises as a result of the conduct of the third parties and claims the third parties are liable to indemnify it with respect to the plaintiff's claim.

[14] The third parties defend the second defendant's claim against them on the basis, inter alia, that they did not owe the second defendant a duty of care and that they relied on the expertise of the second defendant to arrange appropriate cover. Further, they allege that the *Corporations Act* 2001 (Cth) precluded them from advising the plaintiff about his insurance requirements as they were not licenced to do so under that Act. They allege the second defendant, as a holder of an Australian Financial Services Licence (AFSL), was engaged by the plaintiff to provide such advice. They allege that any loss the second defendant might suffer is a result of its own negligence.

[15] In such circumstances each of the second defendant and the third parties seek to strike out parts of the other party's pleading.

Second defendant's application

[16] It is appropriate to deal with the second defendant's application first. As I earlier indicated the second defendant's objections to the third parties defence can be considered in four separate groups. I will deal with each of those in the order set out in [6] above.

[17] The paragraphs of the third parties' defence set out in sub para (1) of para [6] hereof should, it was submitted by the second defendant, be struck out because each of the numbered subparagraphs relies on the assertion that s 911A of the *Corporations Act* "prohibits" certain conduct by the third parties. The second defendant submits that the section does not impose any such prohibition but merely requires that "a person who carries on a financial services business (in Australia) must hold an Australian Financial Services Licence covering the provision of the financial services". It does not suggest the third parties carried on such a business.

[18] The third party submits that in conformity with the requirements of the section the third parties did not make representations or take actions concerning the insurance policy because to do so would have been to provide financial product advice contrary to the requirement to have an AFSL in order to do so.

[19] In my view, in the absence of an assertion the third parties carried on such a business, s 911A cannot preclude the third parties from engaging in the conduct the second defendant alleges was required of them. To have done so would not mean that they were carrying on a financial services business and so would not require that they hold an AFSL. More fundamentally, the third party pleading does not assert they would have been engaged in carrying out a financial services business if they had given such advice or the basis of any such assertion.

[20] The pleading indicates in my view that the third parties mistake the need to obtain such a licence if carrying on a financial services business and a prohibition on them, in circumstances where they do not have such a licence, from providing financial services of any kind incidental to the business they conducted as a football player agent.

[21] In oral submissions counsel for the third parties submitted that "the nub of the allegation is (that) the broker (is) the one licenced to carry out this exact type of business" (see T1-26 l 18 FF). He however conceded at (T1-26 l 33/37) that "you do not have to be licenced in order to give that type of advice".

[22] In the circumstances it appears to me that to then assert that the third party was not allowed to give advice to their client, the player, about the policy because to do so would amount to carrying on a financial services business without a licence to do so is untenable.

[23] It may be that in fact what the third parties really wish to allege is that the fact that the second defendant held such a licence imposed on it, the second defendant, an obligation to provide advice about the scope and content of the policy. That in my view is an assertion which could quite readily be pleaded by the third parties and does not depend on an assertion that for the third parties to advise its footballing client about the scope of the policy requires it to engage in unlawful conduct.

[24] Those paragraphs referred to in sub-paras 1 of para [6] hereof should therefore be struck out, with leave given to the third party to replead.

[25] The second defendant next seeks to strike out paras 10(g), (h), (i) and (j) of the third parties' defence. Those paragraphs relate to the third parties' response to para 10 of the second defendant's statement of claim against them. In that paragraph the second defendant asserts, inter alia, that:

(i) Mr Carl Truijans, a principal of the second defendant, was phoned by the second third party (Mr McGregor-Lowndes);

(ii) Mr McGregor-Lowndes advised Mr Truijans he was the plaintiff's player agent and was a representative of the first third party;

(iii) Mr McGregor-Lowndes advised Mr Truijans he needed a "quotation for insurance" to indemnify the plaintiff if he suffered loss of his contractual entitlements arising from a contract to play rugby in Japan in the event of being injured when playing for the Queensland Reds rugby team.

[26] In relation to those allegations the third parties plead in sub-paras (g), (h), (i) and (j) of para 10 of their defence (which I shall hereafter refer to using the same subparagraph numbering as in the pleading);

(g) (i) Mr Truijans made a representation about insurances at the Rugby Union Players Agent Accreditation Conference in 2016, which was attended by Mr McGregor-Lowndes;

(ii) The presentation stated, inter alia, that players playing on an overseas contract can arrange suitable insurance to protect them "in the event that they are unable to fulfil a future overseas contract."

(h) The second defendant "thus held itself out as having particular expertise in respect of the insurance needs of Australian professional rugby players" especially in relation to those who might be injured playing in Australia and thus unable to fulfil overseas playing obligations;

(i) "As a result of that presentation and the fact that it was given at a RUPA accredited agents conference" Mr McGregor-Lowndes

believed the second defendant had particular expertise in advising the plaintiff in relation to appropriate insurance;

(j) "For that reason and purpose" Mr McGregor-Lowndes contacted the second defendant on behalf of the plaintiff.

[27] The second defendant seeks to strike out those paragraphs of the third parties' defence. It submits inter alia, that the pleading does not allege the first or second third parties "attended, received, read or otherwise were aware of that representation with the result that the fact of the delivery of the presentation is not relevant to any state of mind of the third parties".

[28] It further submits that in correspondence (see Exhibit TRJ-09 to the affidavit of Trent Jones) the third parties assert those paragraphs are relevant to:

(i) The scope of agency between the third parties and the plaintiff;

(ii) The third parties' denial of breach of any duty owed by them to the plaintiff and to the second defendant;

(iii) The just and equitable contribution sought under the *Law Reform Act*;

(iv) Contributory negligence.

[29] It is in my view palpably clear that the third parties assert that Mr McGregor-Lowndes attended the conference at which Mr Truijans made the presentation referred to in the third parties' defence. It is also palpably clear that the third parties assert that by reason of that presentation, and in particular by reason of the matters alleged in para 10(g)(2) of the defence, Mr McGregor-Lowndes believe the second defendant has expertise in relation to arranging insurance to cover players who had contracted to play rugby overseas and were injured playing football in Australia so as to prevent them from fulfilling their overseas contract.

[30] It is also clear that it is alleged that Mr McGregor-Lowndes believed by reason of that presentation that the second defendant had particular expertise in advising the plaintiff about and procuring appropriate insurance.

[31] The second defendant asserted in submissions that the third parties "do not allege" that they "attended, received, read or otherwise were aware of that presentation". That allegation is inconsistent with the express pleadings of the third parties. The assertion in para 10(i) of the defence that "as a result of that presentation" the second third party believed the second defendant had expertise in relation to procuring appropriate insurance and the assertion in sub-para (j) that "for that reason and purpose" the third parties contacted the second defendant is clearly a pleading of reliance. In my view that makes the content of sub-paras (g), (h), (i) and (j) of para 10 relevant to the dispute between the second defendant and the third parties. They help define the relationship between the second defendant and the third parties the subject of para 10 of the second defendant's statement of claim against the third parties and are relevant to the state of mind of the second third party at the time he contacted the second defendant about such insurance.

[32] In my view the presentation by Mr Truijens is, on the pleadings, clearly relevant to the state of mind of Mr McGregor-Lowndes, and so also of the first third party, contrary to the second defendant's submission to the contrary at para 14 (c) of her written submissions.

[33] Counsel for second defendant after oral discussion concerning the issue of whether the pleadings properly alleged reliance, and whether Mr McGregor-Lowndes attended the relevant conference, also submitted that the allegations in sub-paragraphs (g), (h), (i) and (j) of para 10 of the third party's defence were in any case irrelevant

or made for some other unspecified improper purpose, and so likely to delay or prejudice the fair trial of the matter.

[34] In her written submissions counsel for the second defendant referred to the correspondence from the solicitors for the third parties of 18 October 2018, referred to in [29] hereof.

[35] That correspondence was a response by the third parties to the second defendant's solicitors' complaints about the third parties' defence. Counsel enumerated what the third parties' solicitors had said was the relevance of sub-paragraphs (g), (h), (i) and (j) of paragraph 10. Specifically the solicitors had said the sub-paragraphs are relevant to, inter alia, the third parties' denial of the breach of any duty owed by the third parties to the plaintiff and to the second defendant.

[36] Counsel for the second defendant submits in respect of that matter that the matters alleged in sub-paragraphs (g), (h), (i) and (j) are not relevant or capable of effecting any duty existing, inter alia, between the third parties and the second defendant "in circumstances where it is not alleged that either of the third parties saw the presentation". I have already indicated why that submission is factually incorrect. In my view in those circumstances it cannot be said, as was submitted, that the allegations are irrelevant to the question of whether or not there was any breach of a duty owed by the third parties to the second defendant. It cannot be said that the allegations are irrelevant or made for an improper purpose. They are relevant to issues which arise on the pleadings concerning the scope of any duty that might arise between the second defendant and the third parties and so ought not be struck out.

[37] The next issue concerns paras 27 and 29 of the third party's pleading. Such pleadings are a response to the second defendant's allegation;

(i) That it was reasonably foreseeable that if the third parties did not carry out instructions of the plaintiff to arrange suitable insurance to protect him, then the plaintiff would suffer loss or damage and;

(ii) That it was also reasonably foreseeable that if the third parties misrepresented either the plaintiff's instructions about such insurance or that the plaintiff understood the terms and conditions of the policy, that the plaintiff would suffer loss.

[38] In its defence to those allegations the third parties, in para 27 of their defence, deny the allegation referred to in sub-para (1) above "because the pleading does not identify any foreseeable risk of harm to the plaintiff or how he would suffer loss or damage".

[39] The third parties also, in para 29 of their defence, deny the second allegation above "because the pleading does not identify any foreseeable risk of harm to the plaintiff or how he would suffer loss".

[40] In my assessment the pleadings in paras 27 and 29 of the third parties' defence are unresponsive to the matters alleged in the statement of claim and disclose no reasonable defence. It cannot be said of para 27 of the second defendant's statement of claim that the reasonable risk of harm to the plaintiff or how he would suffer loss is not identified.

[41] The risk, in the circumstances of this case, was clearly a risk of loss of the benefit of appropriate insurance to cover the plaintiff for loss arising out of his being unable to play in Japan pursuant to his playing contract if he were to suffer injury when playing in Australia prior to his commencing playing in Japan. That is, to me, self-evident from the nature of the plaintiff's case as identified in the second defendant's pleading.

[42] To merely deny the content of para 27 because of the assertion the pleading does not identify any foreseeable risk of harm to the plaintiff is unresponsive. The pleading, in the context of the whole of the pleaded case, does sufficiently identify the foreseeable risk of harm and the third party should in such circumstances also be required to re-plead to para 27 of the defence.

[43] So too an identical approach has been inappropriately taken by the third parties to the allegation in para 29 that it was reasonably foreseeable that if the third parties misrepresented the plaintiff's instructions or misrepresented that in fact the plaintiff understood the terms and conditions of the policy then that he would suffer loss. In the circumstances of the second defendant's' pleaded case the risk was that if the third parties failed to communicate that the plaintiff wished to effect cover in respect of injuries suffered when playing for the Wallabies, or failed to communicate that the plaintiff understood he was covered for injury suffered only when playing for the Reds, and not for the Wallabies, he might suffer loss.

[44] The final issue in the second defendant's application concerns para 12(b)(iv)(4), (5) and (6) of the third parties' defence. That pleading is in response to para 12 of the second defendant's statement of claim in which it is said the second defendant had on 7 March emailed proposed terms and conditions of insurance for the plaintiff to the second third party, Mr McGregor-Lowndes, together with a financial services guide and documents entitled "important information for clients". The third parties contend that the email constituted financial product advice from the second defendant to the plaintiff and in sub-paras (4), (5) and (6) of para 12(b) (iv) allege that the email was provided without a financial services guide, statement of advice or product disclosure statements, contrary to requirements of s 941A, 946A and 1012A of the *Corporations Act*, and so was in breach of those sections.

[45] The assertions can be seen to be ones of law – namely that the second defendant has breached various sections of the *Corporations Act* – but the third parties do not plead facts to support such conclusions, contrary to the requirements of r 149(2) UCPR that requires, if a party pleads a conclusion of law, that it states also the material facts in support of that conclusion. The pleading by the second defendant relates to its communicating the terms and conditions of the insurance effected on behalf of the plaintiff to the third party. That communication is of course relevant to the issue of whether the plaintiff and the third parties knew that the policy extended only to his suffering injury when playing for the Queensland Reds and not if injured playing for the Wallabies.

[46] In such circumstances the allegation that the second defendant breached the consumer protection provisions of the *Corporations Act* appears to me, in any case to be entirely irrelevant. Even if true, that does not affect the scope of the insurance arranged or the plaintiff's or third parties' knowledge of that matter.

[47] In written submissions the third parties submit that the fact the email "contained only a summary" of the proposed coverage and "did not attach a financial services guide or other alleged document" and also that the second defendant had failed to comply with the regime for financial product advice under the Act is relevant. It submits that these allegations are relevant to the assertion of breach of duty of care, scope of requested advice and reliance.

[48] In my assessment, issues concerned with whether there was in fact a breach of the relevant provision of the *Corporations Act* are entirely irrelevant to consideration of such issues. They cannot affect in any way the alleged duty owed to the plaintiff or issues of contribution or contributory negligence. They are quite simply irrelevant and should be struck out.

Third parties' application

[49] The third party applies to strike out paras 27, 28 and 29 of the second defendant's statement of claim. I have referred already to paras 27 and 29 in considering those corresponding sections of the third parties' defence.

[50] Paragraph 28 is an allegation that the third parties each owed the second defendant a duty of care not to cause harm as a result of any negligent misstatement.

[51] The third parties deny that it owed such a duty "because it did not owe the pleaded duty of care" – an entirely circuitous assertion. No facts are relied on which might enable a court to conclude that no duty of care was owed by the third parties to the defendant. In my assessment the application to strike out para 28 of the second defendant's statement of claim should be dismissed.

Relevant orders

[52] I order:

1. The third parties' application filed 30 October 2018 is dismissed
2. In relation to the second defendant's application filed 18 October 2018:
   (a) The second defendant be given leave to amend paragraph 1(a) of its application such that sub-paragraph (a) thereof shall read as follows:
      (i) "Paragraphs 7(b), 10(g), 10(h), 10(i), 10(j), 11(b), 12(b)(ii), 12(b)(iv)(5), 12(b)(iv)(6), 14(c), 27, 29, 30(d)(iv), 30(e)(ii), 31(a) and 38";
   (b) Paragraphs 7(b), 11(b), 12(b)(ii), 12(b)(iv)(5), 12(b)(iv)(6), 14(c), 27, 29, 30(d)(iv), 30(e)(ii), 31(a) and 38 of the defence of the first and second third parties be struck out and the third parties be given leave to re-plead;

(c) The application in relation to paragraph 10 of the defence of the third parties is dismissed.

Costs

[53] After hearing submissions, I order:

1. The third parties should pay the second defendant's costs of the third parties application filed 30 October 2018;

2. The third parties should pay 60% of the second defendant's costs of the second defendant's application filed 18 October 2018.