

CITATION: *Dwyer v Noden* [2005] NTMC 047

PARTIES: LESLEY DUNCAN DWYER

v

SALLY JANE NODEN

TITLE OF COURT: LOCAL COURT

JURISDICTION: Local Court Act

FILE NO(s): 20500647

DELIVERED ON: 3 August 2005

DELIVERED AT: DARWIN

HEARING DATE(s): 4 July 2005

JUDGMENT OF: A/JR Day

**CATCHWORDS:**

Practice and Procedure - Local Court Rules – Amendment of Pleadings – Strike out for failure to disclose a cause of action.

**REPRESENTATION:**

*Counsel:*

Plaintiff: Mr. Cahill  
Defendant: Mr. Tompkins

*Solicitors:*

Plaintiff: Peter Cahill  
Defendant: Cridlands

Judgment category classification: B  
Judgment ID number: [2005] NTMC 047  
Number of paragraphs: 22

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20500647

BETWEEN:

**LESLEY DUNCAN DWYER**  
Plaintiff

AND:

**SALLY JANE NODEN**  
Defendant

REASONS FOR JUDGMENT

(Delivered 3 August 2005)

ACTING JUDICIAL REGISTRAR DAY:

1. This matter came before me on 4 July 2005 when the plaintiff made application for leave to amend the statement of claim in this proceeding and the defendant applied for the plaintiff's statement of claim to be struck out and for ancillary orders. As was agreed by counsel during argument it is appropriate to deal first with the plaintiff's application.
2. This proceeding was commenced by the filing of a statement of claim on 7 January 2005. In the proceeding as it then stood Noden Dwyer Nominees Pty Ltd ACN 089 624 215 ('the company') was named as the first plaintiff and Lesley Duncan Dwyer as second plaintiff. On 6 April 2005 Judicial Registrar Fong Lim made orders by consent striking out the first plaintiff's claim and giving leave for the remaining (second) plaintiff to file and serve a draft amended statement of claim within 14 days. At a pre-hearing conference on 4 May 2005 the plaintiff was ordered to file and serve any application to file and serve an amended statement of claim within 14 days.

On 1 June the plaintiff was given a further 14 days to comply with the previous order.

3. The proposed form of the plaintiff's amended statement of claim is annexed to the form 25A application filed by the plaintiff on 14 June 2005. References in this judgment are to that document.
4. The defendant opposed the application to file the amended statement of claim. The opposition is put on a number of bases, the most significant of which is that the defendant alleges that the proposed amended statement of claim fails to disclose a cause of action.
5. The Court's power to allow the amendment in these circumstances is governed by rules 3.08 (General Power of Amendment) and 5.15 (Amendments and orders as to form, filing and service) of the *Local Court Rules*. The main purpose of allowing the amendment of pleadings in situations such as the present is to enable determination of the real question in issue between the parties and thereby avoid multiplicity of proceedings.
6. The law as to amendments was stated by Dawson J. in the High Court in *The Commonwealth v Verwayen* (1990) 70 CLR 394 at 456 in the following terms

“In granting leave to amend, a court is concerned with the raising of issues and not with their merits. Of course, an amendment which is futile because it is obviously bad in law will not be allowed. But it is no ground for refusing an amendment that it raises a claim or defence which ought not to succeed. That will be an issue upon trial.”

The defendant in this matter argues that the plaintiff's purported amended statement of claim is futile because it is bad in law. The plaintiff's response is that these are issues which should be determined at trial.

7. There are a number of components to the claims raised by the plaintiff in the amended statement of claim. Firstly, in paragraphs 1 – 3 the plaintiff

alleges that there was an agreement between the parties, which he calls a 'joint venture', pursuant to which certain things were done and which, he asserts, gave rise to a fiduciary obligation by the defendant to the plaintiff.

Paragraph 1 of the amended statement of claim is in the following terms

- “1. Pursuant to an Agreement made in Bendigo, Victoria in or about September 1999 between the Plaintiff and Defendant, it was agreed that;
  - a) They would form Noden Dwyer Nominees Pty Ltd ('the Company') with themselves as directors and shareholders thereof;
  - b) The company would take a lease of the premises in the Casuarina Shopping Centre in Darwin ('the Premises') and commence to conduct the business of a Health food shop under the name "Natural Life" ("the business");
  - c) The Defendant would move to Darwin and be responsible for the conduct and management on a day to day basis of the Business as a director of the company and regularly report to the Plaintiff as to the conduct and operation of the Business;
  - d) The plaintiff would advance \$110,000 to the Company to enable the Company to setup and conduct the Business ("the Loan");
  - e) The Loan was to be repaid to the Plaintiff from the Business by calendar monthly instalments of \$2,000.00 ("the Loan Repayments")

### **PARTICULARS**

The agreement was party in writing, partly oral, partly to be implied. In so far as it was in writing it was constituted by a Debenture Charge between the Company and the Plaintiff entered into on or about November 1999 and the necessary documents associated with the creation of the Company. In so far as it was oral it consisted of conversations between the Plaintiff and the Defendant at Bendigo during August and September 1999, the substance of which is as alleged. In so far as it was implied, it was implied by the fact that the Company was formed and leased the Premises, conducted the Business and the need to give business efficacy to the foregoing ("the Joint Venture").”

8. Paragraph 1 of the amended statement of claim is the central statement of facts upon which the claim is based. It refers to the agreement which, in the particulars, is called the joint venture. Leaving aside the question of whether the agreement is properly described in that way it is hard to see that the pleading describes any agreement between the parties to conduct a business on their own behalf. It is pleaded that the agreement was to conduct a business through the company and that this was put into effect. The company took the lease on the premises and conducted the business. There was a loan from the plaintiff which was secured by a debenture. It is pleaded at 1(e.) that the loan was to be repaid from the business. This can only be the business conducted by the company. It is not pleaded that anyone else owned the business or, for example, that there was any partnership between the company and the parties or either of them in relation to the health food shop. Accepting the facts set out in the pleading this was a business conducted by a company on behalf of its shareholders, who were the parties, via the directors, who are also the parties. In my opinion this paragraph does not, contrary to submissions made on behalf of the plaintiff, disclose any agreement between the plaintiff and the defendant to do anything other than set up a company to run the business, an agreement which, it is pleaded, has been brought to fruition.

9. At paragraph 2 of the amended statement of claim the plaintiff claims

“2. By virtue of the matters set out in paragraph 1 hereof the Defendant was in a position of trust and confidence and thereby was under a duty to the Plaintiff conduct the business in a proper and business-like manner for the benefit of the Plaintiff and the Defendant (“the Defendants Duty”)

It was submitted by the defendant’s counsel that any duty owed by the defendant in her capacity as a director can only have been owed to the company, not to the plaintiff because the directors of a company owe a fiduciary duty to the company alone and not to the individual shareholders. The case relied upon was *Cope v. Butcher* (1996) 20 ACSR 37, a decision of

Acting Master Johnston in the Supreme Court of Western Australia where he quotes, at p.38, a decision of Brinsden J. of that Court, *Esplanade Developments Pty Ltd v. Dinive Holdings Pty Ltd* [1980] AR 151 which in turn refers to the original decision on this point, namely *Percival v. Wright* [1902] 2 Ch 421. This point is not always straightforward. In *Brunninghausen v. Galvanics* (1999) 17 ACLC 1,217 the Court of Appeal of New South Wales held that the decision in *Percival v. Wright* (supra) was not binding upon the Court and that whilst the principle was in general correct and undiminished there may be situations where a fiduciary duty is owed to shareholders in relation to dealings in their shares and so the Court found in that case (see *Brunninghausen v. Galvanics*, supra, p. 204).

10. The existence of the fiduciary duty found by the NSW Court of Appeal in *Brunninghausen v. Galvanics* was, however, a rather special situation. The Court made it clear that the duty was owed in the circumstances of that case because the subject matter (purchase by the director/shareholder of the shares of a minority shareholder) was not the same as and did not compete with, any duty owed by the director to the company. Indicators of the existence of a fiduciary obligation between the directors of a company and a shareholder are summarised by the authors of *Ford's Principles of Corporations Law* (11<sup>th</sup> edn., Ford, J., Austin, R. & Ramsay, I.) at paragraph [9.050] as follows:

“In summary, pointers towards the existence of a fiduciary obligation include shareholders’ dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and the extent of any positive action taken by, or on behalf of, the directors to promote the transaction and the structure of shareholdings in the company: *Coleman v. Myers* [1977] 2 NZLR 255 at 325; *Chan v. Zacharia* (1984) 154 CLR 178 at 198 per Deane J; *Glavanics v. Brunninghausen* (1996) 19 ACSR 204.”

Having considered these issues I have formed the view that the matters pleaded in paragraph 1, particularly when taken together with the

statements of fact in paragraph 3, which clearly state that the parties together did set up and operate the business through the company, do not disclose circumstances which could at law give rise to the fiduciary obligation pleaded in paragraph 2.

11. The pleading in paragraph 4 alleges an agreement between the parties in March 2003 whereby the plaintiff agreed to purchase the defendant's shares for \$47,620. This agreement is alleged to have been subject to a condition precedent (although it is not stated in that way) that the defendant would allow the plaintiff to set up a new health food shop in Darwin. At paragraph 7(a) it is pleaded that the defendant did subsequently set up another business. I am not entirely sure about the relevance of the pleading concerning what I have termed the condition precedent except perhaps to show that it was fulfilled. The defendant's objection to this pleading, in her written submissions, is that the plaintiff has not alleged the capacity in which the defendant offered to buy the shares. I do not consider that this is a proper objection. The plaintiff is entitled to plead an agreement to purchase shares and to plead, as he does (with some deficiencies described below) at paragraph 10, a breach of that agreement and consequent loss. To this extent the amended pleading appears to me to disclose a cause of action and is therefore not futile, although it requires amendment as described further below.
12. Paragraphs 5 – 8 of the amended statement of claim rely upon almost the same facts as paragraph 4 but in paragraph 5 these are pleaded as 'representations' rather than terms of an agreement. I note that 5(b.) is raised for the first time and does not form part of the agreement pleaded at paragraph 4. At first blush it appears that the bulk of the matters set out at this part of the proposed pleading should more properly form the basis for a statutory derivative action and/or action brought by the company for breach of director's duties contained in Pt 2F.1A of the *Corporations Act*. Such an action can only be commenced by leave pursuant to s.236 of the

*Corporations Act*. However the proposed pleading does not seek to bring such an action as the company is no longer named as a plaintiff, as described above.

13. I have formed the view that paragraphs 5 and 6, pleaded as they are in terms of representations made, should not be allowed in their current form. I have considered the various causes of action based upon misrepresentation, breach of legislative misleading and deceptive conduct provisions and based upon the equitable doctrine of estoppel and it seems to me that the pleading does not sufficiently identify any of these. The representations pleaded may be put on the basis that they were inducements to get the plaintiff to enter into another agreement, namely an agreement to allow the defendant to set upon a rival business to that of the company. It is not made clear what loss the plaintiff (or indeed the company) has suffered as a result of this.
14. The losses stated at paragraph 8 (in the pleading put as matters in respect of which the said representations were untrue) cannot flow from the representations as pleaded. Those particular 'losses' (failure to pay certain amounts allegedly due to the plaintiff) could only flow from a failure by the plaintiff to complete a concluded agreement, of the sort pleaded at paragraph 4. (As noted above, paragraph 4 does not include the additional undertaking to repay the monies owed by the company to the plaintiff pursuant to the loan.) The pleaded 'losses' cannot possibly result from the fact that the plaintiff acted to his detriment by consenting to the establishment of a rival business which is the only operative representation coming from the pleading at paragraph 6. The sort of loss that would apply there would be such things as the reduction in value of the plaintiff's shares in the company. This is not pleaded. Of course in order to plead this sort of loss the plaintiff would have to show that there was a breach of a fiduciary duty owed by the defendant to the plaintiff personally, as opposed to a duty to the company. This has not been done.

15. In conclusion therefore I consider that paragraphs 5 – 8 of the proposed amended statement of claim are confusing and therefore embarrassing in that they do not clearly state the case which the defendant is required to meet. Further I am of the opinion that those paragraphs as currently pleaded do not disclose a proper cause of action. Accordingly the amendment presently sought in that regard should not be allowed.
16. Paragraph 9 is also embarrassing and should not be allowed. The pleading seeks to claim loss to the plaintiff in the failure of the company to make repayments under the loan agreement. The plaintiff relies firstly upon a breach of the ‘joint venture’ agreement referred to in paragraph 1. The breach is said to flow from the failure *by the defendant* to continue to make the loan repayments. The loan repayments were due by the company to the plaintiff. I have already found that there is nothing in paragraphs 1 and 2 which could possibly rise to a personal obligation on behalf of the defendant in that regard and therefore this pleading should not be allowed. In the alternative the same paragraph relies upon a breach of the ‘Defendant’s Duty’. This appears to be a reference to paragraph 2 and cannot be sustained for the same reason. Finally paragraph 9 relies upon the representation pleaded at paragraph 5(b). For the reasons set out above in relation to paragraph 8 this also should not be allowed.
17. I have briefly commented as to paragraph 10 above. In so far as this paragraph seeks to plead a breach of the alleged agreement by the defendant to purchase the plaintiff’s shares it is unobjectionable. Clearly, however, the reference to the representation in paragraph 5(a.) should be deleted. Further, the pleading must be incomplete as there is no reference to the relief including an order that the defendant complete the purchase by doing everything necessary to bring the share transfer into effect. In other words I agree with the submissions of the defendant that it is incumbent on the plaintiff to properly plead this cause of action to include in the prayer for relief a claim for specific performance. The plaintiff will need to plead that

he is ready willing and able to complete the transaction, specifically by tendering the shares.

18. Paragraphs 11 – 13 seek to draw into this proceeding a claim for losses which the plaintiff alleges that he suffered as a result of an action by the landlord of the company. The action was apparently taken directly against the plaintiff and the defendant in their capacity as guarantors for the company's debt to the landlord arising as a result of a breach of the company's lease. The matter is said to have been the subject of other proceedings in the Local Court which were settled. The plaintiff apparently paid some monies to the landlord, together with an amount to his own lawyers for costs. It is pleaded that there were contribution proceedings between the parties in the other proceeding. It is not pleaded that the contribution proceeding has been concluded and I will assume that it has not, although the substantive proceeding between the landlord and the parties to this action is said to have been 'settled'.
19. Contribution proceedings are available in this Court pursuant to rules 13.03 of the *Local Court Rules*. The procedure is available between parties where circumstances exist which would otherwise enable a defendant to issue a third party notice. As such the contribution notice stands as a separate proceeding and is not concluded by the entry of judgment or discontinuance of the substantive proceeding.
20. It is not appropriate for parties to commence a second proceeding in the same court seeking the same relief as that sought in an earlier action which remains on foot. The appropriate way for the plaintiff to proceed would be to seek an order either for consolidation or that the actions be heard together. In any event I should say that I am not persuaded, for the same reasons as set out above, that the matters set out in paragraphs 11-14 of the proposed amended statement of claim disclose a good cause of action. Accordingly I would not allow the amendment sought.

21. Considering the proposed pleading as a whole I have come to the view that leave to amend should be refused. It seems to me that the plaintiff just does not disclose a sufficient cause of action on the document as presently drawn. Turning to the defendant's application to strike out the existing pleading, for reasons set out above, that application should succeed. However, I am mindful that the Court should give the plaintiff every opportunity to properly present his claim in order that the matter be decided upon the merits and that the plaintiff should not be unduly penalised for the failure of his legal advisors to properly plead his case. I would not give this indulgence if I thought that the whole case was hopeless however as I have said there is at least one aspect of the pleading which may be saved by amendment. Accordingly I propose to give the plaintiff a last chance to amend his pleading. The plaintiff may wish to seek the assistance of counsel and accordingly I am prepared to give a further 28 days for the plaintiff to again seek leave to amend his statement of claim. Should the plaintiff fail to apply to amend his statement of claim in that time then the claim will be struck out. As the defendant has been substantially successful in this application the plaintiff should pay the defendant's costs of and incidental to the application to amend and the application to strike out the claim.

22. I make the following orders:

- 22.1 The application for leave to amend the statement of claim is refused;
- 22.2 The plaintiff has leave to apply, within 28 days, to amend the statement of claim;
- 22.3 Should the plaintiff fail to apply for leave to amend the statement of claim within 28 days the plaintiff's claim will be struck out;

22.4 The plaintiff is to pay the defendant's costs of and incidental to the application for leave to amend the statement of claim and the application to strike out the claim.

Dated this 3<sup>rd</sup> August 2005

-----  
MEREDITH DAY  
A/JUDICIAL REGISTRAR