IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2012 00018

BETWEEN

TRADITIONAL VALUES MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVER APPOINTED) (ACN 055 106 100) — Plaintiff

and

WHO INVESTMENTS PTY LTD & ORS — Defendants

JUDGE:	SIFRIS J
WHERE HELD:	Melbourne
DATE OF HEARING:	21 September 2015
DATE OF JUDGMENT:	8 October 2015
CASE MAY BE CITED AS:	Traditional Values Management Limited (in liquidation) v Who Investments Pty Ltd & Ors
MEDIUM NEUTRAL CITATION:	[2015] VSC 518

PRACTICE AND PROCEDURE – Application to further amend defence and counterclaim – Amendments directed to whether plaintiff made mistaken payments and whether plaintiff entitled to demand recovery – Unable to conclude that amendments have no real prospect of success – Amendments allowed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	C Van Proctor	Mills Oakley Lawyers
For the Defendant	Dr A P Trichardt	Charles Fice Solicitors

HIS HONOUR:

Introduction

1 In this proceeding the plaintiff seeks to recover money mistakenly paid to the defendants, who together, as unitholders, represent about 18.4% of the units in the Blue Diamond Trust (BD Trust).

2 The mistake arises from the overvalue of the units and in this regard the plaintiff commenced separate proceedings against the directors, solicitors, accountants and auditors of the BD Trust. These proceeds, which were consolidated, have been resolved (Related Proceeding). It is common ground that a not insubstantial payment was made to the plaintiff.

3 The defendants deny the plaintiff's claim. They deny there was any mistaken payment and plead change of position. They also proceed by way of counterclaim essentially for misleading or deceptive conduct.

4 By summons filed 21 August 2015, the defendants seek leave to amend their Further Amended Defence and Counterclaim dated 11 November 2014 in the form of the draft Second Further Amended Defence and Counterclaim (SFADCC) as annexed (CAC-3) to the affidavit of Christopher Anthony Charles sworn 21 August 2015.

5 The amendments introduce paragraph 6A which pleads the nature, substance and context of the Related Proceeding. Paragraphs 6B, 6C and 6D are in the following terms —

> 6B. In light of the facts and matters pleaded in paragraph 6A hereof, they say that —
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> (g) the monies they received as alleged in paragraph 508 were not paid to them by the Plaintiff acting under a mistake.
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> (h) if (which they deny) any monies were paid to them as alleged in paragraph 508 by the Plaintiff acting under a mistake, they say it would be unjust and inequitable to make an order that they repay the monies or any part thereof because that would result in double recovery by the Plaintiff.
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> 6C. They say further that:
>
> (i) there are 25,628,064 units in BDT;
>
> (j) they hold 4,719,976 units or 18.4% of the units in BDT;
>
> (k) the Plaintiff instituted proceedings only against them to claim

repayment of the monies allegedly paid to them by the Plaintiff acting under a mistake;

(l) the Plaintiff has not claimed, and is now statute barred from claiming, repayment of any monies from the other unit holders in BDT to whom (on the Plaintiff's theory of its case) overpayments were made by reason of their redemption of units or their receipt of income distributions in BDT in or after December 2003 (Non-pursued Unit Holders) on the basis that any such payments were made to them under an alleged mistake;

(m) if the Plaintiff were to be successful in its claim against them (which they deny) the Plaintiff will use such monies to pay its creditors and to make distributions to both them and the Non-pursued Unit Holders and/or redemptions of the units of both the and the Non-pursued Unit Holders, thereby unjustly enriching the Non-pursued Unit Holders at their expense.

6D. In light of the facts and matters alleged in paragraphs 6A and 6C hereof, it would be unjust and inequitable to order them to repay the monies they received as alleged in paragraph 508 or any part thereof, because the Non-pursued Unit Holders would benefit by receiving from the Plaintiff further monies by way distributions and/or redemptions in respect of their units in BDT.

Applicable principles

6 Recently, in *ABL Nominees Pty Ltd v MacKenzie (No 2)*,[1] Derham AsJ summarised the applicable principles as follows:

a. The power to amend in rule 36.01(1) of the *Supreme Court (General Civil Procedure) Rules 2005* (Rules) authorises the Court to order, at any stage, that a party have leave to amend any pleadings for the purpose of determining the real questions in controversy between the parties to any proceeding, correcting any defect or error or avoiding multiplicity of proceedings.

b. The Court will not engage in any detailed examination of the merits of the case foreshadowed by the proposed amendment, but if a proposed amendment introduces a patently hopeless issue for determination then its inclusion would be futile and that will be a significant, and probably decisive, matter in the exercise of the Court's discretion. The test to be applied, having regard to section 63 of the *Civil Procedure Act* 2010 (Vic), is as follows: if the amendment has no real prospect of success at trial then that would be a highly relevant factor in the exercise of the discretion to refuse the application for leave to amend.

c. Some of the factors to be taken into account, although not exhaustive, are:

i. whether there will be substantial delay caused by the amendment;

ii. the extent of any wasted costs that will be incurred;

iii. whether there is an irreparable element of unfair prejudice caused by the amendment, arising, for example, by inconvenience and stress

[1] [2014] VSC 529 at [17] to [22].

caused to individuals or inordinate pressures placed upon corporations, which cannot be adequately compensated for, whatever costs may be awarded;

iv. concerns of case management arising from the stage of the proceeding when the amendment is sought, including the fact that the time of the Court is a publicly funded resource, and whether the grant of the amendment will result in inefficiencies arising from the vacation or adjournment of a trial;

v. whether the grant of the amendment will lessen public confidence in the judicial system;

vi. whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought.

7 Pleadings are not, it was (in my view correctly) submitted, an end in themselves in the judicial process but are means of ensuring that real issues in controversy are raised for determination in a way that is procedurally fair, both to a plaintiff and a defendant. However, an amendment that is obviously bad in law, or otherwise liable to be struck out on a summary application, will not be permitted.[2]

Plaintiff's submissions

8 The plaintiff submitted that leave should not be granted in relation to paragraphs 6B(g) and 6C and 6D because the allegations contained in those paragraphs have no real prospects of success.

9 In relation to paragraph 6B(g) the plaintiff submitted that the claim is illogical and unarguable. The fact that TVM commenced and then settled proceedings against its directors and advisers is irrelevant to the question whether, some years earlier, TVM mistakenly made overpayments to the defendants.

10 In relation to paragraphs 6C and 6D the plaintiff submitted that although the defendants were entitled to raise every possible equitable defence they were still required to identify the defence to the claim. The enquiry as to whether the retention of funds would not be unjust was not at large.

11 The relevant inquiry is, it was submitted, whether it is equitable for the plaintiff to demand, or for the defendant to retain, the money: *Australian Financial Services and Leasing Pty Ltd*

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2 *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98 at [118].

v Hills Industries Ltd.[3] As the High Court made clear at [76]:

> This is not to suggest that a subjective evaluation of the justice of the case is either necessary or appropriate. The issues of conscience which fall to be resolved assume a conscience "properly formed and instructed" by established equitable principles and doctrines. As was said in *Kakavas v Crown Melbourne Ltd*, "[t]he conscience spoken of here is a construct of values and standards against which the conduct of 'suitors' — not only Defendants — is to be judged."

12 In this case it was submitted that the inquiry is directed to the conduct of the defendants (whether they have acted in a manner that would make it inequitable to require them to refund the payments) and TVM (whether it has engaged in disentitling conduct) – not to the conduct of third parties. It was submitted that no principle exists in law or equity that an incidental benefit to a third party could found a basis to refuse to relief to an otherwise entitled plaintiff.

13 Paragraphs 6C and 6D go only, it was submitted, to the question of whether a third party might (also) benefit from the grant of relief sought by TVM. The paragraphs do not establish, or provide support for, any equitable defence asserted by the defendants (or any other equitable defence): such as an asserted change of position on the part of the defendants, a basis for estoppel or any disentitling conduct on the part of TVM.

14 In the circumstances it was submitted that paragraphs 6C and 6D of the proposed 2FADCC is plainly unarguable and leave should not be granted to the defendants to file an amended pleading incorporating those paragraphs.

Defendants' submissions

15 In its outline of submissions filed 4 September 2015 and a further detailed outline in reply filed 21 September 2015, the defendants, by reference to authority submitted that the position in Australia is far from clear and that the law of restitution is not settled.

16 The gravamen of the defendants' submissions was that the defendants were entitled to raise any matter relating to the conduct of either party, for the purpose of an assessment of whether such conduct, when assessed according to a 'constraint of values and standards' offends the conscience of such party. Whilst conceding that this determination or assessment was not at

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[3] (2014) 307 ALR 512 at [75] (*Australian Financial Services*).

large, the defendants submitted that the plaintiff's approach was too narrow and that it was not easy or indeed required that the conduct alleged to be against conscience falls within a neat box or principle.

17 The defendants referred to the recent Court of Appeal decision in *Southage Pty Ltd v Vescovi*,[4] where the Court of Appeal (Warren CJ, Santamaria JA, and Ginnane AJA) stated:

a. at [2] that:

> *It is well established that when money is paid pursuant to a mistake of fact, the person paying the money has a prima facie right to recover it from the recipient via an action for money had and received. However, that prima facie right may be displaced if the recipient can point to circumstances which would make an order for restitution unjust. One such circumstance which may make an order for restitution unjust is when the recipient has changed their position on the faith of the receipt and thereby suffered detriment*.

b. at [50] that:

> *As indicated in David Securities, in order to raise a prima facie entitlement to restitution, it is sufficient for a plaintiff to show that a payment was caused by a mistake; it is not incumbent upon a plaintiff further to plead or to establish that the receipt or the retention of the moneys is unjust. However, in so far as the law will not provide for recovery 'except where the enrichment is unjust' it is open to a defendant to raise 'by way of answer any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust'*.

c. at [53] that:

> *A defendant ... 'may go into every equitable defence ... in short, he may defend himself by everything which shews that the plaintiff, ex aequo & bono, is not entitled to the whole of his demand, or to any part of it'*.

d. at [57] that:

> *As observed earlier ... the recipient of a payment 'is entitled to raise ... any matter or circumstance' to show that his or her retention of the payment would not be unjust*.

18 In *Australian Financial Services* the plurality cited with approval Barton J's observation in *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd*[5] that recovery 'depends largely on the question whether it is equitable for the plaintiff to demand or for the defendant to retain the money'. To determine that question, issues of conscience must be resolved by reference to a '*construct of values and standards against which the conduct of "suitors" — not only defendants — is to be judged*'.[6] What is meant by values and standards, and how they are to

4 [2015] 321 ALR 383.
5 (1910) 12 CLR 515 at 531.

be applied are not clear.[7] The plurality pointed out further at [78] that the inquiry undertaken in relation to restitutionary relief in Australia is '*directed to who should properly bear the loss and why. That inquiry is conducted by reference to equitable principles*'. What is meant by equitable principles it was submitted is not clear.[8]

19 The defendants submitted that they are not constrained by denials, and restitutionary 'defences', but can rely on any matter or circumstance which shows that their receipt or retention of the payments is not unjust or inequitable or against conscience. Moreover, before that is to happen, the plaintiff was required to show that it is equitable for the plaintiff to demand repayment of the money. Proposed paragraph 6C clearly it was submitted pleads facts relevant to the inquiry the court has to make as to both the plaintiff and the defendants' conduct. It clearly sets out facts and circumstances which show, or may show, that it would be inequitable for the plaintiff to demand repayment of the money, alternatively that retention by the defendants of the money is not unjust, inequitable or against conscience, alternatively that repayment would be inequitable or unjust. In short, proposed paragraph 6C will it was submitted enable the court to determine who has to bear the loss and why.

Consideration

20 I propose to allow the amendments.

21 The introduction of paragraph 6A is not itself objected to. Paragraph 6B(g) is in my opinion intended to and does plead by reference to paragraph 6A the underlying matters that gave rise to the Related Proceeding with the pleaded conclusion that, given such matters, that preceded the commencement of the Related Proceeding, namely the reliance on professional advice, there was relevantly no mistake made by the plaintiff in relation to the payments. Of course whether this conclusion follows as a matter of law is a matter for trial. It cannot be said however that the point has no real prospects of success.

22 Paragraphs 6C and 6D are more difficult. However, on balance I am inclined to allow the

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6 *Australian Financial Services* at [76].

7 See R Havelock, 'Conscience and unconscionability in modern equity' (2015) 9 *Journal of Equity* 1 at 9.

8 See K Mason, 'Strong coherence, strong fusion, continuing categorical confusion: The High Court's latest contributions to the law of restitution' (2015) 39 Australian Bar Review 284 at 315.

amendments. The point is a short legal point and does not require any additional evidence. Further, I am unable to conclude at this stage that the point has no real prospects of success. Conduct after the mistaken payment may well be relevant.[9]

23 The authorities are not entirely helpful. This is not meant as a criticism but rather as a reflection on the difficulties associated with stating anything other than general propositions. It is the application of these general and often widely framed propositions to the facts at hand that render the task difficult. It is extremely rare that in this area of the law two cases are the same.

24 It is unnecessary and unhelpful for me, in line with many other and more eminent judges, to attempt to summarise the general principles of law applicable.

25 The question is whether the propositions and allegations contained in paragraphs 6C and 6D are so extravagant that they lack any justification or proper basis. In my view they do not, notwithstanding that they may not fit neatly into a box, doctrine or principle such as change of position. The relevant enquiry is conduct against conscience of both payer and payee. Conduct against conscience is what underpins equitable relief. The defendant is entitled to assert that the relevant conduct of the payer when assessed against community standards (construct of values and standards) precludes recovery.

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9 It is certainly relevant so far as the payee is concerned. I am not prepared to shut out an argument to the effect that it may be relevant so far as the payer's conduct is concerned.