
JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA
IN CHAMBERS

LOCATION : PERTH

CITATION : PHILLIP SKELTON & WANDA MEYER as Trustee
for P SKELTON SUPERANNUATION FUND NO 1 -
v- LEROY NOMINEES PTY LTD [2020] WADC 88

CORAM : DEPUTY REGISTRAR HEWITT

HEARD : 10 JUNE 2020

DELIVERED : 22 JUNE 2020

FILE NO/S : CIV 3209 of 2019

BETWEEN : PHILLIP SKELTON & WANDA MEYER as Trustee
for P SKELTON SUPERANNUATION FUND NO 1
Plaintiff

AND

LEROY NOMINEES PTY LTD
First Defendant

LINDSAY EDWARD QUANN
Second Defendant

LEROY NOMINEES PTY LTD
LINDSAY EDWARD QUANN
Plaintiff by counterclaim

PHILLIP SKELTON & WANDA MEYER as Trustee
for SKELTON SUPERANNUATION FUND
Defendant by counterclaim

Catchwords:

Practice and procedure - Application to strike out counterclaim - Plaintiffs suing in a representative capacity - Counterclaim against one plaintiff personally - Whether counterclaim and set-off should be the subject of a separate action - Comments as to the quality of the pleading generally

Legislation:

Competition and Consumer Act 2010 (Cth)
District Court of Western Australia Act 1969 (WA), s 50(1)(a), s 58(1)
Fair Trading Act 2010 (WA)

Result:

Counterclaim struck out with leave to re-plead

Representation:

Counsel:

Plaintiff	:	Mr I W Priddis
First Defendant	:	Mr J R Shepherd
Second Defendant	:	No appearance
Plaintiff by counterclaim	:	Mr J R Shepherd
Defendant by counterclaim	:	Mr I W Priddis

Solicitors:

Plaintiff	:	Vogt Graham Lawyers
First Defendant	:	Blackwall Legal LLP
Second Defendant	:	Blackwall Legal LLP
Plaintiff by counterclaim	:	Blackwall Legal LLP
Defendant by counterclaim	:	Vogt Graham Lawyers

Case(s) referred to in decision(s):

Nil

DEPUTY REGISTRAR HEWITT:

1 This matter was commenced by a writ filed 23 August 2019 by the plaintiff's in their capacity as trustees of the P Skelton Superannuation Fund No 1 claiming a total of \$420,000 in what is essentially a claim for debt owed by the first named defendant and a further claim under the *Competition and Consumer Act 2010* (Cth) and the *Fair Trading Act 2010* (WA).

2 The action is defended and a defence and counterclaim has been filed, the first such document being filed on 24 December 2019 and an amended version of that document being filed on 3 February 2020. It is the latter of those two versions which is under attack.

3 By an application filed on 12 March 2020 the plaintiff seeks orders striking out the amended defence and counterclaim and set-off and for an extension of time within which to bring the application.

4 Unhelpfully, the chamber summons does not identify the basis for the strike out, but it appears from the submissions filed by the plaintiff on 6 May 2020 that notwithstanding the terms of the application, the counterclaim and set-off are the portions of the pleading which are under attack.

5 On reading the summary of argument, it appears that the basis of the plaintiff's claim for the strike out is that the counterclaim and set-off disclose no reasonable cause of action, are embarrassing and may delay a fair trial of the action. Notwithstanding the deficiencies in the initiating document and the fact that a large proportion of the strike out contended for in the application has been abandoned, the matter did proceed to argument and should be dealt with notwithstanding those deficiencies.

6 The application needs leave but that does not appear to be a contentious point and accordingly leave will be granted. The main thrust of the argument advanced by the defendant in its counterclaim and set-off is that the first named of the plaintiff's is indebted to it in the manner described in the pleading. The basis of that indebtedness arises from transactions which took place between the defendant company and the first named of the plaintiff's and forms the basis of the set-off which is claimed.

7 The first problem encountered by the counterclaiming defendant is obvious. The first named plaintiff is suing in his capacity as a trustee of a trust. The counterclaim is levelled against the first named plaintiff in his personal capacity. There is no basis upon which the personal liability of a trustee is available to be set-off against a claim which is made in a representative capacity such as exists in this action. That the set-off is not available as a defence against the claim brought by the plaintiff's in a representative capacity is obvious and the set-off will be struck out as unsustainable.

8 As to the balance of the counterclaim, although in my opinion it is available to be pursued by the defendant in this action, it is nonetheless riven with problems and difficulties. Not the least of those difficulties are pages of the pleading which are devoted to which might be generously described as evidence but in my view are completely irrelevant. The referral to information which is contained in an annual trial balance of the defendant would at its highest be evidence and thus would not be allowed but my view is that what may or may not be revealed by an examination of a trial balance of the defendant company is not evidence of anything. In any event, my conclusion is that all references to the trial balances of the company should be deleted. Additionally, the pleadings in pars 42 and 43 concern various claims and declarations made in the taxation returns of the parties and are likewise evidence and should not appear in this pleading.

9 I next consider par 46 of the counterclaim which flows from par 44 in which it is indicated that in or around June 2008 a total amount was owing by the first-named plaintiff to the defendant in what has been described as a consolidated loan agreement of \$200,000. It is also pleaded in par 44 that interest on such amount would be 10%.

10 In pars 45 and 46 it is pleaded that the loan had not been repaid and that together with interest, the total amount owing is \$808,607. The problem with that allegation is that by no mathematical gymnastics is it possible to reach a figure of \$808,000 by applying a 10% interest rate to an indebtedness of \$200,000 over 11 years.

11 Counsel representing the defendant suggested the matter could be sorted out by particulars. Particulars have to be consistent with the pleading. It is not possible to produce particulars which are consistent with this pleading. Accordingly, that is an issue that needs to be addressed.

12 There follow claims of unjust enrichment which I find difficult to understand. Either there is a debt owing by the first-named plaintiff to the defendant or there is not. It is very difficult to understand how the pleading of unjust enrichment adds anything to the case advanced by the defendant but I take the view that the proposition is not harmful even though it may be unsustainable.

13 Paragraphs 51, 52 and 53 deal with the set-off which in my view is unsustainable and should not be permitted to remain in the pleading. My overall conclusion is that the whole of the counterclaim should be struck out not because it is necessarily wholly unsustainable but because it is riddled with various problems, has already been amended once and would be far more useful to commence with a clean sheet setting out the counterclaim in better detail.

14 As to the submission that the counterclaim should be struck out because the amount claimed exceeds the jurisdiction of the court I note that:

1. Section 50(1)(a) of the *District Court of Western Australia Act* 1969 provides that the jurisdictional limit does not include interest which may be payable, which would bring the claim within the jurisdiction; and
2. Section 58(1) limits the amount of any award to the jurisdictional limit of the court but does not defeat the claim.

It has been argued by the plaintiff that it is not appropriate for the defendant to proceed by way of counterclaim but it should be doing so by way of a separate action I do not agree. It is clear that the relationship of the parties in this action has been long and their finances have been to a considerable extent, intertwined in various undertakings in which they have been engaged. I think it acceptable that the defendant be entitled to launch a counterclaim but it is necessary for it to be made clear the counterclaim is against the first named plaintiff in his personal capacity and that nothing which is contained in the counterclaim is available to the defendant as a defence to the claim which is brought by the plaintiff's in their representative capacity. It is also necessary to remove from the pleading irrelevancies and references to matters which may or may not be evidence but certainly have no place in a pleading. My conclusion therefore is that the whole of the counterclaim should be struck out and that the defendant should be given leave to re-plead that document, subject to the caveats which I have mentioned.

DEPUTY REGISTRAR HEWITT

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

DH
Court Officer

22 JUNE 2020