SUPREME COURT OF QUEENSLAND

CITATION: *Anderson v Bourke & Ors; Myrteza v North Burleigh Pty Ltd & Ors* [2018] QSC 126

PARTIES: 11485 of 2017:
SONYA MARGARET ANN ANDERSON AS TRUSTEE OF THE ANDERSON FAMILY (NO 2) TRUST
(plaintiff)
v
ALAN JAMES BOURKE
(first defendant)
and
SOUTH MACLEAN HOLDINGS PTY LTD ACN 166 890 080 AS TRUSTEE FOR THE SMH TRUST
(second defendant)
and
JAMIE BOURKE
(third defendant)
and
ACN 128 875 810 (FORMERLY JAMCAM PTY LTD) AS TRUSTEE OF THE IPSWICH UNIT TRUST
(fourth defendant)
and
TIMOTHY DELANEY
(fifth defendant)
and
JB SUPER COMPANY PTY LTD ACN 603 444 695
(sixth defendant)

10886 of 2017:
DUKOS MYRTEZA
(plaintiff)
v
NORTH BURLEIGH PTY LTD ACN 121078 199
(first defendant)
and
WAYNE MELVILLE COLLIE
(second defendant)
and
SOUTH MACLEAN HOLDINGS PTY LTD ACN 166 890 080 AS TRUSTEE FOR THE SMH TRUST
(third defendant)
and
JB SUPER COMPANY PTY LTD ACN 603 444 695
(fourth defendant)
and
JAMIE BOURKE
(fifth defendant)

FILE NOS:	11485 of 2017 and 10886 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	31 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2018
JUDGE:	Applegarth J
ORDERS:	11485 of 2017:

1. **The claim against the fifth defendant be struck out.**
2. **The statement of claim filed 2 November 2017 and the amended statement of claim filed 18 April 2018 against the first, second, third, fourth and sixth defendants be struck out.**
3. **Caveat No 718335433 and Caveat No 718335431 be removed forthwith.**
4. **The plaintiff pay the first, second, third, fourth and sixth defendants' costs of and incidental to the applications filed 25 February 2018.**
5. **The costs of the fifth defendant are reserved.**

10886 of 2017:

1. **The plaintiff's application be dismissed.**
2. **The plaintiff pay the third defendant's costs of and incidental to the application to be assessed.**

CATCHWORDS: MORTGAGES – MORTGAGES AND CHARGES GENERALLY – ACCOUNTS – DUTY TO ACCOUNT AFTER MORTGAGEE EXERCISES POWER OF SALE – duty to account dependent on surplus – fact of surplus not pleaded – striking out of pleading

TORTS – MISCELLANEOUS TORTS – CONSPIRING TO INJURE – GENERAL PRINCIPLES – where plaintiff alleges unlawful means conspiracy against the defendants – where the defendants apply for the pleadings against them to be struck out – where the plaintiff does not properly identify the relevant wrong which is said to constitute the unlawful means – where the plaintiff does not properly plead causation or loss – whether pleadings are embarrassing

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – FORM OF PLEADING – OTHER MATTERS – STRIKING OUT – where pleadings are embarrassing, tend to cause prejudice or delay a fair trial or contain scandalous or unnecessary allegations – requirement for clear pleading – pleading allegations of wrongdoing and dishonesty – pleading basis for equitable remedies– pleading causation and loss

Land Titles Act 1994 s 129
Property Law Act 1974 (Qld) s 85
Uniform Civil Procedure Rules 1999 r 171, 260A

Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No 4) [1985] 1 Qd R 127 cited
Barnes v Addy (1874) LR 9 Ch App 244 cited
Benzlaw & Associates Pty Ltd v Medi-Aid Centre Foundation Ltd [2007] QSC 233 cited
Bond Corp Pty Ltd v Thiess Contractors (1987) 14 FCR 215 cited
Cameron v Brisbane Fleet Sales Pty Ltd [2002] 1 Qd R 463; [2000] QSC 15 cited
C2C Developments Pty Ltd v Commonwealth Bank of Australia [2012] NSWSC 1162 cited
Coomera Resort Pty Ltd v Kolback Securities Ltd [2004] 1 Qd R 1 cited
Cousins Securities Pty Ltd v CEC Group Limited [2007] QCA 192; 2 Qd R 520 cited
Dresna Pty Ltd v Misu Nominees Pty Ltd [2004] ATPR 42-013 cited
Hutchins v Robinson [2012] QSC 411 cited
Landlush Pty Ltd v Rutherford [2003] 1 Qd R 236; [2002] QSC 219 cited
Lee v Abedian [2017] 1 Qd R 549; [2016] QSC 92 cited
Oversea-Chinese Banking Corporation Ltd v Becker [2003] QSC 301; [2004] 1 Qd R 409 cited
Porter v OAMPS Ltd (2005) 215 ALR 327; [2005] FCA 232 cited
Ross Cook and Brett Cook Pty Ltd v Bli Bli #1 Pty Ltd [2009] QSC 300 cited
Terranora Leisure Time Management Ltd (in liq) v Harris [2004] 1 Qd R 93; [2002] QSC 424 cited
Young v Hughes Trueman Pty Ltd [2016] FCA 1176 cited

COUNSEL: A M Nelson for the plaintiff in 11485/17
A J H Morris QC for the plaintiff in 10886/17
C A Johnstone for the first to fourth and sixth defendants in 11485/17 and for the third to fifth defendants in 10886/17
M D Martin QC for the fifth defendant in 11485/17

SOLICITORS: Slade Waterhouse Lawyers for the plaintiff in 11485/17
Australian Law Partners for the plaintiff in 10886/17
James Conomos Lawyers for the first to fourth and sixth defendants in 11485/17 and for the third to fifth defendants in 10886/17
Delaneys Lawyers for the fifth defendant in 11485/17

[1] The focus of these proceedings is upon land at South Maclean, which was once owned by the plaintiff in proceeding 11485/17, Sonya Anderson as trustee of the Anderson Family (No 2) Trust.[1] The land is described as "the 301 Property". It was sold by a mortgagee, North Burleigh Pty Ltd, exercising its power of sale on 31 March 2014. North Burleigh entered into a contract and executed a transfer for a stated consideration of $1 million. The sale was to South Maclean Holdings Pty Ltd as Trustee for the SMH Trust. That company is associated with Mr Jamie Bourke, who negotiated the sale of the 301 Property with Mr Wayne Collie, the sole director and shareholder of North Burleigh. The sale of the 301 Property settled in late April 2014 and the net proceeds of sale of approximately $1 million were accounted to Anderson by way of a $1 million reduction in the debt owed by her to North Burleigh.

[2] In a separate proceeding (7032/16), Anderson sues North Burleigh, Mr Collie and other parties in respect of, among other things, the sale of the 301 Property. That proceeding, like this one, is complex. Messy may be a better word. In essence, in proceeding 7032/16, Anderson seeks:

(a) an order for the taking of an account in respect of the mortgage between her and North Burleigh; and

(b) compensation pursuant to s 85 of the *Property Law Act* 1974 (Qld) on the basis that North Burleigh breached the statutory duty imposed by s 85 to take reasonable care to ensure that the 301 Property was sold at its market value.

Anderson tried and failed to have the buyer (South Maclean Holdings Pty Ltd), Mr Bourke and other interests associated with Mr Bourke and his family, as well as the solicitor acting for the Bourke interests in respect of the purchase of the 301 Property, joined as defendants in proceeding 7032/16. The application to join the Bourke interests and the solicitor who had acted for them (Mr Delaney) was adjourned on different occasions before being dismissed. Indemnity costs orders were made against Anderson.

[3] Undaunted, and apparently to protect certain caveats, Anderson launched proceeding 11485/17 against five defendants associated with the Bourke interests, and also against Mr Delaney. This new proceeding largely recycles allegations advanced against those parties in the application to join them as defendants. The Bourke interests and Mr Delaney separately pointed out to Anderson's legal advisers major defects in Anderson's claims against them. These include a pleaded allegation that the sale of the 301 Property was a "sham transaction" and part of a "collusive scheme" which was said to have the effect that the amount for which North Burleigh would have to account to

[1] For simplicity I shall refer to the plaintiff as 'Anderson' rather than by her full name and capacity as trustee, and so as to distinguish Ms Anderson when acting in her personal capacity.

Anderson would be "artificially diminished". The defendants applied to strike out various allegations in Anderson's statement of claim.

[4] Rather than rectify some obvious defects in her pleading and plead matters essential to the relief she claimed against the defendants, Anderson, shortly before the hearing of the applications, filed without leave an amended statement of claim on 18 April 2018. Amongst other things, it purported to add a claim for damages for the "tort of conspiracy to injure by unlawful means". This late pleading overtook applications which had been filed by Mr Delaney on 22 February 2018 to strike out the claim against him and to strike out paragraphs of the statement of claim which related to him, and an application by the Bourke defendants filed on 23 February 2018 to strike out numerous paragraphs of the statement of claim and paragraphs of the prayer for relief. The application by the Bourke interests also sought orders for the removal of two caveats. Unfortunately, due to the unavailability of legal representatives for Anderson, the applications could not be heard on the originally listed date. Instead, the applications by Mr Delaney and by the Bourke defendants in proceeding 11485/17 and an application by Mr Myrteza in proceeding 10886/17 were heard in the Civil List on 3 May 2018.

[5] Mr Myrteza became a registered mortgagee over the 301 Property in July 2008, when a mortgage that was previously held by Sunshine State Holdings Pty Ltd was transferred to him for the sum of $100,000. Curiously, the amount that was secured by his mortgage at relevant dates is unpleaded and not the subject of any evidence from him or Anderson. By way of introduction, Mr Myrteza commenced proceeding 10886/17 against North Burleigh Pty Ltd, Mr Collie, South Maclean Holdings Pty Ltd, JB Super Company Pty Ltd and Jamie Bourke on 17 October 2017. Many of the allegations in his pleading reflect identical or near-identical allegations in the Anderson proceedings. An important distinction, however, is that Mr Myrteza makes no claim against Mr Delaney, and dissociates himself from any allegation of conspiracy or wrongdoing against Mr Delaney. Mr Myrteza had lodged a caveat over land comprising the 301 Property on 25 September 2009. However, the caveat lapsed. He also lodged caveats in October 2017 over lots which had been part of the 301 Property before it was subdivided. Mr Myrteza filed and served an amended claim on 2 March 2018. Remarkably, he does not plead:

(a) the amount of the debt which was secured by the mortgage in favour of North Burleigh (which had priority over his mortgage); or

(b) the amount of the debt he claims he is owed by Anderson and which was secured by his mortgage.

In fact, on 23 March 2018, he advised that he could not particularise the amount of the debt he claims he is owed.

[6] Knowing of the pending application to remove the Anderson caveats and concerned about his position if that application was successful, Mr Myrteza applies for leave to lodge a further caveat on the same grounds as a caveat lodged in October 2017.

Common issues

[7] The applications raise numerous issues. They include the history of caveats being lodged and whether Anderson has lodged previous caveats over the same property asserting the same grounds, including one which lapsed or was withdrawn, and one which was removed by a court order. Mr Myrteza's application for leave also involves issues about the history of caveats being lodged. There are other issues in connection with the caveat applications, including where the balance of convenience lies and the worth, if any, of any undertaking as to damages by the caveator. I will return to those issues. Presently it is useful to identify some central issues:

1. The claims Anderson has pleaded against the Bourke defendants, and the strength and value of those claims;

2. The claims Anderson has pleaded against Mr Delaney, and the strength and value of those claims; and

3. The claims Mr Myrteza has pleaded against the Bourke defendants in his proceeding, and the strength and value of those claims.

[8] Any assessment of Anderson's claim against the Bourke defendants and her claim against Mr Delaney turns upon a consideration of her pleaded case and the parts of it which remain after determination of the separate strike-out applications. For example, for reasons to be explained, Mr Delaney contends that he has been made the subject of baseless allegations of being involved in an alleged conspiracy or collusive scheme, and even of committing criminal offences, being allegations which are scandalous and embarrassing and should be struck out. In addition, he points out various pleading deficiencies, some of which were acknowledged in the course of the hearing before me by counsel for Anderson. In their strike-out application, the Bourke defendants likewise assert fundamental flaws in Anderson's case and numerous deficiencies in the way allegations against them are pleaded. It will be necessary to refer to these matters in greater detail.

Fundamental problems with Anderson's claim

[9] Over many months, including at mentions or hearings of Anderson's application to join parties associated with Mr Bourke and to join Mr Delaney as additional defendants in proceeding 7032/16, I attempted to point out some fundamental issues relating to the proposed claim. Justice Jackson had occasion to raise a related issue. As long ago as 5 September 2017, I attempted to point out the importance of Anderson coming to terms with what she owed North Burleigh and what her case was against the existing defendants before she started "vexing additional defendants". I pointed out the importance of coming to terms with what the market value of the 301 Property was. Despite attempts by the parties in proceeding 7032/16 to advance matters, Anderson is unable or unwilling to state in this proceeding even the approximate amount of the mortgage debt which was secured by the North Burleigh mortgage when the 301 Property was sold, or indeed at any other time.

[10] In addition, and whatever that debt may prove to be, Anderson has not come to terms with the consequences of the alleged collusion of the defendants in proceeding 11485/17 in

seeking to "artificially" diminish the amount which North Burleigh would have to account to her. Anderson does not plead in this action that her right to an account against North Burleigh has been lost. She does not plead that her right to an account has been diminished or that she is at a risk of not being able to recover what, if anything, is owed to her by North Burleigh following the taking of an account. On the contrary, in proceeding 7032/16, Anderson seeks an account from North Burleigh.

[11] This raises an awkward issue for Anderson, which is to identify what she claims to have lost by reason of the present defendants' alleged improper conduct. This directs attention to her prayers for relief which include "equitable damages or damages at common law for deceit in the sum of $4,300,000 or such amount as is due to the Plaintiff after an account is taken from North Burleigh Pty Ltd in proceeding No 7032/16". Likewise, she claims damages against each defendant for the "tort of conspiracy to injure by unlawful means in the sum of $4,300,000 or such amount as is due to the Plaintiff after an account is taken from North Burleigh Pty Ltd in proceeding No 7032/16". Leaving aside the proper legal characterisation of her claims and the causes of action which she pursues (matters which are obscure, to say the least, in the light of her pleading), Anderson's claim is at best ambiguous, and at worst vexatious and embarrassing, in terms of causation and the loss she has suffered. In particular, if she is right in alleging there was some kind of collusive agreement which was intended to "artificially diminish" the amount to which she was entitled upon the sale of the 301 property, she does not spell out what loss she has suffered as a result. She still has her claim for an account against North Burleigh and the other relief claimed in proceeding 7032/16 in relation to its alleged breach of statutory duty.

[12] There is an even more fundamental issue which is not addressed in Anderson's pleaded claims in proceeding 11485/17 against the Bourke defendants and against Mr Delaney. She has not come to terms, either in that proceeding or in proceeding 7032/16, with what her asserted right to an account would achieve in financial terms, or what success in her claim that the 301 Property was sold at an undervalue in breach of North Burleigh's statutory duty would achieve for her in financial terms. To illustrate the point, let it be supposed that she succeeds in her claims against North Burleigh and other parties in proceeding 7032/16 and establishes that the value of the 301 property was $2 million, rather than the $1 million contract price. Let it be supposed that she succeeds in proving that North Burleigh did not account to her for the true value of that property or the benefit it received in selling it, being $2 million, when only accounting to her for $1 million. Suppose that she proves, contrary to substantial evidence, that the 301 Property had a market value of $2 million, rather than the sale price of $1 million. In that event, her right to an account of $1 million against North Burleigh or her damages against North Burleigh of $1 million would stand to be set off the amount owed to North Burleigh. Consideration needs to be given to whether she would be entitled to a surplus, assuming in her favour that the property had a true value of $2 million. This depends upon:

(a) what she owed or still owes North Burleigh; and

(b) what she owed or still owes subsequent mortgagees, including Mr Myrteza.

[13] In responding to these applications, Anderson makes no attempt to prove, and certainly does not plead, either of these things. It is unnecessary for present purposes to detail some of the evidence which was read in this proceeding, including the contents of Mr Collie's affidavit which was filed on 23 January 2017 in proceeding 7032/16 and

which was read by Ms Anderson for the purpose of these applications. For reasons which he gave in relation to the loss of records in early 2016, after he understood that the relevant transactions were at an end, Mr Collie attempted to calculate the amount owing under the original loan of $1.2 million. Since then, proceeding 7032/16 has progressed. Much depends upon the rate at which interest is calculated, and how account is taken of the sale of various lots which were subdivided. Mr Collie explains that there was a first mortgage over the property securing a loan by Ascent Funds Management Pty Ltd which in December 2007 had a loan in excess of $3.6 million. In any event, leaving aside how and when Ascent Finance had its debt repaid, North Burleigh's counterclaim in proceeding 7032/16 contends that on a proper interpretation of the terms of its original loan and its construction loan, Anderson remains indebted to North Burleigh in an amount presently estimated between $1.2 million and $5 million. This estimate is said to take into account all rental and sale proceeds received by North Burleigh as a consequence of its exercise of its power of sale.

[14] One then turns to the debt owed by Anderson to Mr Myrteza. Anderson does not plead, let alone prove, what that debt is.

[15] The failure of Anderson to plead in proceeding 11485/17 what her debt to North Burleigh was at relevant times, based upon a proper calculation of default interest rates, and what her debt to Mr Myrteza was, represents a fundamental flaw in her case against the Bourke defendants and Mr Delaney. Simply stated, her claim depends upon pleading that, absent the impugned conduct, the sale of the 301 Property by North Burleigh for its market value would have produced a surplus. As was stated in *C2C Developments Pty Ltd v Commonwealth Bank of Australia*:[2]

> "If there is no surplus then there is no obligation to account."

The Court observed that any claim for an account in the circumstances where a mortgagee has sold the property must establish or plead as a material fact that there is a surplus owing.

[16] In this matter Anderson has not pleaded that had the 301 Property been sold for its market value or if North Burleigh had accounted to her for the value of what the Bourke defendants in fact received, then there would have been a surplus. Instead, she pleads that the notice of default served by North Burleigh on 23 July 2009 claimed an amount of $4,550,918.73 was due and owing under the mortgage and the loan agreement. She does not plead, let alone prove, that the amount owing under the mortgage was any less at the time the 301 property sale was effected, taking account of the sale proceeds of 16 lots that are alleged to have been sold between April 2009 and early 2013.

[17] In summary, if North Burleigh as mortgagee exercising power of sale has an obligation to account to Anderson, then that obligation survives regardless of the contract price for which the 301 Property was sold. If by selling the property for $1 million North Burleigh breached its statutory duty to exercise reasonable care to obtain market value then Anderson's claim for compensation against North Burleigh survives. She is prosecuting a claim against North Burleigh for the difference between the sale price of $1 million which was accounted for and what she asserts may be the true value of the 301 Property at the time it was sold. The alleged collusive agreement or conspiracy has not caused the

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2 [2012] NSWSC 1162 at [27].

loss of her claims for an account or compensation against North Burleigh. Anderson has not pleaded that had there not been the "collusive agreement" and, instead, North Burleigh had sold the 301 Property for its market value, observing its obligations under s 85 of the *Property Law Act*, that the proceeds of sale would have been sufficient to discharge the mortgage debt then due to North Burleigh, and debts then due to subsequent mortgagees such as Mr Myrteza, and left her with a surplus.

Background

[18] The 301 Property was originally owned by Pearlbran Pty Ltd as Trustee of the Maclean Land Trust. It is alleged that Pearlbran was in financial difficulties, with various proceedings commenced against it by financial institutions. At different stages it had registered mortgages in favour of Ascent Funds Management Ltd and Win Mezz No 19 Pty Ltd. In circumstances which are unclear, and which are alleged by Mr Delaney to have involved a transfer to defeat creditors, Pearlbran Pty Ltd as Trustee of the Maclean Land Trust is alleged to have transferred its interests in the 301 Property to Steven John Anderson and David Anthony Anderson as Trustees of the Anderson Family Trust No 2. This is alleged to have been a fraudulent scheme by them and others, including the present plaintiff, to remove any assets held by Pearlbran Pty Ltd so as to avoid paying creditors.

[19] In about December 2007, Pearlbran Pty Ltd as Trustee of the Maclean Land Trust entered into a short-term loan agreement with North Burleigh for an advance of $1,200,000 for a term of one month with interest payable at five per cent per month, or at seven per cent per month if in default. This first loan was secured by way of a second mortgage over land then described as Lot 310. At the time of this advance there was a first mortgage over the property securing a loan by Ascent Funds Management Pty Ltd, which Mr Collie says was owed in excess of $3,600,000. There was development approval in place for the subdivision of the property. The borrower defaulted on the North Burleigh loan and failed to repay any of the principal amount upon the expiry of its term. It seems that it was also in substantial default under the first mortgage and Ascent Finance intended to take possession of the property. At that stage no substantive works had been taken towards subdividing the property. The property was transferred from Pearlbran to the Trustees of the Anderson Family No 2 Trust in about April 2008.

[20] Anderson alleges that a meeting took place on 3 July 2008 which included her, her husband, Mr Collie representing North Burleigh and Mr John Smith representing Ascent Finance. No reference is made in the Anderson pleading to Mr Myrteza or his mortgage. However, as noted, he says that he became a registered mortgagee from July 2008.

[21] On 9 July 2008, North Burleigh entered into an additional loan agreement to pay a further $1,200,000 on a nine month term with interest payable at two per cent or at four per cent per month if in default. This new loan is described in various places as "the construction loan". The amount of the construction loan was held in Mr Myrteza's trust account. He was Anderson's solicitor at the time.

[22] Mr Collie says North Burleigh made the construction loan because it was clear at the time that there would be little or no return to North Burleigh as second mortgagee if Ascent Finance proceeded to sell the property in an undeveloped state and prior to completion of the subdivision. According to Mr Collie, after making the construction loan he attempted to work closely with the Andersons in the hope of ensuring the subdivision works proceeded promptly. However, construction did not proceed as anticipated. According

to Mr Collie, from around mid-2009 it was necessary for North Burleigh to pay Ascent Finance the interest charges attributable to the first mortgage so as to avoid Ascent Finance taking direct enforcement action.

[23] Mr Collie's affidavit recites attempts by North Burleigh to recover possession of the 301 Property. Mr and Mrs Anderson resided there. He says that from late 2009 and early 2010 he appointed numerous real estate agents to assist with the marketing and sale of the subdivided lots. However, marketing was difficult due to the GFC. Mr Collie says he was informed by various real estate agents that the best sale price that could be achieved for the 301 Property would not exceed $1 million. The best offer he received was a proposed cash payment of $500,000 plus a small high-rise unit which he thought had a value of no more than $300,000.

[24] According to Mr Collie, in or about early 2014, he and Mr Jamie Bourke negotiated a sale and purchase arrangement whereby:

(a) Mr Bourke (or a nominee or related party) would purchase a property owned by North Burleigh in Southport ("the Southport property");

(b) he (or a nominee or related party) would purchase the leasehold interest of a property at 2 Bell Street, Ipswich from Jamcam Pty Ltd (an entity related to Mr Bourke); and

(c) the purchase price payable to North Burleigh for the Southport property would be offset against the purchase price for the Ipswich property.

[25] Later, Mr Collie showed Mr Bourke the 301 Property and Mr Bourke thought that it had a current value of between $800,000 and $900,000. According to Mr Collie, following further discussions and negotiations, Mr Bourke eventually agreed to pay North Burleigh $1 million for the 301 property. Mr Bourke also agreed that the purchase price due to North Burleigh for the 301 Property could be offset against the purchase price for the Ipswich property.

[26] Mr Collie says that he sought advice from real estate agents at the time in relation to the marketing and sale of the 301 Property. His affidavit details these matters and also says that he obtained a valuation of the current market value of the property in about mid-March 2014. This valuation, which was reflected in a written valuation, was that the property was worth $950,000.

[27] Mr Collie says that settlement of the various contracts occurred in about late April 2014 and the settlement statement shows the net proceeds of sale of the 301 Property was $1,080,000.62. He says these net proceeds were properly accounted to Anderson by way of a commensurate reduction in the debt owing to North Burleigh.

[28] Aspects of the settlement of the different sale transactions in April 2014 have attracted the attention of Anderson following the receipt of documents by way of disclosure in other proceedings. Particular reliance is placed by her upon a contract entered into between North Burleigh and a company named Brilab Pty Ltd as Trustee for the SMH Trust dated 25 November 2013. This matter arises in the context of steps taken by Mr Collie and entities associated with him to obtain finance from the Macquarie Bank to purchase the Ipswich property. He and a company named 2 Bell Street Pty Ltd is alleged

by Anderson to have supplied Macquarie Bank with various documents, including the contract between North Burleigh and Brilab Pty Ltd dated 25 November 2013 in which Brilab agreed to pay $5,300,000 for the 301 property. He is also alleged to have submitted statements of assets and liabilities which stated that the 301 property was worth $5,300,000, as well as a curriculum vitae which stated that the property was under contract for $3,500,000. These matters are relied upon by Anderson to allege that Mr Collie and others knew that the 301 property had an actual market value of between $3,500,000 and $5,300,000. They also are central to an allegation that North Burleigh in fact received a benefit to the value of $5,300,000 when it sold the 301 Property to South Maclean Holdings Pty Ltd.

[29] In answer to these allegations in proceeding 7032/16, North Burleigh, Mr Collie and 2 Bell Street Pty Ltd allege that the Brilab contract was subject to finance, Brilab was unable to obtain sufficient finance and on 13 December 2016 Brilab gave notice that it had not obtained finance and terminated the contract.

[30] I have alluded to these matters at earlier hearings. It occurred to me when I first heard of Anderson's allegations in this regard that there is a possible, indeed probable, explanation for the Brilab contract. Simply stated, the Brilab contract and matters associated with it have the hallmarks of an effort by Mr Collie and others to have Macquarie Bank advance in excess of $12 million in respect of the purchase of the Ipswich property in respect of a contract which stated a purchase price of $18.8 million. The Brilab contract is not much evidence of the market value of the 301 Property. It is evidence of what Mr Collie and others asserted to the Macquarie Bank it was worth. That is a very different matter.

[31] There is another interesting aspect to the contract to purchase the Ipswich property. At least part of the contract appears as Exhibit JN13 to the affidavit of Ms Nelson filed 13 October 2017 in proceeding 7032/16. However, the copy of the contract so obtained may be incomplete. In Mr Delaney's defence, reference is made to a special condition of the contract which was in the following terms:

> "19 REBATE
>
> 19.1 We hereby agree to give you a rebate in the sum of $6.2 million upon settlement of the Contract on the following terms and conditions ("the Rebate"):-
>
> 1) The Rebate is to be adjusted at settlement by deducting the Rebate from the Balance Purchase Price;
>
> 2) The Rebate is only payable should the Contract settle and that you are otherwise not in default under the terms and conditions of the contract; and
>
> 3) That you hereby agree to keep the terms and conditions of the Rebate strictly confidential and most importantly the fact that a Rebate has been given to you by us and the amount of such Rebate strictly confidential, and not to divulge the Rebate or information concerning the Rebate to any other party without our prior written consent, except:-
>
> a) as is properly and reasonably required for the purposes of review by your financier, accountant and/or legal adviser; or

b) to the extent that you are required to disclose such information by law or by any authority or regulatory body having jurisdiction.

19.2 You hereby expressly acknowledge that should you be obtaining finance from a financier to complete the Contract, that you will give such financier notice of the fact that we have granted you the Rebate and the value of the Rebate."

If the rebate was in fact granted, then the net consideration in the contract was not $18.8 million, but $12.6 million.

[32] It appears that the contract for the Ipswich property settled on or about 5 May 2014 and Macquarie Bank provided bank cheques for the balance of the purchase price, stamp duty and legal fees.

[33] In proceeding 7032/16, Anderson asserts against North Burleigh, Mr Collie and 2 Bell St Pty Ltd that North Burleigh in fact received a benefit to the value of $5.3 million when it sold the 301 Property to South Maclean Holdings Pty Ltd. The apparent basis for this assertion and the allegation that North Burleigh did not account to Anderson for the full amount of the benefit is that:

(a) 2 Bell St Pty Ltd received the Ipswich property which was worth $18.8 million;

(b) without taking account of the value of the 301 Property, it only paid about $13.5 million for the transfer to it of the Ipswich property, being $11 million in cash plus the transfer of the Southport property at an agreed price of $2.5 million;

(c) the balance of $5.3 million was the benefit which 2 Bell St Pty Ltd received on behalf of North Burleigh for which 2 Bell St Pty Ltd acknowledged a liability in its balance sheet as at 30 June 2014 in the form of a loan of $5,435,767.66;

(d) the benefit received by North Burleigh and 2 Bell St Pty Ltd was "valued at $5.3 million";

(e) North Burleigh accounted for only $1 million of the value received.

[34] The same matters are not pleaded by Anderson in this case. However, in a similar vein, there is an allegation to the effect that somehow a benefit of $5.3 million was received. Alternatively, it is alleged that but for the collusive scheme or conspiracy, North Burleigh would have sold the 301 property by way of auction for $5.3 million or alternatively for a sum that was greater than $1 million.

[35] Anderson's pleading in the present proceeding (11485 of 2017) does not plead matters such as the value of the Ipswich property. Instead, it emerges from Anderson's submissions that the transactions in relation to the Ipswich property resulted in a "balance of about $5.3 million". This balance is arrived at from the contract price of $18.8 million for the Ipswich property, deducting a loan of $11 million from Macquarie Bank, and further deducting the amount of $2.5 million attributed to the Southport property. This leaves a balance of $5.3 million. The so-called "$5.3M value" is also submitted to be supported by the Brilab contract, and the inclusion in 2 Bell St Pty Ltd's books of account of a loan of $5.24 million said to be owed to North Burleigh Pty Ltd by 2 Bell St Pty Ltd as Trustee of the Bell Street Unit Trust.

[36] This argument is built upon a number of assumptions. One is that the Ipswich property had a value at the relevant time of $18.8 million. It also ignores the special condition in the contract for a rebate. Leaving that special condition to one side and turning to the value of the Ipswich property, Anderson does not plead in this matter that the Ipswich property had a market value of $18.8 million at the relevant time. Anderson's written submissions assert that the commercial building was worth $18.8 million, but this assertion is neither pleaded nor proven. Included in the material read in respect to the Myrteza application is a valuation report dated April 2012 in respect to the property. That valuation report was obtained under instruction from the Commonwealth Bank of Australia. It was two years old at the date of the relevant sale and I note that a number of the important tenancies were due to expire in the meantime. It provides minimal support for a finding that the Ipswich property was worth $18.8 million two years later when it was sold by an entity related to Mr Bourke to an entity related to Mr Collie.

[37] As for the Brilab contract, as previously noted, this contract has the hallmarks of a contract entered into to persuade Macquarie Bank to make the kind of loan which it did. The Brilab contract went nowhere. It provides no real evidence that the 301 property had a value of anywhere near $5.3 million.

[38] In the amended statement of claim filed in proceeding 11485/17, Anderson pleads that if North Burleigh had sold the 301 property by way of auction it would have sold it for "$5,300,000 or alternatively for a sum that was greater than $1 million". This is a curious way in which to plead the market value of the property. In any case, Anderson's submissions on the present application assert that when the 301 Property was sold for $1 million to South Maclean Holdings Pty Ltd its market value was "between $2,500,000 and $3 million".

[39] I am not undertaking a valuation of the property, a trial of proceeding 7032/16 or anything in the nature of a mini-trial of allegations raised by Anderson against the Bourke defendants and Mr Delaney in proceeding 11485/17. Instead, my present endeavour is to attempt to identify the nature of Anderson's claim, the strength of that claim and its value. I need to do so in order to:

(a) ascertain whether the claim is properly pleaded; and

(b) ascertain the strength of the claim as part of deciding whether the claim is one which should be protected by Anderson's caveats or whether, instead, the caveats should be removed.

[40] Insofar as the claim which Anderson apparently wishes to advance involves assertions about the value or market value of the 301 Property, it appears to be built on certain assumptions, including assumptions about the value of the Ipswich property which are not pleaded and also the assumption that a balance figure after the deduction of the Macquarie Bank loan and the value of the Ipswich property can be attributed to the 301 Property. This argument appears to be a weak one, especially since there are grounds to suspect that the $18.8 million price was one arrived at in circumstances in which Macquarie Bank was led to believe that the 301 Property was worth at least $3.5 million and possibly as much as the $5.3 million reflected in the Brilab contract. The $5.3 million balance upon which Anderson relies might as easily be attributed to vendor finance which was not disclosed to the Macquarie Bank or all or part of the special condition rebate.

[41] As to the value of the 301 Property, Anderson pleads that the property would have sold for somewhere between $1 million and $5.3 million, yet she submits that it had a market value of between $2.5 million and $3 million. The material before me includes a contemporaneous valuation obtained by Mr Collie dated 16 April 2014 which valued the property at $950,000. The material also includes a valuation that was apparently obtained by the Commonwealth Bank of Australia in respect of its customer, South Maclean Holdings as Trustee for the SMH Trust. That valuation is dated 26 August 2014 and values the property at $1,050,000. It tends to support the $1 million contract price for which the property was sold a few months earlier.

[42] I have also had regard to a retrospective valuation that was obtained by Mr Anderson in December 2016 (presumably for use in the proceedings that had then been commenced against North Burleigh). It retrospectively values the property at between $2.5 million and $3 million "for internal accounting purposes as at 1 April 2014".

[43] In proceeding 7032/16, Anderson relies on a one page file note from a mortgage broker/agent for South Maclean Holdings Pty Ltd in its dealings with the Commonwealth Bank. This document was obtained through non-disclosure from the Commonwealth Bank. It is hard to understand what the document proves. The mortgage broker is concerned with obtaining refinancing and it seems that the 301 Property was being put forward as an alternative form of security. The broker notes that the $1 million figure "was significantly under its value as there was other consideration given for this transaction for the value of $1 million – hence a value of $2M is more realistic". This seems to be an attempt by a mortgage broker in obtaining finance to persuade the Commonwealth Bank that the property was worth $2 million. As noted, the Commonwealth Bank seems to have obtained its own valuation in August 2014 which gave the property a market value of $1 million.

[44] I have earlier referred to Mr Collie's evidence about the attempts which he made over a lengthy period to sell Lot 301 and the offers which he obtained.

[45] Ultimately, the material before me does little to support the contention that Lot 301 had a value substantially in excess of $1 million at the relevant time.

[46] The material also includes a copy of the 2 Bell St Pty Ltd Unit Trust balance sheet as at 30 June 2015, which the Anderson interests obtained through non-party disclosure. It records a loan from North Burleigh Pty Ltd as at 30 June 2014 of $5,134,746.32 and as at 30 June 2015 of $5,274,087.15. For present purposes, I adopt a loan amount of approximately $5.2 million. Anderson asserts that this entry records "the hidden benefit received from the sale of the 301 Property". This allegation is contained in Ms Nelson's affidavit filed 13 October 2017 in proceeding 7032/16. The recording of such an inter-company loan is, however, consistent with the Bourke interests providing vendor finance, quite possibly undisclosed to the Macquarie Bank.

[47] In any event, if North Burleigh or a related entity associated with the purchase of the Ipswich property received vendor finance of about $5.3 million as part of the transaction associated with the purchase of the Ipswich property, then this benefit cannot necessarily be attributed to the 301 Property. It simply was a benefit which North Burleigh or interests associated with the Ipswich purchase received as a means of being able to finance the purchase of the Ipswich property. If North Burleigh received a benefit in the form of a benefit which was hidden from Macquarie Bank and others, then this does not

mean that the benefit is attributable to the 301 Property. If the 301 Property was in fact worth the $1 million which was paid for it, then this amount was accounted for. If, on the other hand, the 301 Property had a value of $2 million and the parties to the contract for its sale agreed that it had this value, then a different arithmetic is involved and the additional $1 million will need to be accounted for by North Burleigh to Anderson in proceeding 7032/16.

[48] This discussion of assertions and evidence suggests that Mr Collie and Mr Bourke will have some explaining to do about vendor finance in proceeding 7032/16. The material which I have canvassed falls far short of proving that the 301 Property had a value of more than $1 million at the time it was sold by North Burleigh to South Maclean Holdings. The market value of Lot 301 is a matter to be worked out in proceeding 7032/16.

[49] It is sufficient to observe that, for the purpose of this proceeding, Anderson has done little to prove her allegation in the amended statement of claim dated 18 April 2018 that but for "the conspiracy" North Burleigh would have sold the 301 Property by way of auction for $5.3 million or anything like it. Paragraph 22E(a) of the amended statement of claim contains an extraordinarily wide range in alleging that the property would have been sold for $5.3 million "or alternatively for a sum that was greater than $1 million". Anderson's submissions, presumably in reliance upon the retrospective valuation, assert that the 301 Property had a market value of between $2.5 million and $3 million. The contemporaneous valuation of $950,000 and the valuation obtained by the Commonwealth Bank not long after settlement of $1,050,000 cast doubt upon this retrospective valuation.

[50] To return to more fundamental matters, as presently advised, the Anderson pleading and the evidence do not support a conclusion that the 301 Property was worth $5.3 million so that, taking account of the $1 million accounted for, Anderson may expect to have accounted to her by North Burleigh Pty Ltd an amount of $4.3 million, let alone that this is the quantum of her damages claim against the defendants in proceeding 11485/17.

[51] Her claim confronts the fundamental problem earlier identified. Even if it be assumed for the purpose of argument that the 301 property was worth $2 million instead of $1 million and that (in the absence of evidence) Mr Collie and Mr Bourke agreed that it had such a value, this simply means that an additional $1 million will need to be brought into account. The problem remains that Anderson has failed to plead, let alone advance any reason for supposing, that the additional $1 million would have been enough to discharge her debt to North Burleigh, and her debts to subsequent mortgagees such as Mr Myrteza, so as to provide her with a surplus.

Mr Delaney's application to strike out the claim and statement of claim

[52] Mr Delaney submits that Anderson's claim against him is misconceived, bad in law, deficient in point of pleading and includes scandalous allegations of impropriety and criminal conduct which cannot be sustained, and which should not have been pleaded by a legal practitioner. Mr Delaney's application was filed on 22 February 2018 in respect of the existing claim and statement of claim. His submissions were filed on 27 February 2018. Rather than resile from allegations concerning Mr Delaney's alleged involvement in what was described in paragraph 22 and following parts of the statement of claim as the "301 Property Collusive Scheme" or provide better particulars of how, when and the

respects in which Mr Delaney was part of an alleged scheme to artificially diminish the amount for which North Burleigh would have to account to Anderson, in her amended statement of claim filed 18 April 2018, Anderson escalated the allegations against Mr Delaney and the other defendants. In the amended pleading she alleged that he and the other defendants should pay her damages for the tort of conspiracy to injure by unlawful means. Paragraph 22 was amended to allege such a conspiracy and additional paragraphs were introduced in respect of the alleged conspiracy. These included serious allegations of criminal conduct with respect to the Form 1 transfer in respect of the 301 Property and the Form 24 Property Information Statement relating to transfer of the 301 Property.

[53] Incidentally, no application was made for leave to amend the claim so as to reflect the new forms of relief sought in the amended statement of claim.

The alleged conspiracy

[54] Paragraph 22 of the amended statement of claim reads:

> "22. The 301 Sale was a sham transaction and part of a ~~collusive scheme~~ conspiracy by North Burleigh Pty Ltd, Wayne Collie, 2 Bell St Pty Ltd, South Maclean Holdings Pty Ltd, Alan James Bourke, Jamie Bourke, Jamcam and Tim Delaney to defraud by unlawful means the Plaintiff (the 301 Property Collusive Scheme) by dishonestly using North Burleigh Pty Ltd's purported exercise of power of sale to create a trade of properties with the effect that the amount for which North Burleigh Pty Ltd would have to account to the Plaintiff would be artificially diminished and transferred instead to an entity controlled by, and for the benefit of, Wayne Collie, namely 2 Bell St Pty Ltd (the Dishonest and Fraudulent Design)."

[55] Paragraph 22 suggests, and counsel for Anderson confirmed, that Anderson alleges that Mr Delaney was part of the alleged conspiracy from its inception. However, as I pointed out to counsel during the hearing, there are no particulars alleging that he attended meetings or was part of the negotiation of the alleged "sham transaction". Counsel responded that a "deficiency in the particulars is a different issue to striking out the claim". This seems to ignore the fundamental principle that such a serious allegation of Mr Delaney's involvement in the conspiracy from its inception should be supported by properly pleaded material facts and particulars. If it is not, such a pleading is liable to be struck out unless a party persuades the Court that it should not be required to particularise the allegation without the aid of disclosure or some other process. The difficulties of fully particularising a clandestine arrangement or conspiracy are well-recognised by the courts.[3] But this does not mean that speculative claims of a conspiracy should be made in the absence of evidence.

[56] Paragraph 22B of the new pleading alleges that in furtherance of the conspiracy, Mr Delaney undertook certain acts. These are particularised in various subparagraphs. In summary, the relevant paragraphs:

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[3] *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No 4)* [1985] 1 Qd R 127 at 133; *Lee v Abedian* [2017] 1 Qd R 549 at 567 [71].

(a) do not support the allegation that he was a party to a conspiracy or collusive scheme from its inception;

(b) mostly relate to making arrangements for the completion of the sale of the 301 Property and the contents of the Form 1 and the Form 24.

One of the key allegations, namely that contained in paragraph 23(d) does not relate to Mr Delaney at all. Instead, it alleges:

> "on a date unknown between 25 November 2013 and 7 January 2014, North Burleigh Pty Ltd, Wayne Collie, 2 Bell St Pty Ltd, South Maclean Holdings Pty Ltd, Alan James Bourke, Jamie Bourke and Jamcam agreed between them that the 301 Property and 9 Nerang Street, Southport in the State of Queensland ("Southport Property") would be traded by North Burleigh Pty Ltd as part payment for the leasehold interest in a commercial property at 2 Bell Street, Ipswich ("2 Bell Street") which was to be transferred from Jamcan to 2 Bell Street Pty Ltd ACN 163 171 293 as trustee for the Bell Street Unit Trust ("2 Bell Street Pty Ltd"), the full price and the value of which was $18,800,000."

[57] The pleading makes no allegation that Mr Delaney was involved in the negotiation of the Brilab Pty Ltd contract or had any part in its termination.

[58] In short, the pleading contains no particulars to support the allegation that Mr Delaney was a party to the collusive scheme or conspiracy from its inception and the matters pleaded by Anderson suggest that he was not. There is no evidence that he was and Mr Collie's affidavit, which was read by Anderson for the purpose of this application, indicates that his negotiations were with Mr Jamie Bourke.

[59] Anderson's counsel accepted the submission made on behalf of Mr Delaney that a solicitor who simply facilitates a transaction is not therefore a party to a conspiracy.[4] Accordingly, the fact that a solicitor carries out a transaction in accordance with the instructions of a party who is a conspirator will not, without more, make the solicitor a party to the conspiracy. As noted, the focus of the pleading against Mr Delaney is on his role in the settlement of the sale of the 301 Property. The contract was for a price of $1 million. The consideration in the contract was not in the form of a trade or exchange for other property. The Memorandum of Transfer, which was prepared by the solicitors for the mortgagee, reflected the terms of the contract in stating that the consideration was $1 million. The Form 24, which is the standard form which accompanies a transfer, stated that the sale of the 301 Property did not form an arrangement that included other dutiable transactions. It is not apparent to me that this was wrong since the contract for the sale of the 301 Property does not appear to include a condition that made it conditional upon the sale of other properties. The fact that the parties to that contract, or other parties which were related to them, entered into separate transactions at around the same time, including the interdependent sale of the Ipswich property and sale of the Southport property, did not mean that the sale of the 301 Property formed part of an arrangement. I should add that there is no suggestion that inadequate stamp duty was paid on any of the transactions

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[4] Counsel for Mr Delaney cited *Porter v OAMPS Ltd* (2005) 215 ALR 327 at 346 [70] – [75] which, in a different context involving an alleged conspiracy by a solicitor, observed that the giving of advice cannot constitute an agreement.

and I proceed on the basis that stamp duty was paid on the consideration stated in the Ipswich sale contract and on the consideration stated in the Southport property contract.

[60] The matters pleaded in respect of Mr Delaney and the Form 1 and the Form 24 fall short of properly pleading that he knew the contents of either form were untrue, let alone support the serious allegations made of criminal offences committed by him in relation to these forms.

[61] Paragraph 26A of the new pleading alleges:

> "26A. Tim Delaney knew that the price of $1,000,000.00 was not the market value of the 301 Property because:
>
> (a) he knew that no money was in fact paid from the Second Defendant to North Burleigh Pty Ltd for the transfer of the 301 Property;
>
> (b) he knew that the purchase price for the transfer of the 301 Property was set off against the monies that were payable from 2 Bell St Pty Ltd to the Fourth Defendant in respect of the sale of 2 Bell Street, Ipswich."

As counsel for Mr Delaney submitted, this allegation is illogical, even if it is relevant. The market value of a property does not depend upon whether the purchase price is paid in cash, by bank cheque or as a set-off against an existing debt. Counsel for Anderson accepted in argument that a sum required to be paid by a buyer for the purchase of property can be set off against a debt which the seller owes the buyer. If it be assumed that Mr Delaney knew that the $1 million consideration for the sale of the 301 Property was to be set off, then this would not affect the price, which remained $1 million, and it would say little, if anything, about the market value of the 301 Property.

[62] Counsel for Mr Delaney also questioned the relevance of the solicitor for a buyer knowing that the price was more or less than the market value. As I noted in argument, whilst mortgagees exercising a power of sale have duties including the duty to exercise reasonable care to sell at market value, the buyer of such a property does not need to be satisfied that he, she or it is paying the market value. A buyer is entitled to negotiate a good bargain, if possible, and it would be odd if the solicitor for a buyer was required to inquire into whether the price was market value. It is sufficient for present purposes to conclude that s 26A does not plead facts which establish that Mr Delaney knew that the price of $1 million was not the market value for the 301 Property, even if this allegation of knowledge has some relevance.

Conspiracy to injure by unlawful means

[63] The elements of the cause of action for an unlawful means conspiracy are well-established.[5] There is authority that breach of fiduciary duty or certain statutory duties are not unlawful means capable of founding an actionable unlawful means conspiracy.[6]

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[5] *Lee v Abedian* [2017] 1 Qd R 549 at 567 [70].

[6] *Terranora Leisure Time Management Ltd (in liq) v Harris* [2004] 1 Qd R 93 at 99 [29]; see also *Coomera Resort Pty Ltd v Kolback Securities Ltd* [2004] 1 Qd R 1 at 37-38 as to whether a conspiracy can be based on breach of fiduciary duty.

Counsel for Anderson cited the decision in *Dresna Pty Ltd v Misu Nominees Pty Ltd*[7] in which a majority of the Full Federal Court found it arguable that breaches of an undertaking given to the ACCC and false statements made to the ACCC could constitute "unlawful means". That authority was noted by Bond J in *Lee v Abedian*,[8] and it was unnecessary for his Honour to decide the point. Bond J did not refer to the two authorities upon which Mr Delaney relies, being Queensland authorities which support the proposition that breach of fiduciary duty are not unlawful means capable founding an actionable unlawful means conspiracy. No reason has been shown as to why I should not follow those authorities.

[64] The pleading against Mr Delaney does not allege an unlawful means conspiracy in respect of an alleged breach of the statutory duty imposed on a mortgagee pursuant to s 85 of the *Property Law Act*. Moreover, he does not plead that the unlawful means was a breach of fiduciary duty. Under the general law, a mortgagee is not in the position of a trustee or fiduciary.[9] Some parts of the pleading against Mr Delaney are suggestive of a liability founded on the second limb in *Barnes v Addy*.[10] However, the relevant duty of a trustee or fiduciary is not pleaded and any case that Mr Delaney is obliged to pay what the prayer for relief describes as "equitable damages … for deceit" or any other form of equitable relief against him would depend upon a proper pleading of the existence of a trust or of fiduciary duties.

[65] In summary, the pleading does not disclose or plead with the required clarity, the essential elements of a tortious conspiracy involving unlawful means.

Causation and loss and damage

[66] Paragraph 22E of the new pleading states:

> "22E But for the conspiracy:
>
> (a) North Burleigh Pty Ltd would have sold the 301 Property by way of auction for $5,300,000 or alternatively for a sum that was greater than $1,000,000;
>
> (b) The Plaintiff would have known that the 301 Property was transferred as part of an exchange of properties rather than by way of sale and that it was transferred for $5,300,000 or alternatively for a sum greater than $1,000,000;
>
> (c) North Burleigh Pty Ltd would have been obliged to account to the Plaintiff for an additional amount of $4,300,000 or alternatively for an amount that was greater than the $1,000,000 which was falsely stated on the 301 Property Form 1 as the consideration paid for the transfer of the 301 Property by the Second Defendant."

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7 [2004] ATPR 42-013.
8 [2017] 1 Qd R 459 at 573 [82](b).
9 *Cameron v Brisbane Fleet Sales Pty Ltd* [2002] 1 Qd R 463 at 469 [36].
10 (1874) LR 9 Ch App 244 at 251-252; as to which see *Benzlaw & Associates Pty Ltd v Medi-aid Centre Foundation Ltd* [2007] QSC 233 at [104] – [111].

[67] In other than a simple case in which the causal chain is obvious, a plaintiff should plead the material facts upon which the conclusion that the defendant's conduct caused loss or damage relies.[11]

[68] In this matter the pleading does not disclose the basis upon which it is concluded that but for the conspiracy, North Burleigh would have sold the property for an amount as high as $5.3 million. The price range of between $1 million and $5.3 million is embarrassingly wide. It comprehends a sale price of $1 more than what was achieved and the figure of $5.3 million finds no support in the material, including the retrospective valuation which Ms Anderson's husband procured, presumably for the purpose of these or similar proceedings.

[69] The other causal chains raise complexities as to causation of loss since Anderson has been aware of the relevant property transactions and has pursued North Burleigh and other parties for remedies including an account. As to paragraph 22E(c), her case in proceeding 7032/16 is that North Burleigh is obliged to account to her for such an amount. Accordingly, it is hard to know how the alleged conspiracy has affected its obligation to account.

[70] In simple terms, if there was a collusive scheme by which the amount for which North Burleigh would have to account was "artificially diminished", Anderson became aware at some stage of the collusive scheme. The collusive scheme was incapable of actually diminishing the obligation to account. On Anderson's case, the obligation to account remains.

[71] The manner in which causation and loss are pleaded against Mr Delaney (and for that matter against the other parties) is embarrassing, fails to comply with the requirement to plead material facts and has a tendency to prejudice the fair trial of this proceeding.

After the fact representations and alleged misleading and deceptive conduct

[72] Paragraph 37(c)(vi) of the pleading relies on a letter from Delaney Lawyers to Anderson's then solicitors dated 2 November 2015. That letter responded to a letter dated 29 October 2015 from Lillas & Loel Lawyers which sought information in relation to the transfer of Lot 301 for $1 million. Lillas & Loel advised that their client "believes that the transfer does not 'tell the whole story' and that there may well be some obligation cast upon your client to transfer to others, at the direction of North Burleigh Pty Ltd, that part of Lot 301 that is not within Stage 2 of 14 lots namely the House Lot." In response, Mr Delaney provided a copy of the stamped contract and advised that the transaction was "an arms length transaction". He advised:

> "There is no other deal or side deal whatsoever with the Seller, its director or any other related entity or for that matter, any party whatsoever in relation to the property and our client's proposed development thereon."

The letter, in effect, rejected the suggestion that South Maclean Holdings was obliged to, and would, at the direction of North Burleigh, transfer parts of Lot 301.

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[11] *Bond Corp Pty Ltd v Thiess Contractors* (1987) 14 FCR 215 at 222; *Lee v Abedian* [2017] 1 Qd R 549 at 571 [81(b)].

[73] In this proceeding Anderson claims that Mr Delaney engaged in misleading and deceptive conduct, contrary to the provisions of the *Australian Consumer Law*, by sending the letter dated 2 November 2015. The relevant part of the pleading (paragraphs 38 to 43) assert that Anderson lodged a caveat over the title to the 301 Property on 6 October 2015, that on or about 2 November 2017 she received the letter to Lillis & Loel dated 2 November 2015 and "relying upon the representations therein, released the 301 Caveat over the title to the 301 Property". She alleges that she suffered loss and damage as a consequence of releasing the caveat. She provides no particulars of the relevant loss and damage.

[74] As Mr Delaney pointed out in his defence, these allegations are flawed because Anderson did not release or withdraw the caveat, which had been requisitioned by the Land Titles Office and had been subsequently rejected by the Land Titles Office on 12 November 2015. These matters are established by the evidence before me and counsel for Anderson conceded that the caveat was not lodged, registered and then released in reliance upon the alleged representation. This is sufficient to conclude that the claim for misleading and deceptive conduct in paragraphs 38 – 43 of the statement of claim should be struck out. For completeness, I should mention some other matters. The alleged representations, if in fact conveyed by the letter dated 2 November 2015, have not been shown to be false. The sale of the 301 Property was not between related parties. There was no side deal of the kind suggested in Lillas & Loel's letter of 2 November 2015. The contract did not involve a swap of properties. Anderson's own pleading, including in paragraph 26A(b) which I have earlier quoted, seems to suggest that the purchase price was set-off against other monies. Such an arrangement would not necessarily qualify as the kind of improper deal or side deal to which the Lillas & Loel letter was alluding.

[75] Finally on this aspect, because the caveat was not lodged, registered and withdrawn, it is unnecessary to dwell on what loss and damage Anderson may have suffered if it had been. The caveat asserted that Anderson had an interest as an "equitable mortgagee". The basis of that alleged caveatable interest is not evident. If such a caveat had been lodged and registered, it would have been liable to an order that it be removed if it had not been removed voluntarily. Therefore, the loss which Anderson might have suffered had the caveat in fact been registered and later withdrawn remains illusory.

[76] Another letter relied upon in the pleading is a letter dated 24 January 2017 written by Mr Laws, an associate at Delaney Lawyers to Anderson's lawyers. The letter was written by Mr Laws on behalf of South Maclean Holdings pursuant to an order made in proceeding 7032/16 in which freezing orders had been obtained. The freezing orders were later set aside. In accordance with a certain paragraph of the order, Mr Laws advised that his client had instructed the firm to provide the following information:

> "(i) The Contract Date was 7 January 2014;
>
> (ii) The Purchase Price after adjustments was $18,726,334.55;
>
> (iii) The Settlement Date was 5 May 2014;
>
> (iv) The actual amounts paid are as follows:
>
> a) To the vendor - $12,276,334.55
>
> b) Vendor Finance - $6,450,000.00

Total: $18,726,334.55

(v) The manner of payment of purchase price to Jamcam at Settlement was as follows:

(a) Bank cheque from NAB sourced from the sale of Southport to Jamcam for $2,485,951.65;

(b) Vendor Finance $6,450,000.00;

(c) Bank Cheques from Macquarie Bank as Financier for the balance of purchase price, stamp duty and legal fees.

(vi) Source of Funds paid are as set out above in (v).”

This is evidently what Mr Laws was instructed by his client and it relates to the Ipswich property.

[77] The relevance of this allegation is far from apparent. This letter is referred to in paragraph 37(c)(iii) of the pleading. It seems to amount to Mr Delaney’s firm following instructions and writing a letter about the settlement of the Ipswich property.

[78] The pleading alleges that there was no basis for Mr Delaney’s firm to advise that the purchase price had been adjusted by way of vendor finance. If this be the case, then the allegation seems irrelevant. The letter was written long after the alleged conspiracy. In any event, as Mr Delaney pleads, although he was not personally involved in the making of arrangements for the completion of the sale of the Ipswich property, the settlement statements prepared by his firm and by the other firm acting in the transaction noted an agreed rebate and, accordingly, there was a proper basis to believe that a rebate had been given by Jamcam Pty Ltd to 2 Bell Street Pty Ltd in accordance with the special conditions to the contract of sale. There is no satisfactory reply to this matter by Anderson.

Mr Delaney’s alleged knowledge

[79] Paragraph 37 of the pleading asserts that Mr Delaney “knew of and facilitated Alan James Bourke, South Maclean Holdings Pty Ltd, Jamie Bourke and Jamcam in carrying out their roles in the 301 Property Collusive Scheme …” One of many problems with the pleading is that assertions that Mr Delaney knew certain matters lack particularity in some instances, and in other respects the allegation goes beyond an allegation of actual knowledge. For example, paragraph 37(c) pleads, in the alternative to actual knowledge, that he “wilfully shut his eyes to, or recklessly failed to make such inquiries as an honest and reasonable man would make, or had knowledge of the circumstances which would indicate the true facts to an honest and reasonable man regarding the 301 Property Collusive Scheme”.

[80] The pleading does not disclose in any intelligible form plead facts from which to infer that Mr Delaney was a party to the 301 Property Collusive Scheme from its inception and thereby knew of it. The things that it does plead are consistent with his acting as a solicitor for the purchaser of the 301 Property, including conduct which would be undertaken by a solicitor in any such transaction, such as the lodging of a Form 1 which reflected the consideration stated in the contract. The pleading does not disclose, nor does any

evidence before me disclose, that Mr Delaney knew that the consideration for the 301 Property was other than the stated price of $1 million. The pleading, far from alleging that he was a party to the alleged conspiracy from its inception, does not include him as one of the parties who struck what Anderson alleges as the trade involving the Ipswich property and the Southport property. It is not alleged that he had any role in the Brilab contract negotiation or termination. The pleading is consistent with his acting as a solicitor in a transaction. If it be supposed for the purpose of argument that in doing so he facilitated a scheme that was hatched by Mr Collie and Mr Bourke, then he facilitated the settlement of the relevant sale transaction. It does not make him a party to the alleged conspiracy.

Conclusion – Mr Delaney's application

[81] There are fundamental deficiencies in relation to this proceeding against all defendants in terms of matters which are unnecessarily pleaded and the omission to plead matters which are fundamental to the allegation that Anderson suffered loss. This proceeding seems to be contingent upon the allegation made in proceeding 7032/16 about North Burleigh having a duty to account. Anderson fails to plead that had North Burleigh properly accounted for the true value of the 301 Property she would have received a surplus.

[82] Presently I am concerned with the defects in the pleaded claim against Mr Delaney. They are many and varied. The implicit assertion that he was a party to a conspiracy from its inception lacks particularity. It is embarrassing and Anderson's inability to provide particulars or give any indication as to when and how such particulars would be forthcoming justifies paragraph 22 being struck out against him. The alleged conspiracy or collusive agreement is not one which alleges in an intelligible form an unlawful means conspiracy. Insofar as it appears to allege that there was an unlawful means conspiracy in respect of breaches of fiduciary duty, the claim is unsound in law.

[83] The pleading of causation and loss is deficient and embarrassing.

[84] Ultimately, the pleading makes speculative and unparticularised allegations against Mr Delaney including allegations of what he knew. For good reason, the pleading rules require material facts in support of such allegations to be pleaded.

[85] The claim and the pleading against Mr Delaney are vexatious. The original allegations that he was a party to a collusive scheme were serious allegations which should not have been pleaded without a proper foundation. Allegations of dishonesty of any kind should not be lightly made. Rather than resile from them, Ms Anderson and her legal advisers added a misconceived claim against Mr Delaney alleging the tort of conspiracy by unlawful means and included serious allegations of criminal conduct. The material before me does not support the suggestion that Mr Delaney knew that the 301 Property was worth anything like $5.3 million. Anderson's pleading in places gives it a value in a range starting at $1 million, so it is hard to see why Mr Delaney would know that its value was more than $1 million. He was not required to investigate its value.

[86] Whatever suspicions Ms Anderson had about the sale of the 301 Property, and Mr Delaney's involvement in that sale as solicitor for the buyer, do not justify a pleading which makes allegations of conspiracy and criminal conduct against Mr Delaney. Even if Mr Delaney suspected that the 301 Property was worth more than $1 million (and the contemporaneous valuations provide no support for the suggestion that he did), his

primary obligation was to act for the buyer in concluding the sale of that property. The relevant contract stated a purchase price of $1 million. The Form 1 which was completed by Mr Delaney's firm reflected that consideration. Ms Anderson's counsel acknowledges that it is permissible for the sale price under such a contract to be set off.

[87] Mr Collie and Mr Bourke will have some explaining to do about how the sale of the Ipswich property was facilitated through the provision of vendor finance or a rebate. However, if there was such vendor finance, it does not transform Lot 301 into a property worth $5.3 million. Lot 301 was worth what it was worth and the evidence before me tends to suggest that it was not worth as much as Ms Anderson would like to believe. In any case, Mr Delaney's belief as to its value when he acted for the buyer is seemingly irrelevant.

[88] The claim against Mr Delaney is flawed in various respects. The pleading fails to comply with the pleading rules. The claim against him is vexatious and embarrassing. The claim and the statement of claim should be struck out.

Costs of Mr Delaney's application

[89] Mr Delaney seeks an order for costs on an indemnity basis. He notes that he was put to considerable expense in opposing Anderson's ill-fated application for him to be joined as a party in proceeding 7032/16. He obtained an order for costs on an indemnity basis in respect of that application. However, Ms Anderson is impecunious and any order for costs against her is likely to prove to be an empty one.

[90] Proceeding 11485/17 appears to have been instituted:

(a) in order to protect caveats which had been lodged; and

(b) in the face of advice from the Court that Anderson should not vex Mr Delaney and other parties at least until certain allegations made in proceeding 7032/16 were advanced and found to have a basis.

Notably, Anderson's outline of submissions filed 10 April 2018 refers to the advice which I gave on 5 September 2017 about not vexing additional defendants before establishing the value of her claim against North Burleigh.

[91] Even if the current proceeding was motivated by a desire to protect the caveats, Mr Delaney was an unnecessary party to the proceeding for that purpose. I note in passing that Mr Myrteza did not make Mr Delaney a party and disclaims any allegation that he was involved in some kind of collusive scheme.

[92] Anderson's persistence in making ill-founded and poorly-pleaded allegations against Mr Delaney justifies an order for costs in Mr Delaney's favour on the indemnity basis.

[93] Mr Delaney submits that in circumstances in which Ms Anderson is impecunious and her legal representatives (both solicitor and counsel) have made ill-founded, indeed scandalous, allegations against him, that those practitioners should pay his costs of the proceeding on the indemnity basis.

[94] Ms Anderson and her legal representatives now have my ruling on Mr Delaney's application, and the adverse view which I have taken concerning the allegations made

and persisted in against him. They should be given an opportunity to submit as to why the Court should not exercise its extraordinary jurisdiction to order that Mr Delaney's costs be paid by legal practitioners who made and persisted in those allegations.

[95] Presently the only order which I will make is an order that the claim and statement of claim against the fifth defendant are struck out.

The Bourke defendants' application to strike out

[96] The first, second, third, fourth and sixth defendants (who I have described as the Bourke defendants) applied on 23 February 2018 to strike out numerous paragraphs of the then statement of claim and four paragraphs of the prayer for relief. Their written submissions dated 28 February 2018 prompted some minor amendments in the amended statement of claim filed 18 April 2018. However other major amendments, including the introduction of a claim for the tort of conspiracy by unlawful means, prompted further submissions. Many of these I outlined earlier in these reasons and have dealt with in the course of deciding Mr Delaney's application to strike out. In general terms, the Bourke defendants' complaints about Anderson's pleadings relate to:

- the ill-defined nature of the alleged "Collusive Scheme" (later described as an unlawful conspiracy);
- Anderson's failure to properly plead causation and loss;
- the embarrassing manner in which the "Correct 301 Property Value" is pleaded;
- the manner in which the alleged knowledge of certain parties is pleaded; and
- uncertainty about the causes of action that are being pursued, including the cause of action which is said to give rise to a remedy by way of a constructive trust and the apparent assertion of a cause of action for "undue enrichment".

The alleged conspiracy

[97] As quoted above, paragraph 22 of the amended statement of claim refers to a "sham transaction" and an alleged conspiracy by which the amount for which North Burleigh would have to account to Anderson would be "artificially diminished" and transferred instead to 2 Bell St Pty Ltd. The term "sham transaction" has a certain connotation in law, and Anderson justifies the use of this term as denoting the deliberate deception of third parties with the objective of giving effect to a transaction which was not recorded in the documents that were created for the sale of the 301 Property. I would not strike out the words "sham transaction". However, Anderson's pleading uses a variety of terms, and the prayer for relief includes a claim for "damages at common law for deceit". Allegations of "fraud and dishonesty" appear in other contexts, such as the part of the pleading which asserts that the sixth defendant had a subdivided lot transferred to it on 19 June 2017 "with the knowledge of the fraud and dishonesty" of various entities and persons. The pleading as a whole uses a variety of terms in a variety of different legal contexts. This makes it important to understand the equitable remedies which it pursues against different parties, the extent to which a cause of action for deceit is pursued (including how and when a party was deceived) and the basis upon which it is alleged that different parties had knowledge of an alleged fraud.

[98] As to the alleged conspiracy, which is now pleaded to be the basis for a cause of action for damages against each defendant for the "tort of conspiracy to injure by unlawful means", the Bourke defendants' complaint about the "artificial" diminution in the amount for which North Burleigh would account is really a point about causation and loss and damage. I agree with Anderson that if there was in fact a conspiracy, then the fact that she later came to learn of it does not mean there was no conspiracy. Instead, the issue is that the pleading does not properly plead the financial and other consequences to Anderson of the conspiracy, including what her financial position would have been in mid-2014, or now, if there had not been a conspiracy. As already outlined, her case in proceeding 11485/17 turns on the obligation of North Burleigh as mortgagee to exercise its power of sale in accordance with its duties as mortgagee and to account to the mortgagor and to other mortgagees in respect of the proceeds of sale. North Burleigh's obligations survive and if, for example, Lot 301 was sold at an undervalue in breach of North Burleigh's duties, then Anderson has a claim against it.

[99] Anderson's outline of submissions explains in a way which the pleadings do not clearly do that the alleged conspiracy was to dishonestly hide the true amount that was obtained by North Burleigh and its associates for the transfer of the 301 Property so that North Burleigh only had to account to her for the amount of $1 million. She says that her claim against North Burleigh and the defendants is for the value that was actually received by it and its associate, 2 Bell St Pty Ltd. She submits that it "does not matter that the 301 Property might have had a market value of $3,500,000; what matters is that 2 Bell St Pty Ltd received $5,300,000 in value".

[100] It is unnecessary to repeat observations made in relation to Mr Delaney's application to strike out. To the extent Anderson's case is a claim for the tort of conspiracy to injure by unlawful means, there is no allegation that North Burleigh at the time of the alleged collusion or at the time it exercised its power of sale was a fiduciary. In any case, the authorities which I have mentioned do not support the proposition that a breach of fiduciary duty is capable of founding an actionable conspiracy involving unlawful means. The pleading does not allege that North Burleigh was a trustee and that the defendants in this proceeding have an accessorial liability for breach of trust.

[101] As to the tort of conspiracy, an essential element is that the plaintiff suffered loss. As I have explained, the pleading inadequately pleads elements of causation and loss.

Other explanations for what happened

[102] The Bourke defendants in their submissions on the strike-out application raise a matter which is not really a pleading point, but which goes to the substance and strength of Anderson's claim. It therefore is relevant to the application to remove caveats. The Bourke defendants cite, as they did in Anderson's failed joinder application, the proposition that a party asserting an unlawful conspiracy based on circumstantial evidence is required to exclude any reasonable alternative explanation for what has happened, because, without that, the necessary inference cannot safely be drawn.[12] One consequence is that a party making serious allegations of conspiracy is required to do more than merely assert it.[13] At some stage Anderson has to address whether there is any reasonable alternative explanation for what happened. As appears, Anderson's case rests

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[12] *Young v Hughes Trueman Pty Ltd* [2016] FCA 1176 at [39].
[13] At [43].

on the proposition that 2 Bell St Pty Ltd "received $5,300,000 in value", however, there is some hedging of bets in the pleading where other figures appear. Anderson submits that it is the value of $5,300,000 which she was entitled to have applied against her mortgage debt, and it is that value which she was deprived of "by way of fraud" (to use the language of her outline of submissions). If this is her case then the value or agreed value of the 301 Property is confusingly pleaded in many different places. Reference can be found to an assertion that certain parties knew that the purchase of the 301 Property was "part of a trade of properties in which its agreed value was $5,300,000". However, when, by whom and the circumstances in which that value was agreed is not clearly pleaded. Instead, it appears to be based on what I will describe as "the value equation". The components of this value equation are not properly pleaded. Instead, Anderson's submissions on the strike-out application assert that the value of $5,300,000 is determined by taking the value of the Ipswich property ($18,800,000), deducting the value of the Southport property which was exchanged for it ($2,500,000) and deducting the amount of cash that was actually paid, to arrive at a result of $5,300,000.

[103] If Anderson's case about value depends upon such an equation then it is necessary for her to plead and prove the relevant components. For example, it is not sufficient to plead that the contract price for the Ipswich property, as distinct from its value, was $18.8 million.

[104] Even if those matters are properly pleaded then the question remains as to why one would assume that the value of $5.3 million should be attributed, or was attributed by the relevant parties, to the 301 Property. This question arises in circumstances in which:

- Anderson's best valuation case is that in 2014 the 301 Property had a value of between $2.5 million and $3 million, far less than $5.3 million, and the contemporaneous or near contemporaneous valuations attribute a market value of $1 million; and

- There are other explanations to account for the figure of $5.3 million or whatever other figure is yielded from the equation. These include the "Rebate" referred to in the Ipswich contract and the admission that there was vendor finance of $6.45 million.

[105] Anderson's conspiracy theory has to exclude other explanations for the relevant transactions, including what might unkindly be described as "other conspiracies". For example, a conspiracy to induce Macquarie Bank to lend the amount which it did in respect of the acquisition of the Ipswich property. Anderson's own case is that Macquarie was presented with the Brilab contract and other documents so as to suggest that the 301 Property was worth as much as $5.3 million. There is no evidence that Macquarie Bank was told that the parties to the acquisition of the Ipswich property had agreed a component of vendor finance or had agreed to a rebate.

[106] Irrespective of whether Anderson's case is approached on the basis of some kind of value equation or in terms of the market value of the 301 Property, she struggles to show that it had a value much in excess of the amount for which it was sold by North Burleigh.

[107] The present context is a challenge to her pleading. The pleading is confusing, to say the least, as to the basis upon which the claim proceeds, either in terms of the value which North Burleigh and its associated entities are alleged to have actually received or the market value which the property had at its time of sale. Matters which should be clearly

pleaded if the value equation approach adopted by Anderson in her submissions is to be relied upon (such as the value of the Ipswich property) have not been pleaded. Matters which are barely relevant to the question of value or market value, such as the terminated Brilab contract, should not be included in the pleading. The Brilab contract is more consistent with an effort to deceive Macquarie Bank than evidence of the true value of the 301 Property. It apparently was a conditional contract which fell over in late 2013, not long after an application for finance was made to Macquarie Bank.

[108] If the pleading had clearly stated the market value of the 301 Property or even what its agreed value was between relevant parties, then the pleading still would have needed to address what the financial consequences would have been for Anderson had the property been sold for that value following an auction or some other sale process undertaken by North Burleigh at the relevant time. As earlier noted, these matters are not pleaded so as to show that there would have been a surplus available to Anderson after North Burleigh reduced its debt to nil and other debts, including any debt owed to Mr Myrteza, were satisfied.

The plea of "the Correct 301 Property value"

[109] This term is used in different parts of the pleading, and in paragraph 27 is defined to mean that at the time of its sale the 301 Property "had a market value between $3,500,000 and $5,300,000". The regular use of this term adds to the confusion. The Bourke defendants complained about the use of this term and sought further and better particulars of how the market value was arrived at. Anderson's submissions rebuffed the request, contending that the Bourke defendants really sought the evidence to be relied upon in respect of the market value, which was not a proper matter to be pleaded or provided by way of particulars. It was said to be a matter for expert evidence. However, Anderson's assertion about "the Correct 301 Property value" has a tendency to prejudice or delay the fair trial of this proceeding in circumstances in which she has provided no particulars which would support the pleaded range, and even her retrospective valuation falls short of the lowest end of the range.

Pleading of knowledge

[110] As previewed, there are many and varied allegations about what individuals and corporate entities knew. I earlier quoted how Mr Delaney's knowledge was pleaded in paragraph 37(c) of the pleading. In other places a similar rolled-up plea appears of both actual knowledge and knowledge which is alleged to be based upon what inquiries an honest and reasonable man would make. These different states of knowledge are rolled up in the one paragraph. The requirements for pleading any state of mind, including actual knowledge, have been addressed in other authorities. Because of the complexity of Anderson's pleaded case and the multi-faceted causes of action, the defendants and the Court should not be left to guess whether an allegation in a specific legal context is one of actual or some other kind of knowledge. For example, if actual knowledge of fraud is relied upon then this should be clear, together with the material facts relied upon to prove that state of actual knowledge.

The fraud exception to indefeasibility

[111] Paragraphs 44 – 48 relate to what is described as a related party transfer whereby a subdivided lot described as "the Lot 302 Property" was transferred to JB Super Fund Pty

Ltd on or about 19 June 2017. This transfer is alleged to have been made "with the knowledge of the fraud and dishonesty of" various parties. It is apparent that Anderson seeks to invoke the fraud exception to the indefeasibility of title. What must be made clear, and which is not presently made clear in this part of the pleading, is the relevant "fraud or dishonesty". Given what goes before it, the fraud could mean some unspecified and ill-pleaded deceit which seemingly is relied upon in support of common law damages for deceit. The term "dishonesty" has different legal meanings in different contexts and some forms of dishonesty fall short of engaging the fraud exception to indefeasibility. The current pleading does not adequately identify what is meant by "the fraud and dishonesty" of relevant parties so as to enable the issue related to indefeasibility to be defined for trial.

A claim for unjust enrichment

[112] Paragraph 50 of the pleading alleges that South Maclean Holdings has been "unjustly enriched in the amount of $4,300,000". The reference to unjust enrichment might simply have been a pleader's flourish. As the Bourke defendants submit, there is no cause of action for unjust enrichment. Despite this, Anderson submits that it is open to her to plead "a cause of action in unjust enrichment and if there are one or more elements of the cause of action which are missing then the defendants have not chosen to identify what they are so that the complaint might be addressed". It is not for the defendants to spell out the elements of a cause of action which they contend does not exist. It is for the plaintiff to plead the elements of a cause of action which she contends exists.

Prayers for relief

[113] Paragraph 1 of the prayer for relief seeks a declaration that Anderson has an equitable interest in the remaining lots (being the four lots identified in paragraph 48 of the pleading which have been created following the subdivision of the 301 Property). She seeks a declaration that she has an actual interest in those remaining lots and in the Lot 302 Property as beneficiary of a constructive trust. However, the pleading does not adequately plead, or really plead at all, the basis for this equitable remedy. For example, it does not plead relevant fiduciary duties or their breach.

[114] Paragraph 4 of the prayer for relief as amended seeks damages at common law for deceit. Whilst the tort of conspiracy to injure has been pleaded after a fashion, the elements of the tort of deceit are not spelt out. In any event, as will be apparent, the pleading of common law claims for the tort of conspiracy or the tort of deceit, including issues of causation and loss, have not been properly pleaded.

[115] During the hearing it was acknowledged that the prayer for relief in relation to the Bourke defendants' alleged involvement in misleading and deceptive conduct by Mr Delaney had not properly been pleaded. In any event, the flawed nature of the pleaded case for misleading and deceptive conduct against Mr Delaney has been earlier discussed and the claim for misleading and deceptive conduct by him has been struck out.

[116] Finally, there is a claim for exemplary damages. I assume this relates to torts. However, the facts, matters and circumstances upon which the claim for exemplary damages and the claims to which it relates have not been properly identified.

Conclusion – the Bourke defendants' strike out application

[117] The pleading against the Bourke defendants suffers from numerous defects. They include pleas which are bad in law insofar as the tort of conspiracy seems to rely upon unlawful means for breach of statute or an unpleaded breach of fiduciary duty. Any plea of conspiracy involving unlawful means should properly identify the relevant wrong which is said to constitute the unlawful means. More fundamentally, the alleged conspiracy pleaded in paragraph 22 of the pleading faces problems which have been earlier outlined. These include the absence of any proper pleading of causation and loss. The pleading is embarrassing in its pleas of value and how the value of $5.3 million in particular is arrived at.

[118] In general, the pleading has numerous deficiencies and a tendency to prejudice or delay the fair trial of the proceeding. It does not comply in various respects with the rules of pleading, and its various deficiencies make it vexatious. It should be struck out.

What other orders should be made?

[119] The conclusion that neither Mr Delaney nor the Bourke defendants should be vexed by a pleading in such a form returns me to a question which I posed to counsel for Anderson on 5 September 2017. For reasons which I have explained, Anderson has not come to terms with the true value or market value of the 301 Property and therefore the amount, if any, which might need to be brought into account as between her and North Burleigh if an account is ordered against North Burleigh in proceeding 7032/16. On 5 September 2017 I suggested that Anderson address the nature and value of her claim against North Burleigh and the other defendants in proceeding 7032/16 before she started vexing additional defendants. I said that if she did not there would be a "lot of boxing at shadows". Despite some attempts by Anderson in the meantime to ascertain the state of her indebtedness to North Burleigh in 2014 and since, she launched this new proceeding which has proven most vexing. Her claim against both Mr Delaney and the Bourke defendants encounters some fundamental problems. Some essential matters have not been adequately addressed in her pleading. Given these fundamental problems and the number of deficiencies in her pleading, the most appropriate order is that the statement of claim filed 2 November 2017 and the amended statement of claim filed 18 April 2018 are struck out pursuant to r 171 of the *Uniform Civil Procedure Rules*.

[120] In the course of the hearing on 3 May 2018, I raised with counsel for Anderson whether this proceeding should be "put on hold" or stayed pending the progression of her proceeding against North Burleigh so as to enable an attempt to ascertain what debt was owed by her to North Burleigh. Counsel said that he could not argue much against putting a hold on this proceeding. I also mentioned that in circumstances in which Anderson appeared to have limited resources, she should conserve her resources and concentrate for the moment on the proceeding 7032/16 against North Burleigh. Counsel raised a practical problem, and that was obtaining disclosure in that action against non-parties. I said then and I reiterate that I will take steps to ensure that non-parties make appropriate disclosure. That would include Mr Delaney and the Bourke defendants.

[121] There is an obvious need for supervision of the conduct of the three proceedings which relate to the 301 Property. That does not mean that Anderson should continue to vex the Bourke defendants with a proceeding which may prove to be flawed and have no utility. It means that supervision of the three proceedings will be directed to appropriate

disclosure and directions to ensure the resolution, at a minimum of expense, of certain critical issues. Without being exhaustive, these issues will include:

1. The amount owed by Anderson to North Burleigh at relevant dates, particularly the date upon which it sold the 301 Property;

2. The amount which Anderson owed Mr Myrteza and other mortgagees at those dates; and

3. The manner in which relevant transactions were settled, including the amount of any vendor finance or rebate provided in respect to the sale of the Ipswich property.

[122] It will be necessary to hear the parties, including the defendants in proceeding 7032/16, in relation to these matters. By way of preview, I am minded to require relevant parties to make disclosure, if they have not already done so, of relevant documents and to provide either verified statements or affidavits directed to these and other nominated issues.

[123] In the meantime, there is much to be said for placing this proceeding "on hold" at least to the extent of not requiring the Bourke defendants to be vexed by a further amended pleading which is prepared on the basis of inadequate information, assumptions and speculative conspiracy theories.

[124] As indicated, I order that the statement of claim filed 2 November 2017 and the amended statement of claim filed 18 April 2018 be struck out pursuant to r 171.

The application to remove caveats

[125] Anderson has lodged two caveats. One is over lots owned by South Maclean Holdings, the other is over a lot owned by the JB Super Fund.

[126] The history of caveats lodged over the same property is lengthy. It is unnecessary to address all the detail. They date back to 6 October 2015 when Anderson lodged a caveat claiming an equitable interest as mortgagee and an interest on the basis of certain equitable duties in respect of the sale. That caveat was either withdrawn or removed. She later commenced proceeding 7032/16 and applied for freezing orders on an *ex parte* basis. In reliance on the *ex parte* orders she lodged another caveat over a number of lots including the lots which are the subject of the present application. On 17 January 2017, Daubney J ordered that the caveat be removed. The present application is concerned with what have been described as the third and fourth caveats. One relates to the remaining lots; the other relates to a lot which is described as Lot 302.

[127] The applicants for the removal of these caveats contend that these new caveats are, in effect, caveats over the same properties which rely upon the same or similar grounds to the earlier caveats. More fundamentally, they submit that Anderson does not have a caveatable interest or, if she does so, the caveats should be removed, given the nature of her claim and the balance of convenience. As to the last matter, Anderson does not offer any undertaking as to damages and any undertaking she gave would be of no real value.

[128] I was assisted by both counsel with authorities governing the removal of caveats including the provisions of s 129 of the *Land Titles Act* 1994 (Qld) in relation to a further caveat in relation to an interest on the same, or substantially the same, grounds as the ground stated

in the original caveat. It is unnecessary in the circumstances to consider the authorities. Leaving aside whether the third and fourth caveats rely on the same grounds as earlier caveats, the issue of whether they should be removed turns on established principles governing an application to remove a caveat. In essence, the caveator has the onus of satisfying the Court that it has "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo".[14] This turns on two related inquiries of the kind undertaken in deciding whether an interlocutory injunction should be granted. The first is whether there is a *prima facie* case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the party will be entitled to the claimed relief. The second inquiry relates to whether the balance of convenience favours maintenance of the caveat. Certain factors were helpfully identified by Martin J in *Ross Cook and Brett Cook Pty Ltd v Bli Bli #1 Pty Ltd*.[15]

[129] The first substantial issue is whether Anderson has a *prima facie* case that she has the caveatable interest claimed. For the reasons which have been canvassed in respect of her pleaded case, and the evidence before me which might be relevant to a properly pleaded case, I consider that Anderson has a weak case to obtain the relief which she seeks. She has not made out a *prima facie* case in the sense that that term is understood.

[130] As to the balance of convenience, the caveats prevent the sale of lots. If the relevant lots are not sold the registered proprietor will incur holding and other costs in relation to them. The value of the land may diminish. The costs associated with marketing the lots will be lost. The registered proprietors are prejudiced by the caveats remaining.

[131] Anderson is impecunious and any undertaking from her would appear to be worthless. She has existing indemnity costs orders against her. I proceed on the basis that she has no assets; however, what happened to the $1,200,000 she deposed in her affidavit filed 21 December 2016 in proceeding 7032 of 2016 to having in her solicitor's trust account at some stage is unclear. The beneficiaries of the Anderson Family (No 2) Trust have not been identified and none offer an undertaking as to damages.

[132] Anderson submits that her impecuniosity is the result of the conduct of the defendants in this proceeding and in proceeding 7032 of 2016. That is an assertion which cannot be properly assessed on an application of this kind. It depends upon a view being taken as to the state of Anderson's assets and liabilities at the date of the impugned transaction. Given the uncertain state of her indebtedness to North Burleigh and to Mr Myrteza at the time, she may well have been heavily in debt and remained so had Lot 301 been sold to another buyer for more than $1,000,000.

[133] Anderson does not claim that the relevant lots have some special or intangible value to her. She does not claim that in the event of success against the defendants in proceeding 7032/16 or the defendants in this proceeding that any monetary judgment would be empty. Presently, I assess her prospects of success against the Bourke defendants in this proceeding to be poor. I am not persuaded that equitable compensation or damages in the event of success against the various defendants in both proceedings would be an inadequate remedy. Presently, however, the amount of her loss is ill-defined and uncertain. Even if she has a caveatable interest, it may protect a very small amount. She has not demonstrated that it is equal to or exceeds the value of the relevant lots.

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[14] *Cousins Securities Pty Ltd v CEC Group Limited* [2007] QCA 192 at [38].
[15] [2009] QSC 300 at [21].

[134] If the caveats remain then the registered proprietors will be prejudiced. The balance of convenience favours removal of the caveats.

[135] Anderson says that she would prefer that the properties which are the subject of the caveats not be sold so that she can be reinstated as owner, but recognises that the balance of convenience probably favours their sale. She seeks an order that the proceeds of sale be deposited into Court or held in a solicitor's trust account and invested pending resolution of this proceeding. She said she would co-operate to the extent of providing partial releases of the caveats to permit *bona fide* sales upon certain conditions.

[136] I have reached the conclusion that the application of settled principles justifies an order for the removal of the caveats. Anderson has not demonstrated that her claim to equitable relief and a declaration of trust in respect of the lots has sufficient likelihood of success to justify in the circumstances the maintenance of the caveats. The balance of convenience strongly favours removal of the caveats. I order that Caveat No 718335433 and Caveat No 718335431 be removed forthwith.

Costs of the application

[137] Costs should follow the event. The appropriate order is that the plaintiff pay the first, second, third, fourth and sixth defendants' costs of and incidental to their strike-out application and the costs of the application to remove the caveats. Strictly speaking, the costs of the application for the removal of the caveat relate to the costs of the second defendant and the sixth defendant. However, simplicity in the assessment of costs inclines me to order that the plaintiff pay the costs of the first, second, third, fourth and sixth defendants of and incidental to the applications filed 25 February 2018.

Mr Myrteza's application for leave to lodge a further caveat

[138] Mr Myrteza's position as a party to whom a mortgage was transferred has been noted earlier. He lodged a caveat over the property which is described as Lot 301 on 25 September 2009. On 25 September 2017 he caused to be lodged a caveat over properties owned by South Maclean Holdings Pty Ltd and another caveat over a property owned by JB Super Company Pty Ltd. On 29 September 2017 he received a notice from the then solicitors for South Maclean Holdings questioning his alleged interest in the property and demanding the caveat be removed. Mr Myrteza filed a claim and statement of claim in this Court on 17 October 2017 but did not lodge a Notice of Action in time on that day. As a result, the caveat lapsed.

[139] The claim and statement of claim were not served until 17 January 2018, but then with an indication that the pleading would be amended. On 2 March 2018 Mr Myrteza filed an amended claim and an amended statement of claim, and advised that he would endeavour to file an application for leave to lodge a further caveat. He said that it had only come to his attention that the defendants in the Anderson proceeding were applying to remove certain caveats.

[140] Remarkably, the amended statement of claim does not plead:

(a) what amount was secured by the first mortgage in favour of North Burleigh; or

(b) what amount Mr Myrteza claims is secured by his mortgage.

The solicitor for South Maclean Holdings made repeated requests as to the previewed application as well as a request for particulars of the amount Mr Myrteza says is the amount of the debt that he is owed. On 23 March 2018 Mr Myrteza said he could not particularise the amount of the debt he claims he is owed. Despite indicating that a further amended statement of claim would be forthcoming within 14 days, no further pleading has been filed or served. On 11 April 2018, Mr Myrteza indicated that his firm would not take any step against South Maclean Holdings until he had filed and served the further amended statement of claim. However, this application was filed on 27 April 2018, shortly before the return date of the other applications.

[141] The first part of the application seeks orders pursuant to s 129 of the *Land Titles Act* 1994 for leave to lodge a further caveat. In the alternative, an injunction is sought to restrain South Maclean Holdings from disposing of, dealing with, encumbering or diminishing the value of the relevant lots until the trial of the proceeding. On an application for leave under s 129, the Court should consider whether there is a satisfactory explanation for the lapse of the first caveat and for any delay in making the application, and whether the respondent would be unduly prejudiced by the lodging of a second caveat.[16] It will also consider the matters which routinely are considered on an application to remove a caveat, namely whether the caveator has demonstrated a caveatable interest, whether it has a *prima facie* case and whether the balance of convenience favours the maintenance of the status quo.[17]

[142] In this matter the apparent explanation for the delay, and not bringing an earlier application, is that Mr Myrteza understood that the Anderson Trust had a registered caveat over the same property. Of course, its interest is different to his and on 16 February 2018 Mr Conomos on behalf of South Maclean Holdings indicated an intention to apply to remove the Anderson caveat. In any event, Mr Myrteza says that had the Notice of Action been filed on the afternoon the claim was filed, the present application would be unnecessary.

[143] I am disinclined to dispose of the application on the grounds of delay and without regard to its merits. However, there is something troubling about the timing of matters. The application is justified out of a concern that the Anderson caveat might be set aside. However, Mr Myrteza's pleading closely reflects the Anderson pleading. If he thought the Anderson case was a strong one he may not have felt the need to lodge a caveat. If he felt the Anderson case was a weak one and the Anderson caveat was vulnerable to being removed, then he should have applied sooner. In any event, it is convenient to deal with the point of substance.

[144] Mr Myrteza's material indicates that as at February 2009, the Anderson Trust was indebted to North Burleigh for more than $2,500,000. Mr Myrteza was present at meetings at which the construction loan was discussed. He exhibits documents in respect of the terms of the construction loan and the interest rate which it attracted. The term of the loan was nine months after which the construction loan was required to be paid in full together with interest. Based upon the evidence concerning the interest rates payable on the two loans, South Maclean Holdings contends that more than $1,900,000 of interest would have accumulated between 2009 and 2014. If this calculation is correct (and Mr Myrteza does not contend otherwise) then he (and for that matter Ms Anderson as

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[16] *Landlush Pty Ltd v Rutherford* [2003] 1 Qd R 236 at [18].
[17] *Oversea-Chinese Banking Corporation Ltd v Becker* [2003] QSC 301 at [17] – [21].

Trustee of the Anderson Trust) must prove that the 301 Property had a market value of more than $4,400,000 (together with the costs of sale) before any breach by North Burleigh of its duty as a mortgagee would reduce the mortgage debt to nil. Account would also need to be taken of the sale of other properties, including a property described as Highway 100. This property is a point of contention in other proceedings and for present purposes I am prepared to assume that there is an argument that it was sold at an undervalue of a few hundred thousand dollars. However, this does not detract from the problem which Mr Myrteza faces, which is a similar problem to that faced by Anderson. It is to prove that, absent the impugned conduct, there would have been a surplus accounted by North Burleigh to them.

[145] Even if one was to assume for the purpose of argument that the 301 Property had a market value of $2.5 million in April 2014,[18] Mr Myrteza has failed to demonstrate that a sale at that price would have extinguished the debt that was then owed by the Anderson Trust to North Burleigh, so as to provide him with any surplus.

[146] Because Mr Myrteza's pleading closely reflects the original statement of claim in the Anderson proceeding (save that Mr Myrteza makes no allegations against Mr Delaney), it is unnecessary to repeat what I have earlier said about the nature of those claims or their merit. For similar reasons, I consider that, on the present state of the evidence, Mr Myrteza has poor prospects of obtaining an order setting aside relevant transactions or an order that North Burleigh account to him under the *Property Law Act* 1974 or pay damages to him.

[147] Whilst he may have had an interest as a mortgagee, he has poor prospects of obtaining the relief sought in this proceeding, particularly because of his inability to plead, let alone prove, the amounts that were secured by the first mortgage in favour of North Burleigh or the amount which he claims to be owed under his mortgage. Absent evidence that there would have been a surplus arising from the sale which had to be accounted to him, his claim has poor prospects of success.

[148] As to the balance of convenience, Mr Myrteza has given evidence of two properties which he owns, however, one of them is held on trust. The one property which he owns apparently has no real equity. Whilst he offers an undertaking as to damages, the value of that undertaking in financial terms is uncertain.

[149] South Maclean Holdings and JB Super Company Pty Ltd will be prejudiced if they are unable to sell the land by reason of caveats in favour of Mr Myrteza. The proceeding has no prospect of an early trial. On the current state of the evidence, and in the absence of vital evidence concerning the debts which were owed to mortgagees at relevant dates, Mr Myrteza's prospects of success seem poor. It is sufficient to conclude that he does not have a sufficient likelihood of success to justify in the circumstances the grant of leave to lodge further caveats.

[150] Mr Myrteza was prepared, like Ms Anderson, to agree terms whereby the lots were sold on certain conditions, and the proceeds of sale paid into Court or into a solicitor's trust account pending trial. I am disinclined to grant leave on such terms. The balance of

[18] Evidence that the property was listed and advertised for sale at $3 million in late 2015 provides minimal evidence of its market value in a different condition 18 months earlier.

convenience favours the owners of the lots selling them and not having the proceeds frozen for an uncertain and probably very long period.

[151] Similar considerations apply in respect of the alternative application for an injunction. Mr Myrteza's prospects of success are not sufficient to order a restraint. The balance of convenience does not support an injunction in the form of a freezing order under r 260A of the *Uniform Civil Procedure Rules* (which normally would require undertakings in the form prescribed) or an interlocutory injunction to restrain the sale of the relevant lots.

[152] Mr Myrteza's application will be dismissed. Subject to any submissions to the contrary, costs should follow the event and the order will be that the plaintiff pay the third defendant's costs of and incidental to the application to be assessed.