FEDERAL COURT OF AUSTRALIA

McCann, in the matter of Walton Construction Pty Ltd (In Liquidation) v Walton (No 2) [2021] FCA 555

File number(s):	QUD 573 of 2019
Judgment of:	**GREENWOOD J**
Date of judgment:	24 May 2021
Catchwords:	**CORPORATIONS** – consideration of an application for leave to deliver an amended defence which would have the effect of withdrawing a wide range of admissions made in a pleading of an action set down for trial commencing on 19 July 2021
Legislation:	*Corporations Act 2001* (Cth), ss 79, 180, 181, 182, 1317H *Federal Court of Australia Act 1976* (Cth), ss 37P(3)(a)
Cases cited:	*Australian Securities and Investments Commission v Franklin* (2014) 223 FCR 204 *McCann, in the matter of Walton Construction (Qld) Pty Ltd (In Liq) v QHT Investments Pty Ltd* [2018] FCA 1986
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	97
Date of last submissions:	17 May 2021
Date of hearing:	13 May 2021
Counsel for the Plaintiffs:	Mr P Hastie QC and Mr J A Hughes
Solicitor for the Plaintiffs:	Colin Biggers & Paisley Pty Ltd
Counsel for the First Defendant:	The first defendant appeared in person

Counsel for the Third Defendant:	Mr M Wyles QC and Ms S Gibson
Solicitor for the Third Defendant:	Hall & Wilcox

REASONS FOR JUDGMENT

GREENWOOD J:

Background

1 These proceedings are concerned with an application by the third defendant to the principal proceeding, Mr Patrick McCurry, for leave to file an amended defence in the form of Exhibit AMW-1 to the affidavit of Ms Ann Watson sworn 5 May 2021. That proposed amended defence, however, is subject to further proposed changes set out in a schedule prepared by the third defendant's solicitors identifying the paragraph of the statement of claim, the proposed amended defence as at 5 May 2021 and the further "proposed pleading" of the relevant paragraphs in response to the statement of claim.

2 By the proposed amended defence, Mr McCurry seeks, in effect, to entirely reconstitute the controversy between him and the plaintiffs in the principal proceeding. Fundamentally, Mr McCurry seeks to withdraw admissions extensively set out in his defence filed on 13 March 2020 and re-plead his entire defence.

3 As an indication of the scope of the changes to the existing defence, Mr McCurry seeks to withdraw admissions contained in:

(a) paragraphs 3, 6, 16, 22, 24, 27, 33, 34, 35, 39, 41, 42, 45, 62, 63 and 64 of the statement of claim so as to plead either denials of matters previously admitted in those paragraphs or alternatively partial denials of those matters;

(b) paragraphs 5, 23, 25, 26, 28, 29, 30, 31, 32, 36, 37, 43, 46, 59, 60 and 65 of the statement of claim so as to plead non-admissions of matters previously admitted in those paragraphs; and

(c) paragraphs 8, 9, 10, 12, 17, 18, 20, 21, 50, 51, 53, 54, 55, 56, 57, 58, 66, 82, 83 and 84 of the statement of claim so as to now *not* plead to the facts set out in those paragraphs.

4 Apart from these changes, Mr McCurry seeks to withdraw a pleading of "not admitted" asserted in:

(a) paragraphs 40, 61 and 73 of the statement of claim so as to plead denials of the facts pleaded in those paragraphs; and

(b) paragraphs 67, 69, 71, 72 and 79 of the statement of claim so as to now *not* plead to those paragraphs.

5 Apart from the matters at [3] and [4] of these reasons, Mr McCurry, by paras 88 to 125 of the proposed amended defence, seeks to plead an entirely new defence which asserts, in effect, that the plaintiffs could and should have brought all of the claims they now bring against Mr McCurry, in a proceeding they commenced against a company called QHT Investments Pty Ltd ("QHT"): proceeding QUD 674 of 2016. That proceeding resulted in a judgment in favour of the plaintiffs (mentioned further shortly). Mr McCurry says that the plaintiffs are now estopped, by reason of an *Anshun* estoppel, from prosecuting the principal proceeding against him, or alternatively, an estoppel arises on the footing that the claims brought against Mr McCurry in this proceeding constitute an abuse of process. I will return to that matter after noting the subject matter of the principal proceeding.

6 The proposed amended defence in this proceeding represents a *holus-bolus* reconstitution of the controversy by Mr McCurry.

7 At this point, it is convenient to note the following further matters before turning to the subject matter of the principal proceeding. The originating application was filed on 17 September 2019. The application was supported by a reasonably extensive statement of claim comprising 87 paragraphs, also filed on 17 September 2019. Mr McCurry ultimately filed a defence responding to each of the paragraphs of the statement of claim on 13 March 2020. On 27 March 2020, the plaintiffs filed a reply. At that point, the pleadings were closed. Procedural orders were made for the filing of affidavit material and on 11 December 2020 orders were made that by 5 February 2021 Mr McCurry (and also Mr Craig Walton, the first defendant) file and serve any affidavits upon which they intended to rely. The plaintiffs were to file any affidavits in response by 26 February 2021 and the possibility of a mediation was to remain open. The proceeding was to be listed for case management on 1 March 2021.

8 On 2 March 2021, a series of orders were made none of which need to be set out in these reasons except to say that by Order 10, the proceeding was set down for trial for five days commencing on 19 July 2021. The other orders made that day were programming orders enabling a trial on 19 July 2021.

9 On 5 May 2021, Mr McCurry filed his application for leave to file and rely upon the proposed amended defence.

The principal proceeding

10 In abbreviated terms, the subject matter of the principal proceeding concerns these matters.

11 In the principal proceeding, the plaintiffs, Mr McCann, Mr Hewitt and Mr Killer, are the joint and several liquidators of Walton Construction (Qld) Pty Ltd ("WCQ") and Walton Construction Pty Ltd ("Walton Construction"). They were appointed as liquidators of each company by this Court on 29 July 2014 consequent upon a judgment and orders of the Full Court in *Australian Securities and Investments Commission v Franklin* (2014) 223 FCR 204.

12 In the principal proceeding, the first defendant is Mr Craig Walton ("Walton"). He is said to have been the sole director of WCQ and Walton Construction at all material times to the events pleaded in the statement of claim. WCQ and Walton Construction are said to have been part of a group of companies controlled by Walton as pleaded: statement of claim ("SOC"), 5. Walton is an undischarged bankrupt.

13 The second defendant is an entity formerly known as Mawson Restructures and Workouts Pty Ltd ("MRW"). That company is in liquidation.

14 The third defendant is Mr McCurry and the fourth and fifth defendants are Mr Philip Spry and Mr Julian Kirzner.

15 The proceedings as between the fourth and fifth defendants and the plaintiffs have been resolved and the expectation of the solicitors for the fourth and fifth defendants is that consent orders will shortly be filed discontinuing the principal proceeding against Mr Spry and Mr Kirzner.

16 As to the subject matter of the principal proceeding, these matters should be noted, as pleaded.

17 Mr McCurry was at all relevant times a director of MRW and a director of the sole shareholder in MRW, Mawson Group Holdings Pty Ltd ("MGH"). He was also a director of other entities at all relevant times, as pleaded (including QHT), and a director of further entities at particular periods of time, as pleaded: SOC, 7. Other entities, as pleaded, are said to be related entities of MGH: SOC, 11-20. An entity described as Lewton Asset Services Pty Ltd ("Lewton"), now in liquidation, was incorporated in August 2013. Lewton was the grantor of particular security interests including a first ranking general security over all present and after-acquired property of Lewton in favour of Mawson Business Advisory Pty Ltd ("MBA"): SOC, 21. Mr McCurry was a director of MBA from August 2011 to October 2017: SOC, 7(f). Lewton

also granted a security interest in favour of QHT: SOC, 21(d)(ii). Mr McCurry was a director of QHT at all relevant times: SOC, 15.

18 On 5 April 2013, Walton Construction and MRW entered into an agreement pursuant to which MRW agreed to provide business, restructuring and workout advice to Walton Construction, the Walton Group and Walton in return for fees: SOC, 22. It was a term of that agreement that Walton Construction would reimburse MRW for out-of-pocket expenses and thus MRW was a creditor in respect of those expenses: SOC, 23.

19 A second agreement with MRW was entered into on 29 April 2013. It provided for certain payments in consideration of certain services: SOC, 24-26.

20 A third agreement was entered into on 6 May 2013. The third agreement provided for success fees on certain terms: SOC, 27-31.

21 On 18 September 2013, Walton Construction, WCQ and QHT entered into a Deed of Assignment. At that date, Walton Construction owed a debt to WCQ of $18,876,385.00. That debt was assigned to QHT in consideration of a payment of $30,000.00: SOC, 35.

22 On 18 September 2013, QHT and Lewton entered into an agreement by which Lewton acknowledged that it was indebted to QHT in the amount of $18,876,385.00: SOC, 36-38.

23 On 19 September 2013, MRW demanded payment of a success fee and, subsequent to that demand, Walton Construction paid MRW $1,173,807.80 by way of an electronic funds transfer pursuant to "Success Event 4" contemplated by the third agreement (the "MRW payment"): SOC, 39-41.

24 On 20 September 2013, Walton Construction and Lewton entered into an Asset Sale Agreement by which Walton Construction agreed to sell its assets to Lewton on the terms pleaded at para 43: SOC, 42, 43.

25 On 27 June 2012, PPJ Group Holdings Pty Ltd (which later changed its name on 5 August 2013 but is otherwise known as "Peloton") was incorporated: SOC, 17. On 30 September 2013, WCQ and Peloton entered into an Asset Sale Agreement by which WCQ agreed to sell to Peloton certain assets according to the terms pleaded at para 46 with Peloton assuming liabilities and obligations of $3,870,331.00: SOC, 45-47.

26 At paras 50 and 51, the plaintiffs plead particular finance facilities between the National Australia Bank ("NAB") and the Walton Group including Walton Construction and WCQ.

27 On 2 October 2013, Mr McCurry had a meeting with representatives from NAB and others at which he advised NAB that administrators would be appointed to WCQ and Walton Construction the next day and that Walton Construction and WCQ would like to make payments to related parties for the purposes of asset sale agreements with those parties: SOC, 52. On 2 October 2013, Mr Spry sent an email to Norton Rose Fulbright ("NRF"), NAB's solicitors, and Deloitte Touche Tohmatsu, advising of payments to be made to various creditors including an amount of $275,000.00 to Lewton: SOC, 53.

28 On 3 October 2013, NAB transferred $274,618.00 from Walton Construction to Lewton (the "Lewton payment"): SOC, 54. The Lewton payment was authorised by Walton: SOC, 55.

29 On 3 October 2013, Mr Spry emailed NAB providing instructions to NAB to transfer $1.3 million from WCQ's bank account to Peloton's bank account: SOC, 56.

30 On 3 October 2013, NAB served demands on Walton Construction and WCQ under particular facilities in an amount of $15,861,016.00, which was then due: SOC, 57, 58.

31 On 3 October 2013, Mr McCurry sent an email to NAB (Mr Matthew Mattsson) attaching a signed document authorising NAB to transfer $1.3 million from WCQ's bank account to Peloton: SOC, 59.

32 On 3 October 2013, NAB emailed Mr McCurry requesting a further step and, on that day in response, Mr McCurry emailed Walton to request that he formally reply to the email from NAB and request the making of the payment from WCQ's account at the NAB to Peloton's account: SOC, 60, 61. The further step sought by NAB was a request that a "Real Time Gross Settlement request" come from Walton's email address to NAB.

33 At 12.53pm on 3 October 2013, before WCQ was placed in voluntary administration (that day), Walton authorised and directed NAB to transfer $1.3 million from WCQ's account to Peloton: SOC, 62.

34 The settlement payment (otherwise called the "Peloton payment") was effected at 12.59pm on 3 October 2013: SOC, 63.

35 Shortly after the Peloton payment was made, Walton placed WCQ into voluntary administration: SOC, 64.

36 At para 66 of the statement of claim, the plaintiffs assert duties of Walton owed under ss 180 to 182 of the *Corporations Act 2001* (Cth) (the "Act").

37 At para 67, the plaintiffs set out the matters Walton was aware of when he authorised NAB to effect the MRW payment (that is, the success fee earlier mentioned).

38 At para 68, the plaintiffs plead the matters giving rise to a breach of the pleaded duties.

39 At para 69, the plaintiffs plead the matters of which Walton was aware when he authorised NAB to effect the Lewton payment (that is, the $274,618.00 mentioned earlier).

40 At para 70, the plaintiffs plead Walton's breach of the pleaded duties so far as the Lewton payment is concerned.

41 At para 71, the plaintiffs plead the matters of which Walton was aware when he authorised NAB to effect the Peloton payment (that is, the $1.3 million payment).

42 At para 74, the plaintiffs plead the facts giving rise to a breach of duty on the part of Walton in authorising the Peloton payment.

43 As to Mr McCurry in relation to all of these matters, the plaintiffs plead that he aided, abetted, counselled, procured, induced or was knowingly concerned in Walton's breaches of duty in relation to the making of the MRW payment (SOC, 67), the making of the Lewton payment (SOC, 70) and the making of the Peloton payment (SOC, 74).

44 At para 76, the plaintiffs plead the facts said to give rise to that conclusion: SOC, 76A-P. The plaintiffs assert that by reason of these matters, Mr McCurry contravened ss 180, 181 and 182 of the Act.

45 In the result, the plaintiffs seek a declaration that Mr McCurry is a person involved in Walton's contraventions of ss 180, 181 and 182 of the Act, within the meaning of s 79 of the Act. They also seek orders under s 1317H of the Act that Mr McCurry (together with other defendants) pay compensation to the value of the MRW payment, the Peloton payment and the Lewton payment together with interest.

The proceedings said to give rise to the *Anshun* estoppel

46 In proceedings QUD 674 of 2016, the plaintiffs commenced a proceeding against QHT (as earlier described) in which the plaintiffs sought a declaration that a Deed of Assignment between WCQ and QHT dated 18 September 2013 is a voidable transaction within the meaning of s 588FF of the Act. In other words, the focus of the proceeding as between the plaintiffs and QHT was whether the transaction constituted by the Deed of Assignment was a voidable

transaction under the Act. As mentioned earlier, at the date of the assignment, one of the assets of WCQ was a debt owed to it by Walton Construction in an amount of $18,876,385.00. That debt was assigned to QHT in consideration of the payment of $30,000.00. The assignment occurred less than a month before the relation-back day in respect of WCQ's insolvency. The contention of the liquidator was that no reasonable person in the position of WCQ would have entered into that assignment on those terms at that time. The liquidators sustained that case and obtained a declaration from this Court that the Deed of Assignment is a voidable transaction within the meaning of s 588FF of the Act: *McCann, in the matter of Walton Construction (Qld) Pty Ltd (In Liq) v QHT Investments Pty Ltd* [2018] FCA 1986 (the "QHT proceeding").

47 Mr McCurry says that the claims now made in the principal proceeding should all have been made against him in the QHT proceeding. I will return to that matter later in these reasons.

The circumstances identified by Mr McCurry as relevant to the request for leave to amend

48 Mr McCurry's defence to the statement of claim was filed on 13 March 2020 on his behalf by his then solicitors "Keypoint Law" (Mr Vaughan Hager). The defence, line by line, addresses each one of the paragraphs of the statement of claim and is generally in these terms: "McCurry admits paragraph # of the Statement of Claim". Sometimes, a paragraph of the defence admits a paragraph of the statement of claim but then adds some qualification to it. See, for example, paras 35, 36 and 37. Sometimes, a paragraph simply pleads that McCurry does not admit the relevant paragraph of the statement of claim. Sometimes, paragraphs are denied either entirely or with further qualifying words.

49 The alleged breaches of duty on McCurry's part concerning the MRW payment are addressed at paras 67 and 68. By para 67, McCurry does not admit para 67 of the statement of claim and by para 68, he denies para 68 but then asserts a series of things about the MRW payment.

50 The alleged breaches of duty in relation to the Lewton payment are answered at paras 69 and 70. By para 69, Mr McCurry does not admit the allegations in para 69 of the statement of claim concerning the knowledge of Walton and at para 70 he denies the allegations at para 70 of the statement of claim and asserts that the Lewton payment was in the best interests of Walton Construction for particular reasons.

51 The Peloton payment is addressed at paras 71 to 74 of the defence and the allegation at para 74 of the statement of claim is denied with Mr McCurry pleading that the payment was in the best interests of Walton Construction for the reasons identified. The alleged breaches of duty concerning MRW are addressed at para 75 and the alleged accessorial liability of Mr McCurry is dealt with at para 76 with denials and some specific assertions.

52 It seems to follow that every paragraph of the statement of claim was addressed and to the extent that specific qualifying matters were sought to be raised, they were raised and where some additional facts were to be asserted, they were asserted.

53 There seems to be a quite specific level of consciousness about each and every aspect of the pleading as filed.

54 On 9 December 2020, Ms Ann Watson, on behalf of Hall & Wilcox, caused a notice to be filed reciting that Hall & Wilcox was now acting for Mr McCurry. By an affidavit filed 12 May 2021, Mr Wayne Kelcey deposed to these matters. Mr Kelcey is a partner in the firm Hall & Wilcox. On 4 December 2020, he spoke with Mr Hager so as to make arrangements for the collection of the file on behalf of Mr McCurry and so as to understand the history of the proceeding. During the call arrangements were made for the transfer of the relevant Court documents.

55 Mr Kelcey says that Mr Hager told him that he did not maintain a "full file" as there had been limited correspondence and no written advice given; he had not prepared a mediation paper for an upcoming mediation; Mr McCurry was in default in terms of the Court's timetable for particular steps; he had not given Mr McCurry any advice regarding his prospects of success and since his engagement he had taken only minimal steps in the proceeding on behalf of Mr McCurry; and he had really only been trying to help Mr McCurry as a friend as he felt sorry for him.

56 As to the steps taken by Mr Kelcey and Hall & Wilcox since receiving instructions, Mr Kelcey says this in a further affidavit filed 12 May 2021.

57 From the date of engagement on 9 December 2020 including the December holiday period and into January 2021, Hall & Wilcox was taking instructions from Mr McCurry regarding the mediation (which was then part heard) and instructions in relation to preparation and filing of evidence which had been ordered on 11 December 2020. Mr Kelcey says that on 11 February 2021 he was informed by his surgeon that he would require major surgery on 3 March 2021.

On 26 February 2021, he caused an email to be sent to the plaintiffs' solicitors informing them of that circumstance and the potential impact on timeframes for the proceeding. Mr Kelcey received a response agreeing to a requested timeframe which was designed to accommodate the anticipated period of Mr Kelcey's recovery. That timeframe resulted in the orders earlier mentioned of 2 March 2021. Mr Kelcey says that upon his return to work he continued to take instructions regarding the conduct of the proceeding and took steps to retain senior counsel in the matter.

58 Mr McCurry has sworn an affidavit dated 4 May 2021 in which he explains the history of his engagement in the proceeding and factors influencing his conduct in relation to his defence to the proceeding.

59 Mr McCurry says these things.

60 Mr McCurry became aware of these proceedings against him and others in late 2019. Shortly after becoming aware of the proceedings, Mr McCurry asked Mr Hager to represent him in these proceedings. When Mr McCurry was a partner of the "Mawson Group", Mr Hager had been retained to assist on matters. Persons in the Mawson Group had introduced Mr Hager to Craig Walton. Mr McCurry understands that Mr Hager gave advice to Craig Walton concerning the proposed restructure of Mr Walton's businesses which occurred in 2013 and which Mr McCurry understands to be the various transactions giving rise to this proceeding. Mr McCurry says that these transactions were the reason for the QHT proceeding in which he gave evidence in mid-2018. Mr McCurry says that other firms and entities also gave evidence to participants in the restructure of WCQ and Walton Construction.

61 Mr McCurry says that "Mawson" (which presumably is a reference to the "MBA" entity earlier mentioned) began doing work for the "Walton companies" after a representative of NAB spoke to him about the Walton companies as questions of refinancing, renewing, rescheduling (or selling) debt needed to be addressed in relation to those companies.

62 Mr McCurry had developed a relationship over time with Mr Hager and thought that Mr Hager's understanding of the facts and matters, relevant to this proceeding, as a result of having represented Mr Walton meant that Mr Hager would be able to "look after me in this matter". Mr McCurry says that, at this time, Mr Hager understood Mr McCurry's ill health and, because of the side effects of the treatment Mr McCurry was experiencing, Mr McCurry

considered there to be "significant benefit in not having to explain the history of Mawson and the Walton companies", and his ill health, to a new lawyer.

63 Mr McCurry says that on 2 December 2015 he was orally examined in relation to the circumstances concerning the restructure of WCQ and Walton Construction. He says that between 2016 and 2019 the liquidators commenced at least three proceedings against either him or entities related to him.

64 In late 2015, Mr McCurry was diagnosed with cancer, stage 2, located in his calf and shoulder. In March 2016, he was diagnosed with cancer, stage 3 (melanoma) present in lymph nodes under his right arm. Surgery occurred. By December 2016, the cancer had progressed to stage 4. Treatment for that stage began in December 2016. Mr McCurry continued to work throughout 2017. However, he says that his "mental dexterity" was affected by the drug administered to him as part of a trial. By the end of 2017, he had become "quite debilitate[ed] and unable to think clearly". By October 2017, he was unable to continue in his role as a partner in the Mawson Group. From December 2016 throughout 2018, Mr McCurry remained on the trial immunotherapy program. However, the "side effects lasted all through to the end of 2019". Mr McCurry suffered from impaired cognitive function and memory loss. He says that "cognitively and memory wise" he still has not fully recovered to his pre-treatment levels.

65 Mr McCurry says that when this proceeding came to his attention in late 2019, he was beginning to pursue work and income and gradually coming out of the "immuno-chemo fog". He was starting to pursue opportunities in Victoria. He says he does not specifically recall events but believes that he did not hear "anything from Mr Hager about this matter until late in 2020 when he told me there was to be a mediation conference".

66 Mr McCurry says that he is now in remission although he continues to undergo scans to monitor his condition. He says he continues to "experience some cognitive impairment, including memory loss as a consequence of his treatment".

67 Mr McCurry says that during Mr Hager's engagement, Mr Hager did not give him advice as to any of the following matters:

(a) The nature of the allegations made in this proceeding;

(b) What, if any, defences could be advanced on my behalf;

(c) The possible approaches and strategies that I may wish to adopt and how any approach or strategy might impact:

i. The overall outcome of each set of proceedings;

ii. My ability to advance a proper case or defence in response to the allegations made against me or the entities related to me; and

iii. My personal livelihood, role as a director and financial situation for years to come.

(d) The impact of multiple proceedings arising from the same set of facts, matters and circumstances;

(e) Any potential conflicts, including any possible conflicts of interest that arise by reason of Hager's representation of me in this proceeding and his role in representing Mr Craig Walton in the transactions which are the essence of the claims made in this proceeding;

(f) Possible liability of any of the Advisors involved in the transactions;

(g) Any contribution that may be sought from other defendants in this proceeding; and

(h) Possible strategies for settlement and resolution of the claims.

68 Apart from those matters, Mr McCurry says that, in particular, at no time was he ever made aware by Mr Hager (or any other person at Keypoint Law, Mr Hager's firm) of these matters:

(a) that delay in attending to my defence of the allegations made against me by the Liquidators will result in unjust negative outcomes for me and deny me being able to properly defend the allegations made against me; and/or

(b) of my obligations, as a litigant, including adherence to the Court's orders and my obligations under sections 37M and 37N of the *Federal Court of Australia Act* (Cth) 1976.

69 Mr Hager says that it is now apparent to him that Mr Hager "may have misunderstood his role as an advisor" to Mr McCurry, particularly in circumstances where they had developed a "personal friendship" and where Mr McCurry was suffering from ill health. Mr McCurry says that he believes that Mr Hager was trying to prevent him from being stressed by the personal and financial circumstances of being sued. Mr McCurry says that he now realises he was asking too much of Mr Hager to be a friend and an advisor.

70 Mr McCurry says that had he known of the matters described at [67] and [68] of these reasons (about which he was not being advised by Mr Hager including advice about his obligations, rights and defences), Mr McCurry would have engaged lawyers not previously connected with Walton Construction or WCQ and with whom he did not have a personal friendship.

71 Mr McCurry says that by December 2020 (after the claims made against him failed to be settled at mediation), Mr Hager engaged Hall & Wilcox to represent him in the proceeding. Mr McCurry says that since engaging Hall & Wilcox he has "become aware of":

(a) my rights and more importantly my obligations as a litigant in this proceeding, in particular the obligation imposed upon me by section 37N;

(b) the nature of the proceedings as a whole;

(c) the substantive nature of the allegations made against me and the entities related to me;

(d) what, if any, defences can be advanced on my behalf including further evidence that might be filed in the proceeding;

(e) the possible approaches and strategies that I may wish to adopt and how any approach or strategy might impact:

i. the overall outcome of these proceedings;

ii. my ability to advance a proper case or defence in response to the allegations made against me; and

iii. my personal livelihood, role as a director and financial situation for years to come;

(f) the impact of multiple proceedings arising from the same set of facts, matters and circumstances;

(g) possible shared liability for any of the other Advisors involved in the transaction;

(h) contribution that may be sought from other defendants in this proceeding;

(i) possible options for settlement and resolution of the claims;

(j) the consequences and associated risks of my prior, uninformed, decision to seek to delay the matter.

72 Mr McCurry says that having become aware of the matters described as [71] of these reasons, he has instructed Hall & Wilcox to take all steps necessary to pursue his defence of the proceeding and prepare an amended defence in accordance with his "obligations as a litigant". Thus, he seeks leave to amend his defence. He apologises for "any inconvenience caused to the Court". He also says this:

> However, for whatever reasons, and I can only suppose that Mr Hager was trying to protect me and spare me the stress of being a litigant, *I just did not understand the consequences* of the defence which was filed for me in March 2020. I do not wish to waive my privilege in the conversations I have had and advice I have been given by Mr Kelcey of Hall & Wilcox. Without waiving that privilege, I can tell this Court that I did not understand in March 2020 the *consequences of the admissions which Mr Hager made*. Mr Hager just told me that he thought I *had to admit matters* even if they were not allegations *against me*. Mr Hager never mentioned Anshun estoppel to me.
>
> [emphasis added]

73 Mr McCurry also says this:

> I apologise that I did not *understand my March 2020 defence* and the *harm which it*

> *does to me*. I humbly request this honourable court to give me the opportunity to properly defend the allegations made against me. I apologise for not understanding sooner than now, how the Court process works and the fact that I have not raised with the Court *all of the matters which I was entitled to raise in my defence*.
>
> [emphasis added]

The contentions

74 The plaintiffs oppose, on a number of grounds, the application for leave to amend the defence.

75 *First*, the delay in making the application is significant having been filed on 5 May 2021, more than 13 months after detailed admissions were made throughout the defence and within close to two months of the commencement of the trial of the action on the basis of those pleadings.

76 *Second*, the scope and number of admissions of matters of fact now sought to be withdrawn is very extensive casting a probative burden on the plaintiffs in terms of evidence (affidavits, documents etc) which was otherwise the subject of the very extensive admissions: see [3] of these reasons.

77 *Third*, nowhere in Mr McCurry's affidavit does he say that he, together with his new advisors (but particularly for his own part in addressing the facts), has considered each allegation of fact in the statement of claim and the corresponding admission made by him and now realises that the matter of fact admitted is not correctly admitted as it is not the fact with the result that he must now seek to withdraw the admission. Mr McCurry's silence, in his affidavit, as to the actual position in respect of each previously admitted fact is said to be a telling matter in terms of the exercise of the discretion to allow him to withdraw the many admissions.

78 *Fourth*, the plaintiffs are prejudiced by Mr McCurry's change of position.

79 *Fifth*, the admissions have stood on the record for a long period, which is a contention related to the delay point.

80 *Sixth*, Mr McCurry seeks to withdraw admissions and plead a *denial* of a fact (without asserting that he now realises that the admission of fact is incorrect), or plead a *non-admission* or *not plead* at all to an asserted fact previously admitted. The plaintiffs say that Mr McCurry, as a matter of proper case management principles, ought not be now allowed such an indulgence. The plaintiffs say that every matter of fact pleaded in the statement of claim is a *material fact* in making the pleaded case that Mr McCurry aided, abetted, counselled, procured, induced or was knowingly involved in Mr Walton's breach of duties in relation to the MRW payment, the Lewton payment and the Peloton payment, and that Mr McCurry, as a matter of pleading, ought

to admit or deny the fact or say that he cannot plead to the fact as he does not have the knowledge to admit or deny the fact.

81 For Mr McCurry, counsel contends that the circumstances that brought about the pleaded admissions, the relationship between Mr McCurry and Mr Hager, the lack of engagement by Mr Hager in advising Mr McCurry (for the reasons identified), the circumstances of Mr McCurry's ill health and the tasks consuming Mr Kelcey's time since he accepted instructions to act in the matter on 9 December 2020, have all been explained with the result that the interests of justice are served in allowing Mr McCurry to rely on the amended defence and withdraw all of the admissions identified at [3] of these reasons.

82 As to the *Anshun* estoppel, Mr McCurry contends that the common substratum of fact, or substantially common substratum of fact giving rise to the investigation of the legality of the QHT transaction is such that the claims now advanced against Mr McCurry ought to have been identified, formulated, pleaded and made in that action with relief identified against Mr McCurry, and Mr McCurry joined as a party to all possible controversies to be quelled against him.

83 One other aspect of the criticism made by the plaintiffs of Mr McCurry's proposed amended defence is that he now wants to put in issue a range of foundation facts such as the fact of an email or a letter passing between A and B or a document of a particular date rather than merely contesting inferences or conclusions said to arise out of the fact of the email, letter or document. That criticism led to Mr McCurry's advisors preparing the schedule described at [1] of these reasons. By that schedule, Mr McCurry under the heading "Proposed pleading" (in various places) admits the relevant instrument (email, letter, document) but "otherwise denies" the relevant paragraph. In response, the plaintiffs say that they are willing to accept a pleading that continues to admit the relevant document, but the difficulty remains that much of the factual material (which the plaintiffs say cannot objectively be said to be genuinely in dispute) remains in dispute as it is otherwise denied.

84 A further criticism of the amended defence made by the plaintiffs is that there are many references to findings, observations or remarks made by Derrington J in the course of the reasons for judgment in the *McCann* matter otherwise described in these reasons as the "QHT proceeding". The plaintiffs say that there is simply no proper basis for incorporating into the amended pleading any of that matter. Any findings, references or observations by Derrington J in the course of deciding a matter between the plaintiffs and QHT, are simply not relevant to

the process of fact-finding in the proceedings between the plaintiffs and the parties to this proceeding, or as it remains, the plaintiffs and now Mr McCurry alone.

Conclusions

85 I do not propose to examine in these reasons point by counterpoint the paragraph of the statement of claim, the proposed amended defence to that paragraph and the proposed change to the amended defence otherwise described as the "Proposed pleading". I have examined those documents carefully and have described in principle the context of the present controversy.

86 I accept Mr McCurry's evidence about the circumstances in which he came to retain Mr Hager to represent his interests and I accept that Mr McCurry has suffered considerable illness as a result of which there has been a progression in his condition and consequential treatment and the administration of drug therapy.

87 I also accept that the defence came to be filed on 13 March 2020 at a point when Mr McCurry was in remission but remained affected by drug treatment.

88 I also accept on the face of the affidavit of Mr McCurry and the affidavit of Mr Kelcey that Mr Hager was seeking to assist Mr McCurry in what might be described as a holding pattern having regard to the circumstances and the nature of the relationship.

89 However, I remain troubled that the admissions have been on the record for a long time and that Mr McCurry has not expressly addressed in his affidavit the notion that having examined the pleading carefully in the context of the defence which was filed, he is in a position to say that each admission is incorrect and it may be necessary to do that paragraph by paragraph. Mr McCurry ought to swear an affidavit supporting the amended defence. It is a fundamental difficulty and a telling problem that Mr McCurry has not descended into a specific observation that the matters of fact previously admitted by him are in fact not correct and warrant a denial. It is not sufficient to admit the document but otherwise render every other factual matter in the paragraph in question subject to a denial.

90 Mr McCurry seeks a very considerable indulgence from the Court. The scope and content of the admissions he seeks to withdraw are very extensive indeed. Not only does Mr McCurry seek to withdraw admissions, he seeks to substitute for those admissions continuing denials of many matters, seeks to render some of the admissions as simply non-admissions and seeks to substitute other admissions for no pleading at all.

91 In other parts of the pleading, Mr McCurry seeks to rely upon findings, observations and comments of Derrington J in a different proceeding.

92 The overall objective in the management of any litigation in this Court is to ensure that the interests of justice are served. That means, especially when parties are close to a hearing as is the position in this proceeding with a trial commencing on 19 July 2021 that a balance must be struck between the interests of the plaintiffs and the interests of Mr McCurry.

93 Although the Court is sympathetic to the circumstances which confronted Mr McCurry in terms of his health throughout 2015, 2016, 2017 and 2018 leading to remission by (it seems) the end of 2019, Mr McCurry must deal more comprehensively with the difficulty created by such a profound proposed change to his defence. I am not satisfied that the interests of justice are served by granting leave to file the amended defence in its present form, so far as the application for leave to withdraw admissions is concerned.

94 As to the *Anshun* estoppel, I am not satisfied that there is any basis for the *Anshun* estoppel contention. The QHT proceeding was a discrete claim by the liquidators as to the legality of that particular transaction. That claim and the particular facts upon which it turned, is different in its particular focus to the broader scope of the factual matrix giving rise to the claims now made against Mr McCurry.

95 As to the amended pleading (as adjusted by the schedule), I am not satisfied that leave ought to be given to rely upon the amended defence (as partially reframed by the schedule). However, Mr McCurry ought to be given an opportunity to formulate a pleading which would warrant further consideration. The essential matter is that Mr McCurry must formulate a pleading which *affirmatively* pleads to every allegation in the statement of claim. To do that he would need to take each factual allegation and determine whether each such allegation is to be admitted or denied. If Mr McCurry is not in a position to say whether each such allegation can be admitted or denied, it would be open to him to plead that he has no knowledge of the relevant matter. In formulating an amended defence, Mr McCurry ought not now be entitled to simply *not admit* a factual contention. He must affirmatively plead to every allegation. Moreover, there is no proper basis upon which findings, observations or remarks of a trial judge in another matter are to be incorporated into a pleading in this matter. The Court will direct Mr McCurry to formulate a pleading of the kind contemplated by these reasons as an exercise of the power conferred under s 37P(3)(a) of the *Federal Court of Australia Act 1976* (Cth) by Friday, 4 June 2021. The Court does so on the footing that the proceeding has progressed a very long way

down the track with evidence filed and a trial imminent. The plaintiffs are entitled to know precisely what is admitted and denied. Given the advanced state of the proceedings, it is absolutely necessary for Mr McCurry to plead in a detailed and clear way if he wishes to substitute the existing defence for a defence which broadens the scope of the controversy. Mr McCurry must understand that the plaintiffs are exposed to prejudice because the case has been prepared on the basis of the admissions of so many matters of fact as pleaded in the statement of claim. The Court would be willing to consider a reformulated amended defence which accommodates these requirements and, of course, the plaintiffs would need to be further heard concerning any such document.

96 Otherwise, the proceeding will go to trial on the basis of the present pleadings.

97 Mr McCurry will be ordered to pay the costs of the present application.

I certify that the preceding ninety-seven (97) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood.

Associate:

Dated: 24 May 2021

SCHEDULE OF PARTIES

QUD 573 of 2019

Plaintiffs

Second Plaintiff	WALTON CONSTRUCTION PTY LTD (IN LIQUIDATION) ACN 060 900 218
Third Plaintiff	WALTON CONSTRUCTION (QLD) PTY LTD (IN LIQUIDATION) ACN 100 833 225

Defendants

Second Defendant	A.C.N. 152 646 323 PTY LTD (FORMERLY KNOWN AS MAWSON RESTRUCTURES AND WORKOUTS PTY LTD) (IN LIQUIDATION) (ACN 152 646 323)
Third Defendant	PATRICK McCURRY
Fourth Defendant	PHILIP SPRY
Fifth Defendant	JULIAN KIRZNER