

FEDERAL COURT OF AUSTRALIA

Wallace (Liquidator), in the matter of Avestra Asset Management Ltd (In Liq) v Dempsey [2021] FCA 1643

File number(s): QUD 26 of 2020

Judgment of: **GREENWOOD J**

Date of judgment: 22 December 2021

Catchwords: **CORPORATIONS** – consideration of an application under Rules 8.21(1)(c) and (d) of the *Federal Court Rules 2011* (Cth) for leave to amend the title of the proceedings to properly describe the applicant/plaintiff as the company in liquidation rather than a proceeding in the name of the liquidators in their capacity as liquidators of the company in liquidation – consideration of the principles governing leave to amend – consideration of whether leave is to be given to add further claims

Legislation: *Corporations Act 2001* (Cth), ss 477, 588F, 598, 601FD, 1317H, 1317J, 1317K, 1325
Federal Court Rules 2011 (Cth), r 8.21

Cases cited: *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231
Environinvest Ltd (in liq) v Former Partnership of Webster, White, Gridley, Nairn, Newman, Peters and Miller (2012) 208 FCR 376
Evans Construction Co Ltd v Charrington & Co Ltd [1983] QB 810
Mitry v Business Australia Capital Finance Pty Ltd (in liq) [2010] NSWCA 360
McGraw-Hill Financial Inc v Clurname Pty Ltd [2017] FCAFC 211
The “Sardinia Sulcis” and “Al Tawwab” [1991] 1 Lloyd’s Rep 201

Division: General Division

Registry: Queensland

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

Number of paragraphs: 67

Date of hearing: 7 July 2021

Counsel for the Plaintiff: Mr P McQuade QC and Mr S C Russell

Solicitor for the Plaintiff: McCullough Robertson

Counsel for the Defendants: Mr G D Beacham QC and Mr C J Crawford

Solicitor for the Defendants: Barry.Nilsson.Lawyers

ORDERS

QUD 26 of 2020

IN THE MATTER OF AVESTRA ASSET MANAGEMENT LTD (IN LIQUIDATION)

BETWEEN: **SIMON ALEXANDER WALLACE AND RICHARD HUGHES
IN THEIR CAPACITY AS LIQUIDATORS OF AVESTRA
ASSET MANAGEMENT LTD (ACN 119 227 440) (IN LIQ) AS
RESPONSIBLE ENTITY FOR "AG ACCELERATOR FUND"
ARSN 139 641 946, "EXCELA MAXIMISER" ARSN 130 533
685 AND "GENERATOR™" ARSN 127 699 754**
Plaintiff

AND: **CLAYTON DEMPSEY**
First Defendant

PAUL ROWLES
Second Defendant

ORDER MADE BY: GREENWOOD J

DATE OF ORDER: 22 DECEMBER 2021

THE COURT ORDERS THAT:

1. The solicitors for the applicants are directed to submit orders to the Court giving effect to these reasons by 21 January 2022.
2. Costs reserved.
3. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published from Chambers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GREENWOOD J:

Background

1 On 19 February 2016, this Court appointed Simon Alexander Wallace-Smith and Richard Hughes as joint and several liquidators of Avestra Asset Management Ltd (the “Company”). The liquidators had previously been appointed joint and several provisional liquidators of the Company.

2 The Company was incorporated on 11 April 2006. In the period between 20 March 2013 and 1 February 2015, the first defendant, Mr Clayton Dempsey, was a director of the Company. In the period between 20 March 2013 and 6 January 2015, the second defendant, Mr Paul Rowles, was a director of the Company. The Company held an Australian Financial Services Licence (“AFSL”) and each of Mr Dempsey and Mr Rowles were “responsible managers” under the AFSL. The Company at all material times on and from 30 January 2014 was the responsible entity for the purposes of Part 5C.2 of the *Corporations Act 2001* (Cth) (the “Act”) of the following registered managed investment schemes: *Excela Australian Equity Income Accelerator Fund* ARSN 139 641 946 known as the “AG Accelerator Fund” (the “Accelerator Fund”); *GeneratorTM* ARSN 127 699 754 (the “Generator Fund”); and *Excela Maximiser* ARSN 130 533 685 (the “Maximiser Fund”). For the purposes of these reasons, I will describe these Funds collectively as the “Funds” and individually as the “Fund” or a “Fund”.

3 The matters described at [2] of these reasons concerning the Company are matters of contended fact set out in a Statement of Claim filed in these proceedings on 4 February 2020. They were also matters of fact set out in a draft Statement of Claim enclosed with a letter sent to Mr Dempsey by Mr Hughes on 3 June 2019 and in a letter dated 3 June 2019 sent by Mr Hughes to Mr Rowles.

4 In those letters, Mr Hughes said this after having referred to his appointment with Mr Wallace-Smith as joint and several liquidators of the Company:

Based on my investigations, I consider *the Company* has a claim against you including for breach of director’s duties.

I have **enclosed** a draft statement of claim in respect of the proceeding which is intended to be issued in the Supreme Court of Queensland.

The statement of claim has been provided to you in draft to give you notice of *the claim*, including for the purposes of the [relevant policy of insurance] issued by Dual

Australia Pty Limited for the period 31 January 2015 to 31 January 2016.

The draft statement of claim is not intended to set out the *final position of the Company* and we reserve the rights of *the Company* in their entirety, including the right to amend the statement of claim prior to it being filed and served.

There is presently no need for you to respond to this letter or the statement of claim.

[emphasis added]

5 It is apparent from each letter that the liquidators had in mind a claim to be made by the Company against each of the directors for breach of duty.

6 As to that claim, the draft Statement of Claim as sent to each director and the Statement of Claim as filed on 4 February 2020 involves these contended material facts. Each of the Funds being administered by the Company as responsible entity had a product disclosure statement which described an investment mandate for each Fund setting out the types of securities in which each Fund may invest. It is not necessary to recite the elements of the investment mandate for each Fund. In the period between 17 March 2014 and 27 October 2015, transactions occurred which the liquidators contend were outside the investment mandate for the relevant Fund. The liquidators have identified those transactions which were completed prior to their appointment and those which were not. The completed transactions are said to have given rise to a loss (called the “trade loss”) in each Fund which in total amounts to \$2,138,292.28. The incomplete trade loss in respect of two of the Funds amounts to \$1,983,427.58. Apart from these losses, the liquidators contend, by the Statement of Claim, that each Fund suffered a loss described as a “loss of opportunity” as a result of investments not having been made in the securities authorised by the investment mandate for the relevant Fund. The loss of opportunity claim concerns the Accelerator Fund and the Maximiser Fund. The claim amounts to a loss in the range of \$1,926,327.08 and \$1,982,528.04. The total loss the liquidators say the Company suffered is in the range of \$6,048,046.90 and \$6,104,247.86.

7 Thus, the loss is said to be not less than \$6,048,046.90.

8 The basis upon which a claim for the recovery of that loss is framed by the Statement of Claim is this. The defendants authorised and approved each of the transactions falling outside the investment mandate. Those transactions, as so authorised, materially increased the risk of a loss to each Fund and were not notified to the members of the Funds. Prior to undertaking the transactions, *the Company* did not inform the members of each Fund of any change in the nature of the investment risk associated with the purchase of units in the Funds: para 43. Neither Mr Dempsey nor Mr Rowles took any steps to cause *the Company* to inform the

members of the Funds of particular pleaded matters: para 44. By reason of the material facts pleaded in the Statement of Claim, Mr Dempsey and Mr Rowles failed to exercise the degree of care and diligence which a reasonable person in their position would have exercised as required by s 601FD(1)(b) of the Act and failed to act in the best interests of members of each Fund as required by s 601FD(1)(c) of the Act. In the draft Statement of Claim and in the Statement of Claim, as filed on 4 February 2020, the liquidators also contended that each of the defendants failed to act honestly as required by s 601FD(1)(a) of the Act. However, that last allegation has been abandoned by the liquidators and the breach of duty relied upon now rests upon contended contraventions of ss 601FD(1)(b) and (c). By reason of the contravention of those provisions, Mr Dempsey and Mr Rowles are said to have contravened s 601FD(3) of the Act.

9 At para 46 of the Statement of Claim, it is said that by reason of the matters pleaded in the various paragraphs of the Statement of Claim and the contraventions of s 601FD(3) of the Act by the defendants, *the Company* is said to have suffered the losses identified at para 46(b)(i) to (v), giving rise to a loss of not less than \$6,048,046.93 in the Funds.

10 In the letters sent to Mr Dempsey and Mr Rowles on 3 June 2019 (in identical terms), there is a reference to an insurance policy issued by Dual Australia Pty Limited (“Dual”). The liquidators apparently took the view that that policy responded in a way relevant to the claims being made by the liquidators. In their letter to Dual on 18 January 2016, the liquidators observed that the letter was written on behalf of the “Policy Holder” which was the Company.

11 On 4 February 2020, the solicitors for the liquidators filed an Originating Application (“OA”) and the Statement of Claim (“SOC”) earlier described. The OA recites the document as having been prepared by Mr David O’Farrell of HWL Ebsworth Lawyers. The OA says that on the grounds stated in the SOC, the “Applicant” claims, “[p]ursuant to s 1317H(1) of the [Act], compensation in the amount of not less than \$6,048,046.93, being the total loss of value of the Funds”. The OA also claims interest pursuant to ss 51A and 52 of the *Federal Court of Australia Act 1976* (Cth) (the “FCA Act”) and costs.

12 The OA describes the “Applicants” (described in these reasons alternatively as the “plaintiff” or the “applicants”) in respect of the claims described at [11] of these reasons, in these terms:

Simon Alexander Wallace and Richard Hughes in their capacity as liquidators of Avestra Asset Management Ltd (ACN 119 227 440) (in liq) as Responsible Entity for “AG Accelerator Fund” ARSN 139 641 946, “Excela Maximiser” ARSN 130 533 685 and “GeneratorTM” ARSN 127 699 754.

13 Section 477 of the Act sets out the powers of a liquidator of a company and s 477(2) provides
(among other things) that, subject to the section, a liquidator of a company may “bring or
defend any legal proceeding in the name and on behalf of the company”. This proceeding,
however, is brought in the name of the *liquidators* in their *capacity* as liquidators.

14 As already mentioned, by the proceeding, the liquidators claim compensation in the amount
described pursuant to s 1317H(1) of the Act.

15 Section 1317H(1) relevantly provides that a court may order a person to compensate a
corporation or a registered scheme for damage suffered by the corporation or scheme if the
person has contravened a corporation/scheme civil penalty provision in relation to the
corporation or scheme and the damage resulted from the contravention. A contravention of
s 601FD(1)(b) or (c) (or both) gives rise to a contravention of s 601FD(3) which is a civil
penalty provision. Section 1317H(1) confers *power* on the Court to *order* a person to
compensate a corporation in the terms of the section.

16 The question of who has standing to apply for an order under s 1317H(1) is determined by
s 1317J. Section 1317J(1) confers standing on ASIC to apply for a compensation order.
Section 1317J(2) confers, relevantly, standing on the “corporation” or the “responsible entity
for the registered scheme” to apply for a compensation order. Section 1317J(4) provides,
relevantly, that *no person* may apply for a compensation order “unless permitted by this
section”.

17 The short point is that although the liquidators could have brought the proceeding in the *name*
and on behalf of the Company, and the Company (and only, relevantly for present purposes,
the Company) had standing under s 1317J to apply for a compensation order under s 1317H,
the proceeding was commenced in the name of the liquidators in their *capacity* as liquidators
rather than in the *name* of the Company.

18 Apart from describing the “Applicants” in the manner described at [12] of these reasons, the
OA also recites that the proceeding is:

In the *matter of Avestra Asset Management Ltd* (ACN 119 227 440) (in liq) as
Responsible Entity for “AG Accelerator Fund” ARSN 139 641 946, “Excela
Maximiser” ARSN 130 533 685 and “GeneratorTM” ARSN 127 699 754.

[emphasis added]

19 These proceedings are concerned with an interlocutory application made by the liquidators as
applicants originally filed on 11 December 2020. At the hearing of the application on 7 July

2021, the applicants sought and were granted leave to file and rely upon an amended interlocutory application (as exhibited at KCP-30 to the affidavit of Katrina Christine Pagey sworn on 1 April 2021). By the amended interlocutory application, the applicants seek leave under r 8.21(1)(c) or, in the alternative, r 8.21(1)(d) of the *Federal Court Rules 2011* (Cth) (the “Rules”) to amend the Originating Application by correcting the name of the plaintiff to:

Avestra Asset Management Ltd (ACN 119 227 440) (in liquidation) as Responsible Entity for “AG Accelerator Fund” ARSN 139 641 946, “Excela Maximiser” ARSN 130 533 685 and “GeneratorTM” ARSN 127 699 754.

20 The applicants seek leave to make that amendment so as to either correct a “mistake” in the name of the plaintiff (r 8.21(1)(c)) or to correct the “identity” of the plaintiff (r 8.21(1)(d)). The applicants contend that they are not seeking to substitute a person for an existing party (as contemplated by r 8.21(1)(f)) but rather to correct a mistake in the name of the existing plaintiff (although described as applicants) or to correct the identity of the existing plaintiff.

21 The applicants also note that r 8.21(2) expressly provides that an application may be made under rr 8.21(1)(c) and (d) even though the application is made after the end of any relevant period of limitation applying at the date the originating application was filed which, in this case, was 4 February 2020. As to the leave sought under rr 8.21(1)(b) and (c), the applicants contend that any such amendment by leave ought to take effect from the date of filing of the OA on 4 February 2020.

22 Apart from these matters, the applicants also seek leave under r 8.21(1)(g)(i) to amend the OA to add a claim for relief by the Company for equitable compensation for breaches of fiduciary duty by the defendants as directors of the Company at the material time, and a claim for relief by the Company under s 1325 of the Act for compensation for loss and damage suffered by reason of the conduct of the defendants (in contravention of s 601FD(1)(b) and (c) and s 601FD(3) of the Act).

23 The applicants also seek leave to amend the SOC in the form of the document at KCP-31 to the further affidavit of Ms Pagey filed on 1 April 2021 (the “Proposed Amended Statement of Claim” or “PASOC”), consistent with the leave sought in relation to the OA.

24 As to the matters described at [21] of these reasons, the applicants seek an order (para 4 of the amended interlocutory application) that the proposed amendments “take effect” on 4 February 2020 or alternatively on 9 December 2020. In oral and written submissions, the applicants contend that any dispute as to the date on and from which these amendments ought to take

effect (or as to whether a limitation period has elapsed in respect of such claims) should, as a matter of principle, be determined at the trial of the proceeding, not on the present application.

25 The applicants adopt the same position in relation to the PASOC.

26 The orders sought by paras 4, 5 and 6 of the amended interlocutory application are in these terms:

4. Pursuant to rules 1.32 and 1.35 of the Rules the date on which the amendments referred to in paragraph 2 above [the amendments to the OA to add the equitable compensation claim and the s 1325 claim] take effect is 4 February 2020 or, alternatively, 9 December 2020.
5. Pursuant to rules 1.32 and 1.35 of the Rules the date on which the amendments to the Statement of Claim take effect:
 - a. which are consequential to the relief in paragraph 1 [correcting the name] and 2(b) [the s 1325 claim] above, being paragraphs 1, 2, 47(b), 47(c), and 48(a), of the Proposed Amendment Statement of Claim, is 4 February 2020;
 - b. which are not referred to in sub-paragraph 5(a) is 4 February 2020 or, in the alternative 9 December 2020.
6. A direction that the application for the relief sought in paragraph 4, with respect to paragraph 2(a) [the equitable compensation claim], and 5(b) above be determined at trial.

27 In the alternative to all of the above orders (which the applicants describe as the “Primary Relief” they seek by the application), the applicants seek “Alternative Relief” as described at paras 8 to 13 of the amended interlocutory application. That relief is in these terms:

8. Pursuant to Rule 8.21(1)(c), the name of the first named Plaintiff be corrected to Simon Alexander Wallace-Smith.
9. Pursuant to Rule 9.05, Avestra Asset Management Ltd (ACN 119 227 440) (in liquidation) as responsible entity for [the three Funds] be joined as the Second Plaintiff.
10. Pursuant to Rule 8.21(g)(i), leave be granted to amend the [OA] to add:
 - a. a claim for relief by the Company for equitable compensation because of breaches of fiduciary duty by the Defendants;
 - b. a claim for relief by the Company for compensation for loss or damage pursuant to s 1325 of the [Act]; and
 - c. a claim for relief by the Liquidators for compensation or loss or damage pursuant to s 598 of the Act.
11. Pursuant to Rule 16.53 leave be granted to amend the [SOC] in the form being annexure [KCP-32] to the further affidavit of [Ms Pagey] filed 1 April 2021.
12. Pursuant to [R]ules 1.32 and 1.35 of the *Rules*:

- a. the date on which the amendments referred to in paragraph 10 and 11 above [the amendments to the OA and SOC] take effect is 4 February 2020 or, alternatively, 9 December 2020;
 - b. the start date of the proceeding for the Company is taken to be 4 February 2020 or, alternatively, 9 December 2002.
13. A direction that the application for the relief sought in paragraph 12 above be determined at trial.

The evidence of Ms Pagey

28 In Ms Pagey’s affidavit of 9 December 2020, she says that she is a Special Counsel in the employ of McCullough Robertson Lawyers and that she has the conduct of the matter under the supervision of the firm. She says that in June 2020, she ceased employment with HWL Ebsworth Lawyers (“HWL”) and commenced employment with McCullough Robertson (“MCR”). Ms Pagey, when employed by HWL had the care and conduct of the matter subject to the supervision of Mr O’Farrell. In June 2020, Mr O’Farrell took up a position as a member of MCR. Ms Pagey continued to have the care and conduct of the matter under the supervision of Mr O’Farrell.

29 Ms Pagey says that she attempted to file the OA and SOC on 3 February 2020 by filing the documents online. Apparently there were difficulties as to form which prevented that from happening. Unfortunately, a further complication was that Ms Pagey’s house was burgled on 3 February 2020 with the result that other support lawyers were called in aid to assist with the filing on 4 February 2020. Ms Pagey says that the OA and SOC had been settled by counsel which contained some errors of misdescription and they were filed in that way as already described in these reasons. Other matters are addressed in Ms Pagey’s affidavit of 9 December 2020 but they do not need to be addressed here.

30 Ms Pagey filed a further affidavit on 1 February 2021 and a further affidavit on 4 February 2021.

31 Ms Pagey also filed two affidavits on 1 April 2021. In the first of these affidavits lodged at 2.40pm and identified as her fourth affidavit, Ms Pagey says that the purpose of the affidavit is to explain the intention of the liquidators and their solicitors at the time of commencing the proceeding and to identify contemporaneous documents which reveal that intention. By way of context, Ms Pagey says that she has practised almost exclusively in the area of commercial litigation and insolvency and that she has always been aware that it is the company and not the liquidators that have standing to make a claim under s 1317H of the Act. Ms Pagey says that

she is informed by Mr O'Farrell and believes that he too has always been aware that it is the company and not its liquidators that must make a claim under s 1317H of the Act. Ms Pagey says that to her knowledge from the conduct of the file, the liquidators, prior to the OA and SOC being filed, had been investigating claims the Company may have available to it against its former directors arising out of losses suffered by the Company as a result of contended breaches of duty owed to the Company by each of the defendants. Ms Pagey says that because the relief is claimed pursuant to s 1317H of the Act, it was always the liquidators' intention to commence this Proceeding in the name of the Company (in liquidation). Ms Pagey says that she is informed by Mr David Orr of the office of the liquidators, and informed by Mr Richard Hughes (and believes to be true) that it was the intention of the liquidators to bring the proceeding in the name of the Company and not in the name of the liquidators, and that any claim pursuant to s 598 of the Act was not considered until the "administrative error" was identified in the heading of the OA after the commencement of the proceeding.

32 Ms Pagey annexes to her affidavit copies of the letters dated 3 June 2019 sent by Mr Hughes to Mr Dempsey and Mr Rowles and a copy of the correspondence in relation to the matter of the insurance, mentioned earlier.

33 Ms Pagey says that having regard to the matters set out in her first affidavit, a *mistake* was made in the heading of the proceeding. The mistake is that although the name of the Company was included in the text in describing the initiating party, the "name of the plaintiff does not specify that the Company is *itself* the plaintiff". Ms Pagey says that for the reasons she has identified in her affidavit (as described above), "it was the intention of the Liquidators to commence the Proceeding in the name of the Company". Counsel for the applicants particularly emphasises the letters dated 3 June 2019 sent to each director which make it unmistakably clear that the liquidators had in mind that the claim was one being made *by* the Company in respect of losses *suffered by* the Company. Ms Pagey says that she cannot say how the mistake occurred. She says that neither she nor Mr O'Farrell identified that the name of the applicant recited in the OA, SOC and Genuine Steps Statement "did not refer only to the Applicant as the Company as responsible entity". Ms Pagey says that had either she or Mr O'Farrell recognised that the descriptive text did not recite the Company as applicant/plaintiff, she is "certain" that one of them would have ensured that the name of the liquidators be removed so as to ensure that the Company as responsible entity was the plaintiff.

34 Ms Pagey also says that one contributing factor to the mistake is that both she and Mr O’Farrell believed that the relevant limitation period would expire on 5 February 2020, the day after the filing of the OA and SOC. The pressure of the impending expiration of the limitation period (at least as Mr O’Farrell and Ms Pagey understood it to be so) may well have contributed to the mistake. Ms Pagey also refers to a letter dated 17 September 2020 signed by Mr O’Farrell and Ms Pagey addressed to “Wotton + Kearney”, the solicitors acting for Mr Dempsey, in which it is said that the form in which the OA and SOC was issued was in error.

35 Section 1317K of the Act provides that proceedings for a compensation order may be started no later than six years after the contravention. The transactions relied upon by the Company giving rise to the claim as earlier described occurred in the period 17 March 2014 to 27 October 2015. As to transactions as at 17 March 2014, the limitation period expired on 17 March 2020 and as to transactions occurring at the latest on 27 October 2015, the limitation period expired on 27 October 2021.

The application

36 Rule 8.21 of the *Federal Court Rules* provides as follows:

8.21 Amendment generally

- (1) An applicant may apply to the Court for *leave to amend* an originating application for any reason, *including*:
 - (a) to correct a defect or error that would otherwise prevent the Court from determining the real questions raised by the proceeding; or
 - (b) to avoid the multiplicity of proceedings; or
 - (c) to correct a *mistake* in the *name* of a *party* to the proceeding; or
 - (d) to correct the *identity* of a *party* to the proceeding; or
 - (e) to change the *capacity* in which the party is suing in the proceeding, if the changed capacity is one that the party had when the proceeding started, or has acquired since that time; or
 - (f) to substitute a person for a party to the proceeding; or
 - (g) to add or substitute *a new claim* for relief, or a new foundation in law for a claim for relief, that arises:
 - (i) out of the same facts or substantially the same facts as those already pleaded to support an existing claim for relief by the applicant; or
 - (ii) in whole or in part, out of facts or matters that have occurred or arisen since the start of the proceeding.

Note: For paragraph (1)(b) and the avoidance of multiplicity of proceedings,

see section 22 of the Act.

- (2) An applicant may apply to the Court for leave to amend an originating application in accordance with paragraph (1)(c), (d), (e) or subparagraph (g)(i) *even if* the application is *made after* the end of any relevant period of limitation applying at the date the proceeding was started.
- (3) However, an applicant *must not apply* to amend an originating application in accordance with subparagraph (1)(g)(ii) *after* the time within which any statute that limits the time within which a proceeding may be started *has expired*.

[emphasis added]

37 These rules, by reason of the introductory term “including” are not an exhaustive statement of the circumstances in which a relevant application may be made.

38 In *McGraw-Hill Financial Inc v Clurname Pty Ltd* [2017] FCAFC 211, Allsop CJ, Jagot and Yates JJ said this at [23]-[26]:

[23] The primary judge also expressed doubt about the correctness of *Voxson Pty Ltd v Telstra Corporation Ltd (No 7)* (2017) 343 ALR 681; [2017] FCA 267 (*Voxson*) at [21] in which it was said that “the Court has the power to grant leave to amend both an originating process and a pleading to add a statute-barred cause of action but only in the circumstances referred to in r 8.21(2) of the FCR... We do not consider that *Voxson* is correct in this respect. The language of r 8.21(1) is clear: an applicant may apply to the Court for leave to amend an originating application for any reason “including” any of the reasons in r 8.21(1)(a)-(g). Subrules (a) to (g) are examples of amendments that may be the subject of application. *They are not a code*. Thus, the interaction of r 8.21(1)(g) and (2) does not mean that the Court’s power to permit an amendment asserted to involve a statute-barred claim is confined to the circumstances in r 8.21(1)(g)(i). We leave to one side for further argument the proper approach to an amendment introducing an *unarguably* statute-barred claim. Nevertheless, the following considerations undermine any rigid or bright-line approach exclusively based on r 8.21(1)(g) and (2).

[24] *The Federal Court Rules must also be construed as a whole*. Apart from the fact that the power to apply to amend is expressed inclusively in the opening words of r 8.21(1), other rules disclose the true position. Thus, the rules include [Rules 1.32, 1.33, 1.34, 1.35, and 16.51]...

[25] Rules 1.32–1.35 are important weapons in the Court’s armoury to enable the overarching purpose of the “civil practice and procedure provisions” (defined in s 37M(4) of the Court Act to comprise the Rules and “any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court”) to be achieved as identified in s 37M(1) of the Court Act. The overarching purpose is to facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible. Faced with these provisions to construe r 8.21(1)(g) as an exclusive power to permit a statute-barred amendment let alone a merely arguably statute-barred amendment (as in the present case) only in the circumstances permitted by r 8.21(2), is inconsistent with the language of the Rules and inimical to the overarching purpose in s 37M of the Court Act. As the present case demonstrates, given the competing arguments about when the cause of action

first accrued and the potential operation of s 55(1) of the Limitation Act, *if there is a reasonable argument the claim is not statute-barred, there is no reason in principle that an amendment should not be permitted, particularly if all rights are preserved by the date on which the amendment takes effect being determined as part of the final judgment rather than on an interlocutory basis.*

[26] To the extent it has any remaining operation in this Court, the rule in *Weldon v Neal* (1887) 19 QBD 394 at 395 to the effect that a party is not permitted to amend a pleading to add a cause of action which is statute-barred, depends on the new claim being statute-barred. As *Wardley* at CLR 533–4; ALR 259–60 makes plain, that matter should not ordinarily be determined at an interlocutory stage.

[emphasis added]

39 As to the application for leave pursuant to rr 8.21(1)(c) or 8.21(1)(d) to correct a mistake in the name of the plaintiff so as to remove the names of the liquidators and recite only the name of the company, the relevant principles concerning rr 8.21(1)(c) and (d) are set out in *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 (“*Bridge Shipping*”), by McHugh J at 260-261 (Brennan and Deane JJ agreeing at 234):

... a plaintiff may make "a mistake in the name of a party" not only because the plaintiff mistakenly believes that a certain person, whom the plaintiff can otherwise identify, bears a certain name but also because the plaintiff mistakenly believes that a person who answers a particular description bears a certain name. Thus, a plaintiff may make a mistake "in the name of a party" because, although intending to sue a particular person whom the plaintiff knows by sight, the plaintiff is mistaken as to that person's name. Equally, the plaintiff may make a mistake "in the name of a party" because, although intending to sue a person whom the plaintiff knows by a particular description, e.g. the driver of a certain car, the plaintiff is mistaken as to the name of the person who answers that description. In both cases, the plaintiff knows the person intended to be sued by reference to some property or properties which is or are peculiar to that person but is mistaken as to the name of that person. In the first case, the properties which identify the person are personal characteristics; in the second case, they are the properties which are of the essence of the description of that person. But for the purpose of sub-r. (4) that distinction is irrelevant. In both cases, the plaintiff was mistaken only as to the name of the person intended to be sued. There is no warrant for treating sub-r. (4) as dealing only with the case where the properties which identify the party are inherent properties. That is, there is no warrant for treating sub-r. (4) as dealing only with the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by certain inherent properties peculiar to it but whose name I mistakenly believed was X." The sub-rule applies equally to the case where the plaintiff says: "The person I wish to substitute as a party is that entity which I identified by reference to certain properties which are true of it and of no one else and whose name I mistakenly believed was X." In both cases, a mistake in the name of the party has occurred and can be seen to have occurred only because the person sued does not have or is not identified by some property or properties which is or are peculiar to the person intended to be sued and to no one else.

Rule 36.01(4) is a *remedial rule* and should be given a *beneficial interpretation*. It is proper to give it the *widest interpretation which its language will permit*. It should be interpreted to cover not only cases of misnomer, clerical error and misdescription but also cases where the plaintiff, intending to sue a person he or she identifies by a

particular description, was mistaken as to the name of the person who answers that description. In my opinion, *Evans v. Charrington* and *Lloyd Steel* were correctly decided.

[emphasis added; citations omitted]

40 Thus, the Rules include cases of misnomer, clerical error, and misdescription and instances where a plaintiff, intending to sue identified by a particular description, was mistaken as to the name of the person answering that description.

41 The defendants contend that the reasoning in *Bridge Shipping* concerns a conscious mistake, namely, a positive belief about the name of a party whom the applicant knows, or can identify, by a particular description. The defendants contend that the way the reasoning has been applied is consistent with such a characterisation and does not engage forgetfulness, ignorance or inadvertence.

42 The plaintiff contends that this is an unnecessarily “narrow” view of the principles set out in *Bridge Shipping* and the “remedial” character and “beneficial interpretation” to be attributed to the Rules governing leave to amend, and does not properly take into account the decisions cited with approval by McHugh J (in particular, *Evans Constructions Co Ltd v Charrington & Co Ltd* [1983] QB 810, where it was said that it was not the *identity* of the person *sued* that is crucial, but the identity of the person *intended* to be sued that is vital).

43 In support of a broader approach, McHugh J cites a passage from the Court of Appeal decision in *The “Sardinia Sulcis” and “Al Tawwab”* [1991] 1 Lloyd’s Rep 201 (“*Al Tawwab*”) expressing the test for leave to amend to correct the name of the party as follows (Lloyd LJ at 207):

... it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an *intended defendant*, the plaintiff gets the *right description but the wrong name*, there is unlikely to be any doubt as to the *identity* of the person intended to be sued. But if he gets the wrong description, it will be otherwise.

[emphasis added]

44 Elsewhere in *Al Tawwab*, Stocker LJ considered the distinction between the *identity* of the party and the *name* of the party, and said the following (at 209):

... in terms of general application I do not feel I can improve on the test suggested by Lord Justice Lloyd – can the *intending plaintiff* or *defendant* be identified by reference to a description or defendant be identified by reference to a description which is specific to the particular case – eg landlord, employer, owners or shipowners? If the identification of the person intending to *sue* or *be sued* appears from a specific description it is one of name, where it does not it will in many cases involve the

description of another party rather than simply the name.

[emphasis added]

45 Stoker LJ also observed that the nature of the claim will usually provide the answer to the issue.

46 In *Environinvest Ltd (in liq) v Former Partnership of Webster, White, Gridley, Nairn, Newman, Peters and Miller* (2012) 208 FCR 376, Gordon J said this concerning rr 8.21(1)(c) and (d) at [29] and [31]:

[29] ... Put simply, r 8.21(2) expressly provides that amendments made under, *inter alia*, r 8.21(1)(c) or r 8.21(1)(d) can be made notwithstanding the effluxion of a relevant limitation period. Such a result is not surprising. It is not surprising because, consistent with the earlier analysis of “mistake”, such an amendment does not change or alter the *substantive basis on which the proceeding was commenced*. There was a change in name but that is all — at all relevant times Environinvest intended to commence proceedings against its auditor for the 2005 year. There has been no substantive change in the purpose of the proceedings, the identity of the party intended to be sued, the subject matter of the proceedings or the causes of action pleaded.

...

[31] ... Adapting the analysis of McHugh J in *Bridge Shipping* at 262, Environinvest made a *mistake* as to the *description* of the party that it wished to sue. It intended to sue the auditor and no other party. Environinvest’s mistake was one of *misnomer*. Put another way, it intended to sue the party that it identified by a particular description (the auditor) but it was mistaken as to the *name* of the person or persons who answered that description. Although there was arguably a “substitution” in the technical sense, it was not a substitution of “another person” of the kind with which r 8.22 is concerned.

[emphasis added]

47 The defendants rely on Gordon J’s analysis of McHugh J’s judgment above to support the proposition that an amendment which looks to change the *substantive* basis of the proceeding is one that is likely to fall outside the bounds of a qualifying mistake. This is said to be so because the nature of the amendment being made under rr 8.21(1)(c) or (d) is one that is backdated to the date of filing.

48 The parties have extensively addressed *Mitry v Business Australia Capital Finance Pty Ltd* [2010] NSWCA 360 (“*Mitry*”). This was a case not unlike the present proceeding, in which the original proceeding was commenced with the plaintiff described as “Andrew Hugh Jenner Wiley in his capacity as Liquidator of Business Australia Capital Finance Pty Ltd ACN 002 426 726”. However, because the claim was for the repayment of a loan made by the company, it ought to have been commenced by the company as plaintiff. The trial judge granted leave to amend the proceeding to change the name of the plaintiff by removing the name of the

liquidator and inserting the name of the company under the equivalent New South Wales Supreme Court Rules. Although the Court of Appeal affirmed the trial judge’s decision to make that order, the appeal was otherwise successful on different grounds.

49 In affirming the trial judge’s decision to grant leave to amend, Macfarlan JA (Hodgson and Young JJA agreeing) made the following observations at [43] to [45]:

43 I do not consider that this decision [*Bridge Shipping*] dictates a conclusion that leave should have been refused in the present case. The present is a different case to *Bridge Shipping*. Here the liquidator, in exercise of the power conferred upon him by s 477(2)(a) *Corporations Act*, purported to bring the action “on behalf of the company”. What he failed to do was to bring the action “in the name ... of the company” as s 477(2)(a) also specifies. This was truly “a mistake in the name of a party” in the sense contemplated by s 65(2)(b). True it is that in strict terms the effect of the amendment was to substitute a new party, that is, to substitute the company for the liquidator, but that is a circumstance expressly permitted by s 65(2)(b).

44 The subsection specifically contemplates that an amendment to correct the name of a party may be one that substitutes a new party for an existing one. If the present is not a case of the type contemplated in the subsection, it is very difficult to contemplate one that would be.

45 Bearing in mind that the rule “is a remedial rule and should be given a beneficial interpretation” and that “[i]t is proper to give it the widest interpretation which its language will permit” (*Bridge Shipping* per McHugh J at 260–261), my view is that the rule authorised the primary judge to grant the leave that he did grant.

50 Despite noting that there was “no express evidence” in the case as to how the proceedings came to be formulated in the way that they were, Macfarlan JA was satisfied that there had been a mistake, observing at [49] and [50] that:

49 It is in my view significant that in this case, pursuant to the power conferred by s 477(2)(a) of the *Corporations Act*, the liquidator did attempt to pursue the proceedings on behalf of the company. However by naming himself as plaintiff rather than the company, he stopped short of conforming with the first element of s 477(2)(a) That was in my view “a mistake as to the name of a party” within the meaning of s 65(2)(b) *Civil Procedure Act*.

50 The position in *Sibroll* was different because the company in liquidation had *no right to bring the preference proceedings on behalf of the liquidator*. The company could not act as agent of the liquidator for that purposes. In the present case the legislation specifically authorised the liquidator to act as agent for that purpose. He attempted to do so but made a mistake as to the name in which he sued.

51 The defendants contend that *Mitry* turns on its own facts and the willingness of the trial judge and Court of Appeal to draw certain inferences. The defendants contend that the present proceeding is more complex in the sense that it is not simply a matter of a company recovering

a debt from a defendant, but rather the subject matter of the proceeding involves a claim made against the directors of a responsible entity for contended breaches of duty concerning the management of certain Funds and a claim for recovery of losses suffered by the Funds by reason of those breaches (s 601FD(3) of the Act). The plaintiff contends that the point made by the defendants is a distinction without a difference in point of principle because the cause of action in *Mitry* (an action for recovery of a debt payable to the company) and the statutory cause of action in this proceeding can only be brought in the name of the company and there is no relevant difference simply because of the character of the claim. Each claim must be made in the name of the company.

52 The position in this case is reasonably clear.

53 There can be no serious doubt that the liquidators, as a result of their analysis of the transactions relating to the losses suffered in the Funds clearly had in mind that *the Company* had a claim against each of the directors for breach of duty. At no point did the liquidators believe that they had a claim to be advanced in *their names* in their *capacity* as liquidators as if the relevant statutory structure was one analogous to an application by a company's liquidator by the mechanism contemplated for example in s 588FF(1) of the Act. The liquidators knew and understood that the *Company* had the benefit of a claim for compensation measured by the quantum of the losses based on the contended contraventions. At no point in any of the correspondence do the liquidators assert a right vested in them in their capacity as liquidators.

54 Unfortunately, the solicitors made a mistake by framing and filing the OA and SOC (and the Genuine Steps Statement) in a way which was inconsistent with the intention that the liquidators were trying to effect (in a manner entirely consistent with the position they had been adopting in the correspondence). The intention of the liquidators is clear from the correspondence of 3 June 2019, the draft Statement of Claim and the SOC as filed. Ms Pagey's evidence identifies the position of Mr Orr and Mr Hughes as to that matter and the text of the pleading and the letters of 3 June 2019 speak for themselves.

55 The defendants, however, contend that a relevant mistake has not been made out for the purposes of making an order under rr 8.21(1)(c) or (d) for the following reasons.

56 The interlocutory application first filed by the applicants on 11 December 2020 to change the name of the applicant/plaintiff with leave given under r 8.21(1)(f) by way of *substituting* the Company in place of the Liquidators. Ms Pagey's first affidavit, sworn on 9 December 2020,

was filed in support of the interlocutory application in that form. The defendants therefore make the following submissions Ms Pagey's evidence in that affidavit:

- (a) The proceeding was filed through an extended process that occurred on 3 and 4 February 2020. There were some administrative difficulties with the Federal Court Registry, but these are not said to have been the source of any error or mistake.
- (b) Ms Pagey states that the filed documents – which include the originating application and the statement of claim - were settled by a barrister (**the Settled Pleadings**), and that:
 - “The documents provided by Counsel [the Settled Pleadings] contained errors in the description of the parties which, for the reasons set out below, were inadvertently transcribed into the documents filed with the Court.”
- (c) The error that is then identified is that in the course of transferring the Settled Pleadings into the correct Court form, certain errors which existed in the Settled Pleadings “were not identified”, including that “there ought to have been no reference in either the heading or the schedule to [the Liquidators]”

57 As to the characterisation of the mistake in Ms Pagey's affidavit of 1 April 2021 as one of failing to specify the Company *itself* as plaintiff, the defendants consider this to be “meaningless” as it “simply describes what appears in the heading of the originating application”.

58 Further, they take issue with Ms Pagey's inability to explain “how the mistake occurred”. As to this, they submit that there is no direct evidence of a mistake because Ms Pagey cannot say what occurred, or why; and, at best, Ms Pagey's evidence establishes inattention or inadvertence, not a *mistake*, and only at the time of transferring the settled pleadings which had been received from the barrister into the correct Court form.

59 The defendants complain that the plaintiff has not provided any direct evidence of mistake and argue that the Court should not infer a mistake was made where the plaintiff could presumably have given direct evidence of it, but has not. They say that there must be someone in the plaintiff's “camp” who can explain how it came to be that the proceeding was brought in the name of the Liquidators and that, despite this:

- (a) there is no evidence of who drafted the originating application and statement of claim, and why they drafted them in the form that they took. The drafter may have been the barrister, but it is not clear whether that is the case or not. There is nothing about the instructions to the drafter, or communications with him/her;
- (b) the Liquidators had a draft of the statement of claim by 3 June 2019. The heading to the draft statement of claim described the Liquidators as the

Applicants. The Liquidators do not give any evidence directly about this or anything else (there is some evidence of their intention, from Ms Pagey on information and belief). Again, there is no evidence of instructions from, or communications with the Liquidators;

- (c) in addition, the draft statement of claim in its opening paragraphs distinguished between the parties on the one hand (being the Liquidators/Applicants and the Respondents) and the Company on the other hand (at the time referred to as AAML). This was, on its face, a case of deliberate drafting, as opposed to misnomer. Neither the Liquidators nor the drafter address this;
- (d) the relief sought in the application in its first two iterations is inconsistent with the proposition that there was a mistake. The proposed substitution or joinder of the Company had, as its premise, a change in the parties, as opposed to a correction of a mistake in relation to an existing party. This is not explained;
- (e) when the issue was first brought to the attention of the Applicants' solicitors on 12 August 2020, they did not say that there had been a mistake in commencing the proceedings in the name of the Liquidators. Instead, the Applicants' solicitors' initial reaction was to say that the proceedings had in fact been commenced by both the Company and the Liquidators and the court documents would be amended to reflect that. This is not explained. Indeed, the Applicants' solicitors had referred to the proceedings being commenced by both the Company and the Liquidators from at least 19 April 2020. Ms Pagey cannot now recall why she referred to the proceeding as having been commenced by both the Company and the Liquidators.

60 Thus, the defendants contend that the evidence before the Court does not make out a mistake for the purposes of rr 8.21(1)(c) or (d). They submit that Ms Pagey's evidence establishes no more than inattention at the time of filing the documents, and that inattention itself is not a mistake within the meaning of the rule.

61 The defendants characterise the "mistake" upon which the applicants are seeking to rely as one in which the intention was for the plaintiff to be identified by a particular description (for example, "the Company in Liquidation"), but there was a mistaken belief that commencing the proceeding in the name of the Liquidators satisfied that description. The defendants contend that the evidence supports a contrary position, namely, that the solicitors and the Liquidators well understood the distinction between the Company itself and proceedings taken by liquidators but nevertheless elected to commence the proceedings in the name of the Liquidators and thus there was no operative mistake.

62 The first thing to recognise about these unfortunate proceedings is that it is perfectly plain that the Liquidators understood that the claims to be made against the directors for breach of duty arising out of their analysis of the transactions were claims, transaction by transaction, to be made by the Company. As mentioned earlier, the letters of 3 June 2019 and the text of the draft Statement of Claim and the Statement of Claim as filed make it perfectly plain that both the

Liquidators and the solicitors understood that the claims being made both as a matter of fact and law were claims enjoyed by the Company.

63 The OA and SOC as filed make plain that the claims are “in the matter of” the Company in its capacity as responsible entity for the Funds. The proceeding, however, was not commenced in the name of the Company. It ought to have been but it was not and it is clear from the material that the solicitors made a mistake in the sense that they believed that the action was properly constituted by adopting the textual language as appears on the document. In the modern world of litigation with the hideous costs associated with it, we do not want to return to some form of modern mutation of the archaic forms of pleading which caused proceedings to be lost and struck out on grounds, and for purposes, that serve no good public purpose. The directors have been in no doubt whatsoever about the nature of the claims being made against them. They know and understand in black and white terms that the Company in liquidation has a claim against them (or so its officers in the form of its liquidators believe) for the recovery of compensation for losses suffered because, as pleaded, the directors made investments outside the investment mandate for the Funds which gave rise to losses.

64 There was, in this case, a clear and operative mistake.

65 The applicants will be given leave to amend as sought by para 1 of the primary relief.

66 As to paras 2 to 6 of the amended interlocutory application, I propose to give leave to the applicants to amend the Originating Application and Statement of Claim in the manner foreshadowed by the proposed orders. In particular, the relevant questions about when amendments are to take effect will be reserved for determination at the trial.

67 It is not necessary to consider the alternative relief which is only agitated on the footing that the primary relief is not granted.

I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Greenwood.



Associate:

Dated: 22 December 2021