

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12268/16

First Plaintiff

PETER JOHN MULLEN

AND

Second Plaintiff

**P & R FOOD SERVICES PTY LTD
(ACN 105 891 969)**

AND

First Defendant

RICKY JOHN MUNDAY

AND

Second Defendant

**SPEND LOVE PTY LTD (ACN 155
331 525)**

Evans Lawyers acting for the First and Second Defendants successfully made application to have the First and Second Plaintiff's Amended Statement of Claim struck out.

SUMMARY

1. The Application filed on 24 February 2017 sought an order pursuant to UCPR 171 that the Plaintiffs' Amended Statement of Claim be struck out.
2. In the alternative the Application sought an order pursuant to UCPR 171 paragraphs 7, 8, 9, 10, 13, 13A, 13B, 15, 17, 30, 31, 37(i), 38, 39, 40 and 41-47 of the Plaintiffs' Amended Statement of Claim be struck out.

RELEVANT LAW

3. UCPR 171 states:

“Striking out pleadings

(1) This rule applies if a pleading or part of a pleading—

- (a) discloses no reasonable cause of action or defence; or*
- (b) has a tendency to prejudice or delay the fair trial of the proceeding; or*
- (c) is unnecessary or scandalous; or*
- (d) is frivolous or vexatious; or*
- (e) is otherwise an abuse of the process of the court.*

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.”

BACKGROUND

6. The Plaintiffs originally commenced proceedings against the Defendants out of the County Court of Victoria which were dismissed by consent due to the Defendants complaint as to jurisdiction
7. Subsequently the Plaintiffs commenced these proceedings through filing its Claim and Statement of Claim on 25 November 2016 in the Supreme Court of Queensland.
8. The Defendants’ served their Notice of Intention to Defend, Defence and Counterclaim on 16 January 2017.
9. The Plaintiffs’ filed and served an Amended Statement of Claim on 3 February 2017.

THE EVIDENCE AND SUBMISSIONS

10. The Plaintiffs’ case, as best as could be discerned from their pleading, was that:
 - (a) the company (the second defendant) *“At all material times, owned and operated the business known as Spend Love Bistro and Bar (**the Business**) located at the Brickworks Shopping Centre Precinct... ”*¹. The Defendants’ admitted this.
 - (b) on 2 January 2013 the company (the second defendant) entered into a Contract of Sale to purchase the Business. The Defendants’ admitted this.
 - (c) on May 2013 the company (the second defendant) completed the Contract of Sale to purchase the Business which is when the company made the final payment of the purchase price. The Defendants’ admitted this.
 - (d) amongst all of this there was a Partnership Agreement as between *“Mullen and/ or PR”* (being the First and Second Plaintiffs) and *“Munday and/ or the company”* (being the First and Second Defendants) to purchase the Business which on *“...7 January 2013, following completion of the initial payment, Mullen and Munday became the owners of the company and the Business.”*
-

- (e) further or alternatively Munday (the First Defendant) entered into a joint venture with Mullen (the First Plaintiff) and the company (the Second Defendant), the terms of which “...were the terms of the Partnership Agreement set out above., and that by reason of the alleged joint venture “each Munday and the company owed a fiduciary duty to Mullen”.
11. There were a number of issues with this action, as pleaded against the First and Second Defendants, as it relied upon allegations that could not be maintained.
 12. Firstly, paragraphs 9, 10, 13, 13A, 15, 17 and 37(i) of the Amended Statement of Claim (“ASoC”) relied upon an alleged ‘Partnership Agreement’. That alleged Agreement was prefaced in paragraph 9 of the ASoC was in complete contradiction to paragraph 5 of the ASoC. Further those paragraphs:
 - (a) contained multiple allegations, assumptions and particulars;
 - (b) were vague, argumentative and embarrassing; and
 - (c) disclosed no cause of action as against each of the First and Second Defendants as separate parties to the proceedings to enable them to ascertain what case it was alleged they had to meet.
 13. Additionally, the Plaintiffs’ themselves did not articulate which party, it being either the First or Second Plaintiff (in it’s/ their own capacity) was alleged to have entered into the alleged Partnership Agreement with it being either the First or Second Plaintiff (in it’s/ their own capacity). Fundamentally the Second Plaintiff and Second Defendant could not be a party to any Partnership Agreement, even if one existed, by virtue of s 5 of the *Partnership Act 1891* (Qld).
 14. Further, by the Plaintiffs’ own pleadings any Partnership Agreement would seem to have been subsumed into the company on 7 February 2013 when the company purchased the Business which was the subject of these proceedings.
 15. Secondly, paragraphs 7, 8, 30, 31 and 38 were by their content:
 - (a) irrelevant in the context of the First and Second Plaintiffs pleading and as such were unnecessary or scandalous;
 - (b) established no cause of action; and
 - (c) had tendency to prejudice the fair trial of the proceeding.
 16. Thirdly, paragraphs 39 and 40 could not be maintained as a proposition of law in that the allegations alleged loss to the First Plaintiff (Mr Mullen) of a “half share” of a Business which, on the Plaintiffs’ pleading, was a Business owned by the company (the Second Defendant). It was *a fortiori* any profit and value of the Business is the property of the Second Defendant only. Further those pleadings were entirely inconsistent with the ASoC in that it pleaded in an ‘and/ or’ basis all the way through and then made allegations that only the First Defendant was liable. Additionally there was no causative link between the alleged breach and conduct alleged.

17. Similarly, paragraphs 41- 47, in addition to being embarrassing and prejudicial, could not be maintained as a proposition of law because:
 - (a) there was no joint venture relationship pleaded which might give rise to the alleged (or any) fiduciary relationship between the First Defendant and/ or the Second Defendant;
 - (b) the pleading related to duties owed by the First Plaintiff to the Second Defendant as he was a Director of the Second Defendant;
 - (c) the allegations were entirely inconsistent with paragraphs 5 and 10(h) of the ASoC.
18. With these specific paragraphs struck out the affect to the rest of the pleading was such that there was no value in trying to save parts of it; it was an embarrassing pleading exasperated by it being the Plaintiffs' second attempt to cure the deficiencies.
19. In all the circumstances there could not be a fair trial of the proceeding because it failed to inform either of the content of the essential elements of the plaintiff's case.

ORDER

The Court accepted the above submissions made by Counsel instructed by Evans Lawyers and made Orders to the effect that pursuant to UCPR 171 paragraphs 7, 8, 9, 10, 13, 13A, 13B, 15, 17, 30, 31, 37(i), 38, 39, 40 and 41-47 of the Plaintiffs' Amended Statement of Claim be struck out. The Court also ordered certain paragraphs within the Plaintiffs' prayer for relief to be struck out.

The Plaintiffs' were given leave to re plead and ordered to pay the Defendants' costs of and incidental to the application and their further costs in responding to their further ASoC when that was filed and served by leave.