

MAGISTRATES COURTS OF QUEENSLAND

CITATION: \

PARTIES: **MR RENTAL GROUP PTY LTD CAN 166 390 969**
(Plaintiff)
v
365 365 365 PTY LTD CAN 159 624 969
(First Defendant)
and
SPIEL GROUP PTY LTD ACN 609 109 159
(Second Defendant)

FILE NO/S: 6366/17

DIVISION: Magistrates Courts

PROCEEDING: Civil application

ORIGINATING COURT: Brisbane

DELIVERED ON: 7 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 2 November 2018

MAGISTRATE: R. Carmody

ORDER: **I strike out [27] of the Amended Statement of Claim but allow the plaintiff until 4pm on 22 November to replead in accordance with the rules, failing which the second defendant has leave to apply for dismissal**

COUNSEL: Mr Bland for the plaintiff
Mr Jeffrey for the 2nd defendant

SOLICITORS: QBM Lawyers for the plaintiff
Evans Lawyers for the 2nd defendant

[1] The second defendant, Spiel Group Pty Ltd (Spiel) seeks alternative relief that the plaintiff's amended statement of claim or paragraph 27 thereof be struck out pursuant to rule 171 *Uniform Civil Procedure Rules* (1999). Informally, the applicant also asks the court to order the plaintiff replead [27].

[2] Spiel was not a party to the original proceedings.

- [3] The plaintiff's claim was solely against the (first) defendant and was expressed in the claim and statement of claim merely as "Relief: the sum of \$124,656.10, interest and costs". The statement of claim:
- refers to two dated and three undated agreements for the hire of office equipment,
 - claims there was an obligation to make hire payments,
 - states the goods were delivered to the (first) defendant and "have not yet been returned to the plaintiff"; and
 - claims various sums are currently owed.
- [4] In its defence the (first) defendant pleads in effect that it was merely the "front" to allow the plaintiff to rent equipment to Spiel. The plaintiff, it says, could not service Spiel as this would have breached its Gold Coast franchise conditions. The plaintiff used the first defendant's Brisbane address on invoices. The first defendant says it did not agree to be liable to the plaintiff for the cost of the goods rented to Spiel.
- [5] Mr Rappell, the first defendant's Chief Information Officer facilitated the deal with the approval and direction of plaintiff's Chief Operating Officer Mr Michael O'Driscoll and Store Manager Mr David Cunningham. Mr Rappell was also the Chief Information Officer of Spiel.
- [6] After the filing of this defence, unsurprisingly, the plaintiff then sought and was granted leave to join Spiel as second defendant. The proposed amended statement of claim was exhibited to the plaintiff's affidavit material. Neither Spiel nor the (first) defendant appeared on the return of that application although both were served. The Court accepted the plaintiff's submissions that Spiel's presence as second defendant was necessary to enable it to adjudicate effectually and completely on all matters in dispute. There were no directions about the content of the amended claim and statement of claim.
- [7] In its amended statement of claim the plaintiff again says it delivered the goods to the first defendant on 17, 19, 24 and 29 February, 4 March and 20 April 2016, they haven't been returned and nor has it been paid.¹ In the alternative, it alleges at [27] Mr Rappell was the second defendant's agent, it delivered the goods to the second defendant and it hasn't been paid.²
- [8] As second defendant, Spiel denies [27] viz that it entered into the hire agreements with the plaintiff through Mr Rappell as its agent. It says moreover that the contracts' express terms do not nominate it as a party. It neither admits nor denies delivery of the goods to it³, on the basis that the goods aren't described and the allegation is too vague to plead to.⁴
- [9] The amended claim and statement of claim are seriously defective.

¹ Amended statement of claim [4]-[6] [9] [14] [19] [24]

² [27]

³ [27c]

⁴ Defence of second defendant [4]

- [10] The legal nature of the relief sought by the plaintiff e.g. debt or damages, is not identified in either document.⁵
- [11] Although the second defendant has denied the bare allegation of agency and thus made an issue of it, the amended statement of claim does not adopt the first defendant's pleaded facts to establish the agency relationship it alleges in [27]. Nor does it plead material primary facts or inferences supporting a conclusion that the second defendant is liable for the hiring charges in issue as the principal and true customer.
- [12] Rule 151(2) requires that parties must specifically plead any fact from which breach of contract or any other matter in subrule 1 is claimed or is to be inferred. The same applies equally to agency on a parity of reasoning.
- [13] Rule 149(2) permits a conclusion of law to be pleaded only if the facts in support of it are too. Agency is a mixed concept of law and fact.
- [14] As Ambrose J pointed out in *Dominus Pty Ltd v Daydream Island Resort Investment Pty Ltd & Ors* [2003] QSC 044 at [59]

“(The) bare allegation of fact merely pleads a legal conclusion. It does not plead the facts upon which such a conclusion might properly or arguably be reached. The material fact of agency properly particularised must specify every material act or omission of the principal with reference to its time, place and persons involved in respect of which [the plaintiff] will seek to lead evidence upon trial and indeed in respect of which all parties must disclose documents to support or refute the inference (of agency).”

- [15] The amended statement of claim fails to specifically plead any cause of action or alleged inferences to be drawn from the fact so as to make out the agency allegation.
- [16] The options are to strike out the amended statement of claim wholly against the second defendant or strike out [27] under r 171 with or without leave to replead properly and particularly.
- [17] However, both the strike out and costs discretions are informed not only by the rules of practice and procedure but also by the conduct of the parties.⁶
- [18] There are concerning aspects to this proceeding. The first defendant alleges that its Brisbane address was used by the plaintiff on invoices for hire charges which were really owed by and for the benefit of the second defendant so that the plaintiff could avoid (or hide) franchise infringements.
- [19] The amended defence of the first defendant and defence of the second are obtuse. Neither defendant admits delivery of the goods and both deny liability for payment of rent.

⁵ R 150(1)(a) UCPR

⁶ R 171(3)

- [20] None of the parties filed an affidavit exhibiting the written agreements despite disclosure having been made. Consequently, the court has no evidence of the named parties, a description of the goods, or the payment terms and conditions.
- [21] I have a sense that the elephant of illegality is in the room but none of the parties dare speak its name.
- [22] It is arguably contrary to public policy for courts to enforce commercial transactions with the purpose or effect of defrauding a third party or avoiding franchise limitations. It may even be an abuse of process to try to do so.
- [23] The parties to a dispute are obliged to be candid with the court, not dance around an inconvenient truth.
- [24] As the first defendant's allegations against the second defendant are not adopted by the plaintiff and are untested, it would be unfair to act on the basis of the assumption that they are true. Therefore, I will strike out [27] of the amended statement of claim but allow the plaintiff until 4pm on 22 November to replead in accordance with the rules, failing which the second defendant has leave to apply for dismissal.
- [25] Although costs would normally follow the event I will reserve them pending the evidence at the hearing.