



Equity Division Supreme Court New South Wales

Case Name: Mackinnon as plaintiff representative of 153 plaintiff group members v The partnership of Larter, Jones, Miraleste Pty Ltd t/as USG Partner and Johnson, t/as "STC Sports Trading Club" (No 3)

Medium Neutral Citation: [2018] NSWSC 86

Hearing Date(s): 6 February 2018

Date of Decision: 6 February 2018

Jurisdiction: Equity - Commercial List

Before: Stevenson J

Decision: Plaintiff granted leave to file Further Amended Commercial List Statement on terms

Catchwords: PRACTICE AND PROCEDURE – pleadings – amendment - amendment sought on second day of hearing

Legislation Cited: Partnership Act 1892 (NSW)

Cases Cited: Rose v Federal Commissioner of Taxation [1951] 84 CLR 118

Category: Procedural and other rulings

Parties: Ian Henry Mackinnon as plaintiff representative of 153 plaintiff group members (Plaintiff)
The partnership of Anne Patricia Larter, Alan Jones, Miraleste Pty Ltd trading as USG Partner and Leigh Johnson, trading as "STC Sports Trading Club" (First Defendant)
Anne Patricia Larter (Second Defendant)
Alan Jones (Third Defendant)
Miraleste Pty Ltd trading as USG Partner (Fourth Defendant)
Leigh Johnson (Fifth Defendant)
Sports Trading Limited (Sixth Defendant)
Bella Development Limited (Seventh Defendant)
East Ocean Capital Limited (Eighth Defendant)

Arabella Racing Pty Ltd (Ninth Defendant)
Banksia Holdings (Tenth Defendant)
Arabella Louise Foster (Eleventh Defendant)
Peter Foster (Twelfth Defendant)

Representation:

Counsel:
T J Dixon (Plaintiff)

Solicitors:
Nelson McKinnon Lawyers (Plaintiff)
P N Argy (Fifth Defendant)

File Number(s):

SC 2015/332497

JUDGMENT

- 1 On 6 February 2018, the second day of these proceedings, I granted the plaintiff, Mr Ian Mackinnon, leave to file a Further Amended Commercial List Statement.
- 2 These are my reasons for granting that leave.
- 3 Mr Mackinnon was, by order of Hammerschlag J of 15 September 2017, substituted as representative plaintiff in these proceedings of now 153 group members. Each of the group members made an investment in a purported sports betting and trading scheme by way of loans to a partnership styled “STC Sports Trading Club”. The amount invested by group members was in the order of \$12.3 million. The total amount invested was in the order of \$29 million.
- 4 That partnership has been named as first defendant.
- 5 Mr Dixon, who appears for Mr Mackinnon, acknowledged that the nomination of “the partnership” itself as first defendant is an error because a partnership is not a legal person (for example see *Rose v Federal Commissioner of Taxation* [1951] 84 CLR 118 at 124).

- 6 The Amended Commercial List Statement identified the second, third, fourth and fifth defendants as the individuals (and in one case, a company) that are alleged to have been members of the partnership.
- 7 The fifth defendant is Ms Leigh Johnson, a solicitor, who is now the only active defendant in the proceedings. Ms Johnson was a member of the partnership until 21 January 2014.
- 8 Mr Mackinnon alleges that the Sports Trading Club was a fraudulent scheme masterminded by the twelfth defendant, Mr Peter Foster. Mr Mackinnon alleges that none of the funds invested was used for sports betting or trading and that, instead, the funds were misappropriated by Mr Foster and transferred to offshore companies and bank accounts associated with him and his niece Ms Arabella Foster in Hong Kong, the Cayman Islands and Vanuatu.
- 9 Mr Mackinnon sought to amend the Amended Commercial List Statement in four ways.
- 10 First, the Amended Commercial List Statement alleged that the STC Sports Trading Club partnership was a limited partnership for the purposes of s 50A of the *Partnership Act 1892* (NSW).
- 11 It now emerges that, evidently by oversight, the relevant partnership agreement was not registered. The result, Mr Mackinnon contends, is that the partnership was not a limited partnership.
- 12 I granted Mr Mackinnon leave to amend the Amended Commercial List Statement to reflect these matters, but upon the basis that such amendment was not to be taken as permitting Mr Mackinnon to advance a cause of action against Ms Johnson beyond those already pleaded in the Amended Commercial List Statement. In particular, the amendment is not to be taken to enable Mr Mackinnon to allege, separately to the causes of action already pleaded, that Ms Johnson is jointly and severally liable for the debts of the partnership by reason of her status as a general or unlimited partner.

- 13 The second category of amendments was directed to the infelicity of the nomination of the partnership itself as the first defendant.
- 14 Mr Mackinnon seeks to make a number of amendments to make clear that references to “the first defendant” in the Amended Commercial List Statement are to include, and be read as, references to the parties (including Ms Johnson) who are alleged to have been members of the partnership from time to time.
- 15 The conclusion to which I came was that all of the defendants, and Ms Johnson in particular, must be taken to have understood that the reference in the Amended Commercial List Statement to “the first defendant” was intended to be a reference to the persons named in the Amended Commercial List Statement as being members of that partnership. For that reason, I allowed the amendments directed to this issue.
- 16 The next amendments concern par 20 of the Amended Commercial List Statement. That paragraph contains an allegation that the representations made to Mr Mackinnon and the other group members were made by Mr Foster “or persons employed or instructed” by him.
- 17 That paragraph concluded, under the heading “Particulars” that further particulars of the representation set out “will be provided following service of evidence in the proceedings”.
- 18 On 4 March 2016 Ms Johnson, who was then acting for herself, delivered a “Request for Particulars”. The request sought particulars of the representations made in par 20 of the Amended Commercial List Statement.
- 19 Ms Johnson thus evidently apprehended then that the allegations in par 20 may have been intended to be directed to her.
- 20 Whether or not that is so, the response that Ms Johnson received from the solicitors acting for Mr Mackinnon’s predecessor as representative plaintiff

(who also act for Mr Mackinnon) on 19 May 2016 made quite clear that this was so.

21 In those circumstances, I was satisfied that Ms Johnson had long understood the allegations in par 20 of the Amended Commercial List Statement were directed to her, amongst other people.

22 Finally, Mr and Mrs Mackinnon sought to add as one of the representations in par 20 a representation by Mr Foster and by “persons employed or instructed” by him (including Ms Johnson) was:

“By silence of omission, that Peter Clarence Foster...was not involved in Sports Trading Club”.

23 Currently there is an allegation in par 20 that “Mark Hughes” was the National Sales Manager of the Sports Trading Club.

24 It is Mr Mackinnon’s case that “Mark Hughes” is an alias adopted by Mr Foster for the purpose of the fraudulent scheme he is alleged to have masterminded.

25 The conclusion I came to was that the further proposed representation is the corollary of that existing representation, and should be allowed.

26 A Further Amended Commercial List Statement was filed in Court on 6 February 2018 pursuant to the leave I granted earlier that day.
