FEDERAL COURT OF AUSTRALIA

Holland v BT Securities Limited [2022] FCA 539

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| File number(s): |  |
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| Judgment of: | **O'SULLIVAN J** |
|  |  |
| Date of judgment: | 13 May 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – interlocutory application – application for discovery pursuant to r 20.13 of the *Federal Court Rules 2011* (Cth) – whether the making of the order sought will facilitate the just resolution of the proceedings as quickly, inexpensively and efficiently as possible – whether the order sought will require a party to discover documents that are directly relevant – where the respondent discovered documents understood to be in use at the relevant time – where the remaining documents were unable to be located and/or do not exist – application dismissed  **PRACTICE AND PROCEDURE** – interlocutory application – application seeking leave of the Court to amend the statement of claim pursuant to r 16.53 of the *Federal Court Rules 2011* (Cth) – where some amendments were not opposed – where some amendments failed to disclose a reasonable cause of action – leave granted for amendments in the terms of paragraphs 4 to 6 and 12 – leave to amend remaining paragraphs refused |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth)  *Corporations Act 2001* (Cth)  *Federal Court of Australia Act 1976* (Cth), s 37M  *Federal Court Rules 2011* (Cth), rr 16.21, 16.53, 20.13, 20.14(1) & (2)  *Stamp Duties Act 1920* (NSW) s 29 |
|  |  |
| Cases cited: | *Abela v Giew* (1964) 81 WN (Pt 1) (NSW) 344  *Allstate Life Insurance Co v Australian & New Zealand Banking Group Ltd* (1995) 58 FCR 26; 130 ALR 469  *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 2)* [2011] FCA 1396  *Dennis v Brownlee* (1963) 80 WN (NSW) 1239  *Dye v Commonwealth Securities Ltd* [2010] FCA 720  *Pitman v Johnson* [2017] FCA 945 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | South Australia |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 110 |
|  |  |
| Date of last submission/s: | 14 April 2022 |
|  |  |
| Date of hearing: | Determined on the papers |
|  |  |
| Counsel for the Plaintiffs: | The First and Second Plaintiffs appeared in person |
|  |  |
| Solicitor for the Defendant: | Ms S Newman for Dentons Australia Limited |

ORDERS

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|  | | SAD 162 of 2021 |
|  | | |
| BETWEEN: | MARK WILLIAM HOLLAND  First Plaintiff  VIVIENNE LESLEIGH HOLLAND  Second Plaintiff | |
| AND: | BT SECURITIES LIMITED  Defendant | |

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| order made by: | O'SULLIVAN J |
| DATE OF ORDER: | 13 May 2022 |

THE COURT ORDERS THAT:

1. The two interlocutory applications, filed by the plaintiffs on 7 February 2022 and 2 March 2022, seeking discovery of documents, are dismissed.

2. Leave to the plaintiffs to amend the statement of claim in the terms of the proposed amendments in paragraphs 4 to 6 and 12 of the interlocutory application filed on 1 April 2022.

3. Leave refused to amend the statement of claim in the terms of the proposed amendments in paragraphs 7 to 11 and 13 to 19 of the interlocutory application filed on 1 April 2022.

4. Leave to the plaintiffs to amend the originating application in terms of paragraphs 6 and 7 of their interlocutory application filed on 7 February 2022.

5. Costs reserved.

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

REASONS FOR JUDGMENT

O’SULLIVAN J:

# INTRODUCTION

1 There are two interlocutory applications for discovery pursuant to r 20.13 of the *Federal Court Rules 2011* (Cth) (**FCR**) filed by the plaintiffs on 7 February 2022 and 2 March 2022 respectively. There is also an interlocutory application, filed by the plaintiffs on 1 April 2022, seeking leave to file an amended statement of claim pursuant to FCR 16.53.

# DISCOVERY

2 I will deal first with the two interlocutory applications for discovery.

3 The first and second plaintiffs, (**Mr Holland** and **Ms Holland** respectively) seek discovery of specific documents which are identified and/or categorised in paragraph 1(a)-(r) of the interlocutory application filed on 2 March 2022, and paragraph 1(s) of the interlocutory application filed on 7 February 2022. The documents sought are as follows:

(a) The ‘Client Details Form’ sent by Mr Holland to the defendant shortly before the establishment of the loan facility in or around March 1997;

(b) The ‘Risk Disclosure Statement’ form sent by Mr Holland to the defendant shortly before the establishment of the loan facility in or around March 1997;

(c) The ‘Power of Attorney’ form sent by Mr Holland to the defendant shortly before the establishment of the loan facility in or around March 1997;

(d) The ‘Declaration of Purpose’ form sent by Mr Holland to the defendant shortly before the establishment of the loan facility in or around March 1997;

(e) The executed ‘Margin Loan Facility Agreement’ referred to in the defendant’s ‘Letter of outcome’ dated 25 May 2021;

(f) The ‘Power of Attorney’ document under which the executed ‘Margin Loan Facility Agreement’ referred to in the defendant’s ‘Letter of outcome’ dated 25 May 2021 was executed;

(g) The executed facility, loan or other agreement under which the alleged ‘BT Margin Lending Terms and Conditions’ referred to in paragraph 6 of the defence in these proceedings allegedly formed part of the terms of the facility;

(h) The ‘Power of Attorney’ document under which the executed facility, loan or other agreement referred to in paragraph (g) was executed;

(i) Any other facility, loan or other agreement held by the defendant, applying to the facility;

(j) Any other Power of Attorney document held by the defendant, applying to the facility;

(k) Any correspondence held between the defendant and ASIC concerning compliance issues at Barton Capital Securities identified and investigated by ASIC around May 1992. (The year of this item was amended at the hearing to 2002);

(l) Any correspondence held by the defendant between the defendant and ASIC concerning the voluntary undertaking entered by Barton Capital Securities and ASIC around May 2002;

(m) Any correspondence held by the defendant between the defendant and ASIC concerning the loss of the dealer’s licence by Barton Capital Securities around 17 December 2002;

(n) Any correspondence held by the defendant between the defendant and Barton Capital Securities concerning compliance issues identified and investigated by ASIC around May 2002;

(o) Any correspondence held by the defendant between the defendant and Barton Capital Securities concerning the voluntary undertaking entered by it with ASIC around May 2002;

(p) Any correspondence held by the defendant between the defendant and Barton Capital Securities concerning the loss of the dealer’s licence by Barton Capital Securities around 17 December 2002;

(q) Any correspondence held by the defendant between the defendant and Mr Peter Bennett (**Mr Bennett**) or A.C.N. 008 082 157 Pty Ltd concerning Mr Bennett’s dealing, licencing, product sales or commission paid or payable from around July 2002 to June 2003;

(r) Bank statements or payment advices or correspondence including, where possible, dates and amounts of all commission paid to any of Mr Bennett, Barton Capital Securities, Centec Securities, Diversa, A.C.N. 008 082 157 Pty Ltd or any other entity on behalf of Mr Holland’s margin loan; and

(s) Correspondence held by the defendant (including correspondence received and sent) concerning registration of any of Mr Bennett, Kerry Clough, Barton Capital Securities, Centec Securities, Diversa, A.C.N. 008 082 157 Pty Ltd or any other entity as financial advisors, brokers, stockbrokers or recipients of commission registered on Mr Holland’s margin loan.

4 The applications are opposed.

## Affidavits read

### The plaintiffs read:

(a) The affidavit of Mark William Holland, and annexures thereto, sworn on 21 August 2021 and filed on 23 August 2021 (**first Holland affidavit**);

(b) The affidavit of Mark William Holland, and annexures thereto, sworn and filed on 22 September 2021 (**second Holland affidavit**);

(c) The affidavit of Mark William Holland, and annexures thereto, sworn and filed on 21 December 2021 (**third Holland affidavit**); and

(d) The affidavit of Mark William Holland, and annexures thereto, sworn and filed on 27 January 2022 (**fourth Holland affidavit**).

### The defendant reads:

(a) The affidavit of David Michael Morrissey and the annexures thereto, sworn and filed on 14 February 2022 (**Morrissey affidavit**).

## Principles

5 The *Federal Court Rules 2011* (Cth) reflect the overarching purpose of the civil practice and procedure provisions pursuant to s 37M of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**): *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 2)* [2011] FCA 1396 [21].

6 In the event the Court orders that a party give standard discovery: FCR 20.14(1), such an order requires a party to discover documents:

(a) that are directly relevant to the issues raised by the pleadings or the affidavits; and

(b) of which, after reasonable search, the party is aware; and

(c) that are, or have been, in the party’s control.

7 FCR 20.14(2) sets out the requirements for direct relevance for the purposes of FCR 20.14(1)(a). It provides:

(2) For paragraph (1)(a), the documents must meet at least one of the following criteria:

(a) the documents are those on which the party intends to rely;

(b) the documents adversely affect the party’s own case;

(c) the documents support another party’s case;

(d) the documents adversely affect another party’s case.

8 The Court will not approve expansive or unjustified requests and will generally only consider approving a request in one or more of the following circumstances: Central Practice Note: National Court Framework and Case Management (**CPN**) (CPN-1 at 10.6):

(a) That the discovery request facilitates the just resolution of the proceedings as quickly, inexpensively and efficiently as possible;

…

(d) The discovery applicant has adequately justified the need for the Request including demonstrating:

(i) the utility of the Request and the appropriateness of discovery occurring at that time;

(ii) the relevance and importance of the documentation or information sought;

(iii) the limited and targeted nature of the Request; and

(iv) that the documents sought are, or are very likely to be, significantly probative in nature, or the documents materially support, or are materially adverse to, any party’s case in the proceeding.

## Background and overview of the pleadings

9 Mr Holland has operated a margin loan facility with BT Securities Limited (**defendant**), identified by the reference number HOLLM12973-6 (the **facility**) since about 28 April 1997. The facility still exists but the facility balance was reduced to zero on 2 August 2021.

10 Mr Holland also held a stock broking account with Barton Capital Securities Pty Ltd (**Barton**) and with Centec Securities Pty Ltd (**Centec**). Mr Bennett acted as Mr Holland’s stockbroker.

11 Since 28 May 1997, Mr Holland funded share purchases through the facility.

12 The defendant holds Australian Financial Services Licence No. 233722 and is an Australian Financial Services Licensee. Aspects of its business are subject to the provisions of the *Corporations Act 2001* (Cth) (the **Act**).

13 The defendant held a security interest in some shares belonging to Mrs Holland, to secure Mr Holland’s performance of his obligations under the facility.

14 The defendant charged and collected interest in accordance with the terms of the contract for the facility, from 28 May 1997 until 31 July 2021.

15 The plaintiffs allege that the defendant had, or has remuneration agreements with Barton, Centec and other stockbrokers in respect of commission payable to them on the facility.

16 The defendant pleads that at all times while Mr Holland was using the facility to transact shares with Centec as his stockbroker, Westpac Banking Corporation (**Westpac**) had an agreement with Centec in relation to the payment of commission, described as an Equities Distribution Agreement (**EDA**). It cannot locate any EDA between Westpac and Barton extant at the time the facility commenced.

17 The defendant says that pursuant to the EDA with Centec:

(a) Centec (the Distributor) was authorised, at its discretion, to recommend to their clients specified products of the Westpac Group (which group included the defendant);

(b) If Centec recommended to its client, and the client entered into, a margin loan facility (which included the facility), the defendant would pay trailing commission to Centec calculated as a percentage of the client’s loan balance under that facility;

(c) Where Centec assigned or otherwise transferred its rights to receive commission under the EDA to another person, the defendant would thereafter pay the commission to that person; and

(d) If Barton and/or Centec were not entitled to be paid commission under the EDAs in respect of the facility, then any commission paid to them by the defendant has been paid by mistake.

18 Pursuant to the EDA with Centec between 1 April 2013 and 30 November 2020, any trailing commission payable was calculated monthly at the rate of 0.28% per annum on the previous month’s average loan balance.

19 The defendant pleads that it is unable to locate the documentation relating to any earlier payments of commission and denies the allegation that leading commission was paid in respect of the facility.

20 The plaintiffs allege that the remuneration arrangements were not included in any Product Disclosure Statement as required by the Act.

21 The defendant admits that it did not provide a Product Disclosure Statement to the plaintiffs but denies the allegation that it was under any obligation to make supplementary or ongoing disclosure because the Act did not require it at the time the facility commenced.

22 The defendant pleads further that commission paid was not conflicted remuneration within the meaning of the Act because prior to 1 January 2021 the Act did not apply to benefits given under an arrangement entered into before 1 July 2013, and no commission was paid in respect of the facility on or after 1 January 2021.

23 The plaintiffs allege that the defendant wilfully shut its eyes to the following facts:

(a) Stockbrokers were not financial advisors when they were recorded on the defendant’s files and systems;

(b) Stockbrokers did not hold Australian Financial Services Licenses (**AFSLs**);

(c) Mr Holland’s stockbroker, Mr Bennett, was banned by ASIC from 20 May 1992 to 20 May 2002; and

(d) The defendant’s internal procedures required the plaintiffs to complete and sign a ‘Nominal Financial Advisor’ form in order to record an advisory agreement. The agreement required AFSL numbers which did not exist at the time and no form was completed.

24 The defendant admits that Barton and Centec acted only as stockbrokers in relation to the facility and pleads that neither were required to have AFSLs at the times alleged.

25 The defendant admits that Barton, Centec and Mr Bennett acted only as stockbrokers and were not financial advisors and otherwise do not know and cannot admit to the terms of any contracts between Mr Holland and Barton, Centec or Mr Bennett.

26 The defendant admits that a person by the name of Peter Bennett was banned from acting as a representative of a dealer or an investment adviser.

27 The defendant is unable to locate records relating to a ‘Nominated Financial Advisor’ form in use in 1997 or 2003. Its’ practices and procedures in 1997 and 2003 permitted it to implement a customer request which was made in writing and signed by the customer.

28 The plaintiffs allege that the defendant included in its charges to Mr Holland a premium for advisory services; that the defendant misrepresented the truth in a ‘Letter of outcome’ dated 25 May 2021; that the defendant made interest charges and received interest income monthly from May 1997 to July 2021; and, that the defendant failed to report any suspected fraudulent activity to the relevant law enforcement authorities pursuant to the *Crimes Act 1900 (NSW)*.

29 In summary, the plaintiffs allege that the defendants engaged in unconscionable and dishonest conduct; are in breach of contract; and breached their fiduciary duty pursuant to the Act and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

30 The defendant denies those allegations and says that Mr Holland could have acquired identical or equivalent financial services from another financier if at any time he considered the interest rate applying to the facility was too high. It pleads further that Mr Holland has not been treated differently by the defendant from other customers who obtained a similar facility and Mr Holland was not operating under any known special disability.

31 Further, the defendant pleads that the alleged dishonesty on its part is not identified as a basis for the plaintiffs’ claim in the originating application filed on 23 August 2021.

## Plaintiffs’ submissions

32 The plaintiffs are self-represented. Without being critical of them, their submissions tended to conflate both submissions and assertions of fact. That is reflected in my description of their submissions.

### Documents 1(a), (b), (c), (d), (g), (h) and (j)

33 The documents are as follows:

(a) The ‘Client Details Form’ sent by Mr Holland to the defendant shortly before the establishment of the loan facility in or around March 1997;

(b) The ‘Risk Disclosure Statement’ form sent by Mr Holland to the defendant shortly before the establishment of the loan facility in or around March 1997;

(c) The ‘Power of Attorney’ form sent by Mr Holland to the defendant shortly before the establishment of the loan facility in or around March 1997;

(d) The ‘Declaration of Purpose’ form sent by Mr Holland to the defendant shortly before the establishment of the loan facility in or around March 1997;

(e) The executed facility, loan or other agreement under which the alleged ‘BT Margin Lending Terms and Conditions’ referred to in paragraph 6 of the defence in these proceedings allegedly formed part of the terms of the facility;

(f) The ‘Power of Attorney’ document under which the executed facility, loan or other agreement referred to in paragraph (g) was executed; and

(g) Any other Power of Attorney document held by the defendant, applying to the facility.

34 The plaintiffs received a contract for the facility, referred to as the ‘05/96 Loan Agreement’, contained in an application pack that was provided by the defendant as a document which provided for the facility. The plaintiffs submit that the terms of the agreement, and whether it included a commission or assignment clause, are in dispute and are directly relevant to these proceedings.

35 On 21 December 2021, the defendant discovered a document titled ‘BT Margin Lending’ (the **2021 document**): fourth Holland affidavit, annexure MH-4. Paragraph 48 of the 2021 document contains a commission clause which the plaintiffs claim was not included in the documents they received in 1997.

36 The plaintiffs deny that the 2021 document applied to the facility and submit that they had not seen the 2021 document before and do not know how that document allegedly formed part of the contract. The plaintiffs did not receive any further loan agreements: third Holland affidavit, [8].

37 The commission clause, which is reproduced in paragraph 6(d) of the defence filed on 23 November 2021, reads as follows:

Commission

If on the application form you [meaning the first plaintiff] filled out when entering into this transaction (entitled ‘Borrower application form'? you complete the details for a financial adviser or broker [which meaning included a stockbroker], that person, or a person connected to that financial adviser or broker, may be entitled to receive commission from [the defendant] during the term of this agreement. Payment of any such commission is not an endorsement of that financial adviser or broker by [the defendant].

38 The plaintiffs deny completing an application form and contend that the application procedure did not call for one: reply filed on 7 December 2021 [3(g)].

39 The plaintiffs sent a letter, dated 27 May 1997, to the defendant informing it of Mr Holland’s stockbroker: Morrissey affidavit, annexure DMM-3, p 93. The plaintiffs submit that the stockbroker was not included on the ‘Client Details Form’.

40 The plaintiffs refer to a number of unexecuted 9/96 forms referred to at [20] of Mr Morrissey’s affidavit sworn on 14 February 2022, entitled ‘Borrower Details Form’, ‘Risk Disclosure Statement’, and ‘Declaration of Purpose’ and say they did not form part of the facility in 1997 and were not the documents sent before the establishment of the loan.

41 The plaintiffs submit that the execution date of these documents will provide certainty as to when it was executed by Mr Holland and witnessed and furnished by the defendant.

42 The plaintiffs submit that the Power of Attorney enabled execution of the 05/96 Loan Agreement and the CHESS sponsorship agreement: third Holland affidavit [7], annexure MWH-8, p 91, and that it did not authorise the ‘BT Margin Lending Terms and Conditions’. A copy of the executed Power of Attorney was not kept by the plaintiff or provided by the defendant.

### Documents 1(e) and (f)

43 These documents are:

(e) The executed ‘Margin Loan Facility Agreement’ referred to in the defendant’s ‘Letter of outcome’ dated 25 May 2021; and

(f) The ‘Power of Attorney’ document under which the executed ‘Margin Loan Facility Agreement’ referred to in the defendant’s ‘Letter of outcome dated 25 May 2021 was executed.

44 The plaintiffs submit that they have never seen the ‘Margin Loan Facility Agreement’ and that the ‘Letter of outcome’ is dishonest: statement of claim filed on 2 November 2021 [3], [35(c)], [39(d)], [46(b)] [58(i)], [64(c)], [70(a)], [70(c)] and [92(d)]).

45 The defendant states that in the letter, Mr Holland agreed to pay interest listed on BT’s website, www.bt.com.au, in the ‘Margin Loan Facility Agreement’: fourth Holland affidavit [15], annexure MWH-7.

46 The plaintiffs assert that the website is not referenced in the terms of the agreement and did not exist when the terms were agreed: third Holland affidavit, annexure MWH-7, and that if an executed Power of Attorney document authorising the execution of the ‘Margin Loan Facility Agreement’ exists, it is not known to the plaintiffs and likely to be fraudulent in nature.

### Document 1(i)

47 Document 1(i) is ‘Any other facility, loan or other agreement held by the defendant, applying to the facility’.

48 The plaintiffs submit that there are at least two agreements that the plaintiffs have never seen and are submitted by the defendant as applying to the facility.

49 The plaintiffs assert that they have never executed or authorised execution of another loan or facility agreement: third Holland affidavit [8].

### Documents 1(k),(l), (m), (n), (o), (p) and (q)

50 These documents comprise:

(k) Any correspondence held between the defendant and ASIC concerning compliance issues at Barton Capital Securities identified and investigated by ASIC around May 1992. (The year of this item was amended at the hearing to 2002);

(l) Any correspondence held by the defendant between the defendant and ASIC concerning the voluntary undertaking entered by Barton Capital Securities and ASIC around May 2002;

(m) Any correspondence held by the defendant between the defendant and ASIC concerning the loss of dealer’s licence by Barton Capital Securities around 17 December 2002;

(n) Any correspondence held by the defendant between the defendant and Barton Capital Securities concerning compliance issues identified and investigated by ASIC around May 2002;

(o) Any correspondence held by the defendant between the defendant and Barton Capital Securities concerning the voluntary undertaking entered by it with ASIC around May 2002;

(p) Any correspondence held by the defendant between the defendant and Barton Capital Securities concerning the loss of dealer’s licence by Barton Capital Securities around 17 December 2002; and

(q) Any correspondence held by the defendant between the defendant and Peter Bennett or A.C.N. 008 082 157 Pty Ltd concerning Peter Bennett’s dealing, licencing, product sales or commission paid or payable from around July 2002 to June 2003.

51 The plaintiffs assert that ASIC investigated Barton and outlined concerns in its press release, dated 9 May 2022, that Barton was not supervising its authority holders; lacked proper contractual arrangements with them; that three of Barton’s advisors were trading improperly; and that Barton had sought to stop its clients lodging complaints with regulators: fourth Holland affidavit [5], annexure MH-3.

52 The plaintiffs also assert that Barton entered an enforceable undertaking with ASIC that required it to: fourth Holland affidavit [4], annexure MH-2:

(a) Appoint a duly qualified compliance lawyer from 13 May 2002 who would report to ASIC on compliance issues and contraventions of the Act, including in connection with AFSL licencing; and

(b) Ensure by 30 June 2002 all persons providing product advice through Barton had completed training courses at the appropriate level or be listed with ASIC as having been trained to that level.

53 The plaintiffs assert further that Mr Bennett was subject to a banning order until 20 May 2002: first Holland affidavit [16], annexure MWH-8, and was therefore banned from engaging in conduct relating to product or financial advice, including the training required by the undertaking.

54 The plaintiffs submit that since the defendant paid commission on product sales to Barton and/or processed trades through its margin loans, it has, therefore, documents, correspondence and knowledge of Mr Bennett’s activities, such as claiming commission from Mr Holland’s margin loan while he was subject to a ban.

55 The plaintiffs assert that the voluntary undertaking was withdrawn by ASIC on 19 December 2002 following Barton’s request to revoke its dealer license: fourth Holland affidavit [5], annexure MH-3, and that as the defendant was under Westpac ownership at the time, it was therefore likely informed by ASIC and/or Barton.

### Documents 1(r) and (s)

56 These documents comprise:

(r) Bank statements or payment advices or correspondence including, where possible, dates and amounts of all commission paid to any of Peter Bennett, Barton Capital Securities, Centec Securities, Diversa, A.C.N. 008 082 157 Pty Ltd, or any other entity on behalf of the Mr Holland’s margin loan; and

(s) Correspondence held by the defendant (including correspondence received and sent) concerning registration of any of Peter Bennett, Kerry Clough, Barton Capital Securities, Centec Securities, Diversa, A.C.N. 008 082 157 Pty Ltd, or any other entity as financial advisors, brokers, stockbrokers or recipients of commission registered on the plaintiff’s margin loan.

57 The plaintiffs assert that they do not know a person by the name of Kerry Clough or an entity named Diversa, although Kerry Clough appears as a financial advisor registered against Mr Holland’s margin loan on the defendant’s systems: first Holland affidavit [13], annexure MWH-4. The plaintiffs allege that these details have been maintained without the plaintiffs’ knowledge and consent.

58 The plaintiffs assert that they do not know what other entities have been listed as financial advisors, brokers, stockbrokers or recipients of commission on the defendant’s systems, relating to the margin loan and requests copies of documents of all correspondence between the defendant and entities recorded on the defendant’s systems.

## Defendant’s submissions

59 The defendant opposes the plaintiffs’ application for discovery.

60 On the defendant’s case, the documents sought by the plaintiffs can be categorised as follows:

(a) Documents that are relevant on the pleadings, but which the defendant no longer has in its possession or is unable to locate;

(b) Documents not relevant to the pleadings and the provision of which will not result in the just resolution of the proceeding as quickly, inexpensively and efficiently as possible and/or are not significantly probative in nature; and

(c) Documents which do not exist.

### Documents that are relevant, but no longer in the defendant’s possession or the defendant has been unable to locate

61 Documents 1(a), (b), and (q) fall within this objection category.

62 The defendant submits that documents 1(a) and (b) are documents that Mr Holland completed and sent to the defendant in 1997 in order to establish the facility.

63 Mr Morrissey, the head of Margin Lending and Online Products for the defendant, has deposed to conducting and co-ordinating searches of the defendant’s records and has been unable to locate any original document for the facility executed by Mr Holland. Those searches included searches of the defendant’s physical records and archived materials as well as searching for electronic records held by the defendant’s ‘imaging systems’: Morrissey affidavit, [10], [16], [23] and [32].

64 In relation to document 1(q), the defendant admits commission was paid to Centec between April 2013 and November 2020. The defendant’s records do not go back further than 2013 in respect of commission paid in respect of the facility. Mr Morrissey has searched the defendant’s records and has been unable to locate any record of commission paid to Barton in respect of the facility and does not know whether any commission was so paid. Mr Morrissey is not aware of any leading commission ever having been paid in respect of the facility. There are no records that supports that leading commission was paid: Morrissey affidavit [53]-[54] and [62].

### The provision of the documents are not relevant and will not result in the just resolution of the proceeding as quickly, inexpensively and efficiently as possible and/ or are not significantly probative in nature

65 Documents 1(c), (d), (i), (k), (l), (m), (n) (o), (p), (q), (r) and (s) fall into this category.

66 The defendant submits that document 1(c) is not relevant for the following reasons:

(a) There is no allegation contained in the statement of claim that the defendant executed any documents on behalf of Mr Holland;

(b) The defendant does not rely on any document executed using a Power of Attorney in defence of the plaintiffs’ claim;

(c) There is no evidence to support the plaintiffs’ suspicion that any document was executed using a Power of Attorney in page 8 of the plaintiffs’ submissions; and

(d) The use or otherwise of a Power of Attorney is not in issue in the proceedings.

67 The defendant submits that document 1(d) is not relevant for the following reasons:

(a) The purpose of the ‘Declaration of Purpose’ document is to enable the borrower to declare to the lender that the facility is to be applied wholly or predominately for business or investment purposes;

(b) The document can have no bearing on the question of commission and the plaintiffs have not explained why that document is otherwise relevant; and

(c) The issue as to whether the facility was for business and investment purposes is not an issue in the pleadings.

68 Mr Morrissey has conducted searches and has been unable to locate any of the original documents executed by Mr Holland in relation to the facility.

69 In relation to document 1(i), the defendant submits that:

(a) The plaintiffs’ submission that all of the terms and conditions that have applied to the facility over the previous 24 years are relevant, is not maintainable and will not resolve a matter in issue on the pleadings;

(b) The defendant relies on the application documents in use in about 1996/1997, and the margin loan facility terms which applied from May 1997, in support of its position that a term relating to commission applied to the facility. The plaintiffs deny that those terms apply to the facility. There is no other dispute as to the terms and conditions which applied to the facility, and the provision of other sets of terms and conditions will not resolve any issue on the pleadings;

(c) Obtaining the last 24 years of terms and conditions is disproportionate to the probative value of those terms and conditions, and in those circumstances the request for those documents ought to be refused; and

(d) The request appears to be for documents that are not referred to in the pleadings.

70 In relation to documents 1(k), (l), (m), (n), (o) and (p), the defendant submits that:

(a) Whether or not the defendant corresponded with ASIC or Barton about compliance issues at Barton, they are not relevant to the pleaded claim. The plaintiffs’ claim is about the defendant paying commission to Barton and Centec allegedly without the knowledge of Mr Holland. Issues internally at Barton can have no bearing on that issue;

(b) There is nothing in the pleaded case that would make the defendant’s communications with ASIC in 1992 or 2002 (even if they existed) about Barton relevant to the issues in these proceedings;

(c) There is no evidence before the Court that the ASIC investigation related to Barton or Mr Bennett allegedly receiving commissions which they did not disclose to Mr Holland (or anyone else) in alleged breach of fiduciary duty or otherwise;

(d) There is no evidence that would suggest that these documents exist or existed at the relevant time. The request is tantamount to a ‘fishing expedition’;

(e) Commission paid by the defendant in respect of the facility was not paid to Mr Bennett personally, it was paid to Barton. It is not apparent why the plaintiffs say that any ban on Mr Bennett (assuming that it is the same Mr Bennett that was banned by ASIC and assuming that the defendant knew of the ban) put the defendant on inquiry that Barton, an entity over which it had no control, had not disclosed to Mr Holland that it was receiving commission in respect of the facility, nor why or how the requested documents would prove the allegations in paragraph 56(c) and 57(d) of the claim;

(f) The plaintiffs’ submissions appear to be based on supposition that if a compliance lawyer realised certain things about Mr Bennett’s alleged conduct and notified ASIC, ASIC would in turn notify the defendant of those matters. That is highly speculative, without any foundation, not pleaded, and should not be entertained;

(g) Whatever conduct may have been engaged in by Mr Bennett in 2002 that caused ASIC to ban him is of no relevance to the facility that was granted by the defendant some 5 years earlier, nor to the pleaded claim. This is particularly so in circumstances where the plaintiffs have pleaded that neither Mr Bennett nor Barton sold the facility to Mr Holland;

(h) Even if the defendant knew (which is not alleged in the claim) that Barton had sought to surrender or did surrender its dealer’s licence in 2002, that is not relevant to the plaintiffs’ allegation that the defendant was, or ought to have been, aware that Barton had not disclosed to Mr Holland that it had received commission; and

(i) An order granting the requests would not facilitate the just resolution of any issue in the proceeding.

71 In relation to document 1(q), the defendant submits that this category of documents is not relevant to the pleaded claim and the production of those documents (should they exist) will not resolve any issue in dispute on the pleadings.

72 In relation to document 1(r), the defendant submits that:

(a) Pages 24 - 25 of the plaintiffs’ submissions assert that this category of documents is relevant because “it is likely in addition to any commission assigned to Centec by way of assignment of product sales remuneration from other stockbroker(s)”. There is no pleading to this effect by the plaintiffs;

(b) Paragraph 25 of the plaintiffs’ submissions attempt to justify the request for this category of documents on the basis that “the plaintiff is not sure that Mr Morrisey [sic] has fully and correctly investigated the issues and interrogated the defendant’s systems” and as a result, Mr Holland “has concerns that leading … commission is omitted, deleted or filtered out entirely of the data reported in Mr Morrissey’s true spreadsheet”;

(c) The plaintiffs’ submissions make it clear that they are seeking this category of documents to find “documents that will agree with or highlight deficiencies in Mr Morrissey’s numbers, provide a degree of external assurance …” It is clear that the request for these documents is a fishing expedition that should not be permitted;

(d) There is no basis to suggest that Mr Morrissey’s evidence is incomplete or incorrect;

(e) Whilst it is correct that the right to receive commission under an EDA was assignable (noting that this is not pleaded), it is not apparent why, if another entity decided to assign its entitlement to commission to Centec, that would be relevant to the plaintiffs’ claim. The provision of these documents (if in fact they exist or existed at the time) will not resolve any matter in dispute on the pleadings; and

(f) The request is also particularly onerous and disproportionate in view of the evidence deposed to by Mr Morrissey, given the schedule attached to his affidavit setting out the commission paid records maintained by the defendant in respect of the facility.

73 In relation to category 1(s), the defendant submits that:

(a) The claim makes no allegations in relation to Kerry Clough, Diversa, and A.C.N. 008 082 157 Pty Ltd, consequently any documents in respect of those entities (should they in fact exist) are irrelevant to the pleaded claim;

(b) The request for documents in respect of “any other entity” is too broad and is clearly a fishing expedition;

(c) Documents in relation to the recording of Mr Bennett of Barton as Mr Holland’s broker have already been disclosed;

(d) It is not pleaded that the defendant had an obligation to Mr Holland to provide him with notice of the change to any adviser recorded on the defendant’s system;

(e) Commission was paid to the entity recorded as the ‘Commission Party’ in the defendant’s internal records for a particular facility. There is no basis to suggest that the recording of a particular person as broker or advisor on the defendant’s internal records (rather than as a Commission Party) has any relevance to the payment of commission or otherwise to the alleged breach of fiduciary duty, or why the defendant would be required to obtain Mr Holland’s consent to maintain those records; and

(f) Consequently, the provision of this category of documents (if in fact they exist or existed at the time) will not facilitate the just resolution of the proceeding as quickly, inexpensively, and efficiently as possible, nor will it resolve a matter in dispute on the pleadings.

### Documents that do not exist

74 Documents 1(e), (f) (g) (h), (i) and (j) fall into this category.

75 In relation to document 1(e), the defendant submits that the reference to a “margin loan facility agreement” in the defendant’s letter is presumably a reference to the terms which generally applied as at May 2021 to margin loan facilities held with the defendant, rather than a reference to the facility itself, or to a different facility agreement that the first defendant had executed. There is no allegation in the pleadings that the first defendant executed any agreement other than that in relation to the facility. There are no other margin lending facility agreements executed by Mr Holland in the possession of the defendant (nor does the defendant plead that there are any such documents). Therefore, there are no Power of Attorney documents (that are requested at 1(f) of the application) relevant to the non-existent other ‘executed’ margin lending facility agreement.

76 In relation to documents 1(g), (h), (i), and (j), the defendants submit that the plaintiffs appear to have misunderstood both the defence, and the evidence in Mr Morrissey’s affidavit. In particular:

(a) The defendant pleads that the ‘BT Margin Lending Terms and Conditions’ (**May 1997 Terms**) applied to the facility;

(b) Mr Morrissey deposes that based on his enquiries, the May 1997 Terms were used from about May 1997 for margin lending facilities and that based on his experience as to how the defendant updates its terms, he expected that the defendant sent the May 1997 Terms to customers with existing facilities in about May 1997;

(c) The defendant has not pleaded or filed evidence that the May 1997 Terms applied to the facility by reason of having been executed by the defendant using a Power of Attorney (or otherwise);

(d) The existence of an ‘executed’ version of those terms is not in issue; and

(e) It is the defendant’s case that the May 1997 Terms applied to the facility on the basis that they were likely sent to Mr Holland in about May 1997.

77 The defendant also submits that the existence of an ‘executed’ version of the May 1997 Terms and any Power of Attorney used to execute is unfounded speculation by Mr Holland.

78 In relation to document 1(g), the May 1997 Terms are included in exhibit DMM-2 to the Morrissey affidavit. Similarly, in relation to document 1(i), the defendant submits that there are no executed“other” terms as alleged in the plaintiffs’ submissions, nor is there any pleading that suchterms exist.

79 In relation to category 1(j), the defendant submits that:

(a) The request appears to be based on speculation that because Mr Holland did not execute any other loan documents, any other terms said to apply to the facility must have been executed by the defendant on his behalf, using a Power of Attorney; and

(b) No party alleges that any document was executed under a Power of Attorney.

## Consideration

### Documents that are relevant, but no longer in the defendant’s possession or the defendant has been unable to locate

#### Documents 1(a), (b), (g) and (q)

80 The defendant discovered and produced the 2021 document to the plaintiffs. After due search and inquiry, the defendant was unable to locate any other documents of this category and Mr Morrissey has deposed that they do not exist. The plaintiffs have not elected to cross-examine Mr Morrissey on his affidavit for the purpose of the interlocutory application. The plaintiffs may challenge the credibility or reliability of Mr Morrissey’s affidavit at trial but in the circumstances nothing can be gained by making any further orders for discovery.

### The provision of the documents are not relevant and will not result in the just resolution of the proceeding as quickly, inexpensively and efficiently as possible and/ or are not significantly probative in nature

#### Documents 1(c), (d), (i), (k), (l), (m), (n) (o), (p), (q), (r) and (s)

81 None of the criteria for direct relevance are satisfied.

### Documents that do not exist

#### Documents 1(e), (f) (g) (h), (i) and (j)

82 I repeat my reasons given for refusing any further order in respect of the first category of documents.

# APPLICATION FOR LEAVE TO FILE AN AMENDED STATEMENT OF CLAIM

83 The plaintiffs filed an interlocutory application on 23 March 2022 seeking a number of orders. At a case management hearing on 30 March 2022, I declined to entertain the orders sought save for paragraph 5, which seeks leave of the Court to amend the statement of claim. The plaintiffs subsequently filed an interlocutory application on 1 April 2022 which contained within it a draft proposed amended statement of claim.

84 On 5 April 2022, the defendant advised the plaintiffs and the Court of the paragraphs it did and did not oppose.

85 The plaintiffs filed written submissions in support of the application on 8 April 2022 and the defendant filed written submissions in response on 14 April 2022.

86 Paragraphs 4 to 6 and paragraph 12 of the proposed amended statement of claim are not opposed by the defendant. I allow those amendments.

87 The remaining amendments pleaded in paragraphs 7 to 11 and 13 to 19 are opposed.

## Principles

88 The party seeking leave to amend, bears the onus of satisfying the Court that grounds exist for exercising the discretion in his or her favour: *Dye v Commonwealth Securities Ltd* [2010] FCA 720.

89 A ground on which leave to amend may be refused is that a proposed amendment is “obviously futile” or “plainly demurrable”: *Allstate Life Insurance Co v Australian & New Zealand Banking Group Ltd* (1995) 58 FCR 26; 130 ALR 469 (“***Allstate****”*), 478 per Lindgren J citing *Dennis v Brownlee* (1963) 80 WN (NSW) 1239; *Abela v Giew* (1964) 81 WN (Pt 1) (NSW) 344.

90 It would be futile to allow an amendment which “discloses no reasonable cause of action”: *Allstate*, 478, considering the then r 16(a) of O 11 of the *Federal Court Rules 1979* (Cth), now FCR 16.21(e) of the *Federal Court Rules 2011* (Cth).

## The parties’ submissions

### Paragraphs 7 to 11, 13 and 14

91 The plaintiffs plead that the ‘How to Establish Your Loan’ procedure required Mr Holland to retain the ‘Loan Agreement’, ‘Deed of Mortgage’, ‘Nominee Deed’ and ‘CHESS Sponsorship Agreement’ forms and that the defendant executed these documents on Mr Holland’s behalf using the Power of Attorney.

92 The plaintiffs plead further that they never received copies of the executed documents from the defendant and that it was the defendant’s duty to retain them pursuant to an implied term in the Loan Agreement and the ASIC Act requirements of due care and skill.

93 The plaintiffs do not identify how the proposed pleading in these paragraphs relate to or establish in whole or in part, a reasonable cause of action.

94 The defendant submits that the plaintiffs’ allegations about the retention, non-retention or execution of documents, do not relate to any cause of action raised on the pleadings as they stand nor do they raise a reasonable cause of action.

## Consideration

95 I accept the defendant’s submissions. The proposed amendments in paragraphs 7 to 11 and 13 do not relate to an existing cause of action nor do they raise a reasonable cause of action. I decline to grant leave to amend.

96 Paragraph 14 of the proposed amended statement of claim is already pleaded in the statement of claim and is the subject of the defence: defence filed on 23 November 2021, [6(a)-(b)]. It introduced no new material. I disallow the proposed amendment.

### Paragraphs 15 and 16

97 The plaintiffs plead that the ‘Declaration of Purpose’ form is a “business purposes declaration for credit contracts” in a form satisfying s 11(2) of the Consumer Credit Code that this declares the loan as being wholly or predominantly for business or investment purposes and that it is in the form required to be effective for regs 10(1) and 10(2) of the Consumer Credit Code.

98 The plaintiffs further plead that the Loan Agreement contains a warranty that “all moneys advanced hereunder will be used by the borrower wholly or predominantly for business and/or investment purposes as agreed from time to time with BTS” at cl 9.1(b).

99 The defendants submit that there is no cause of action relating to any Consumer Credit Code and that it is not clear to which Code the plaintiffs refer.

## Consideration

100 I accept the defendant’s submissions. The proposed amendments do not relate to an existing cause of action nor do they raise a reasonable cause of action. I decline to grant leave to amend.

### Paragraphs 17 to 19

101 The plaintiffs plead that the defendant charged $17.00 of New South Wales stamp duty paid on the loan on 22 May 1997; $10.00 on the CHESS agreement on 12 May 1997; and $1,336.00 on the Loan Agreement as new advances were made on 13 July 2007.

102 The plaintiffs submit that:

(a) It is a requirement that loan documents executed in New South Wales in April 1997 be executed and stamped in order to be admitted into evidence: *Stamp Duties Act 1920* (NSW) s 29; *Pitman v Johnson* [2017] FCA 945.

(b) The loan documents were subject to New South Wales stamp duty because they were executed by the defendant, on Mr Holland’s behalf, in New South Wales on 28 April 1997; and

(c) The terms of the contract provided that the defendant would charge stamp duty incurred on Mr Holland’s behalf to the plaintiff.

103 The defendants submit that there is no cause of action relating to stamp duty.

104 The defendants submit further that the amendments appear to be directed at the admissibility of documents which cannot be located. The defendant has filed evidence containing examples of the application documents in use around the time the facility commenced. These documents did not affect any transaction or conveyance and their admissibility is not affected by stamp duty legislation.

## Consideration

105 I accept the defendant’s submissions. The proposed amendments do not relate to an existing cause of action nor do they raise a reasonable cause of action. I decline to grant leave to amend.

# CONCLUSION

106 I allow amendments to be made to the statement of claim in the terms of paragraphs 4 to 6 and paragraph 12.

107 I refuse leave to the plaintiffs to amend the statement of claim in terms of the proposed paragraphs 7 to 11 and 13 to 19.

# ORIGINATING APPLICATION

108 The plaintiffs also sought leave in their interlocutory application filed 7 February 2022 at paragraph 6 and 7 for leave to amend their originating application filed 23 August 2021.

109 That application was not opposed.

110 Accordingly, I grant leave to the plaintiffs to amend the originating application in terms of paragraphs 6 and 7 of their interlocutory application filed 7 February 2022.

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| I certify that the preceding one hundred and ten (110) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Sullivan. |

Associate:

Dated: 13 May 2022