Federal Court of Australia

Singh v Khan (No 2) [2021] FCA 463

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| File number: |  |
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| Judgment of: | **STEWART J** |
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| Date of judgment: | 5 May 2021 |
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| Catchwords: | **RESTITUTION** – claim for money had and received on mistake of law – whether applicant must plead loss or liability to third party – whether that the money recovered would be held by the applicant on constructive trust in favour of a third party can be raised as a defence to a common law claim for money had and received  **EQUITY** – constructive trust – whether equity imposes constructive trust on the party receiving an overpayment on mistake of law – unconscionability lacking  **TAXATION** – withholding tax for supplier’s failure to quote a valid ABN – circularity of payment or accounting obligations  **PRACTICE AND PROCEDURE** – application to strike out statement of claim on various grounds – whether reasonable causes of action – whether leave to replead a second time should be given – self-represented litigant |
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| Legislation: | *Taxation Administration Act 1953* (Cth) Sch 1, ss 12-190, 16-70, 16-75, 16-85 |
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| Cases cited: | *Baumgartner v Baumgartner* [1987] HCA 59; 164 CLR 137  *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* [1994] HCA 61; 182 CLR 51  *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; 175 CLR 353  *KAP Motors Pty Ltd v Federal Commissioner of Taxation* [2008] FCA 159; 168 FCR 319  *Piccone v Suncorp Metway Insurance Ltd* [2005] FCAFC 260; 148 FCR 437  *Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; 59 NSWLR 361  *Singh v Khan* [2021] FCA 140 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 33 |
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| Date of hearing: | 4 May 2021 |
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| Counsel for the Applicant: | The applicant appeared in person |
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| Counsel for the Respondent: | R Brown |
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| Solicitor for the Respondents: | McGrath Dicembre & Company |

ORDERS

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|  | | NSD 1392 of 2020 |
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| BETWEEN: | GURJIT SINGH  Applicant | |
| AND: | GHULAM AKBAR KHAN  First Respondent  SAMINA KHAN  Second Respondent  FOBUPU PTY LTD  Third Respondent | |

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| order made by: | STEWART J |
| DATE OF ORDER: | 5 MAY 2021 |

THE COURT ORDERS THAT:

1. The applicant’s statement of claim filed on 29 March 2021 is struck out.
2. The proceeding is dismissed as against the first and second respondents.
3. The applicant has leave to file a new statement of claim by 31 May 2021 to plead a money had and received claim against the third respondent for monies overpaid for the rent of premises at 8 Bringelly Road, Kingswood, in the period February 2012 to November 2017.
4. Costs are reserved.
5. The matter is listed on 3 June 2021, or such other date as the parties may arrange with the associate to Stewart J, for further case management and oral submissions on the costs reserved on 24 February 2021 and today.

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

REASONS FOR JUDGMENT

STEWART J:

1. On 24 February 2021, I struck out the applicant’s statement of claim on the ground, amongst others, that it failed to disclose a reasonable cause of action against the respondents. I allowed the applicant to replead his case. He did that, and the respondents have now applied, again, for the statement of claim to be struck out. They do so on the grounds that it contains scandalous and frivolous or vexatious material, that it is evasive or ambiguous, that it is likely to cause prejudice, embarrassment and delay and that it still fails to disclose a reasonable cause of action.
2. My reasons in striking out the statement of claim on the previous occasion disclose that it suffered many, or possibly all, of the defects that are now complained of in respect of the second attempt: *Singh v Khan* [2021] FCA 140. Perhaps that is not surprising taking into account that the causes of action that the applicant seeks to plead, namely money had and received – a claim for restitution arising from unjust enrichment – and constructive trust – a claim in equity – are complex. The factual underpinnings to the causes of action go back over a long period of time and are of themselves not straight forward, and the applicant is self-represented and not a lawyer.
3. In reaching my conclusions on the present application I take into account that the applicant is self-represented and cannot be expected to plead a case with the same precision as might be expected of an experienced pleader. I give due allowance for that. However, the rules of pleading apply to the applicant as much as they apply to any other litigant. That is for good reason. The respondents are entitled to know with clarity the case that is asserted against them; they are entitled to not have to respond to irrelevant, scandalous, frivolous and vexatious material; and, they are entitled not to have to plead a defence and go to trial unless a reasonable cause of action has been pleaded against them. Were it otherwise, it would be unfair on them. But as importantly, it is critical to the ability of the court to be able to function efficiently and effectively that claims are property pleaded. That is a requirement in the interests of the administration of justice as a whole, and consequently of other litigants whose cases would be delayed and consequently prejudiced by inefficiencies in the conduct of the present case.
4. Leaving aside the question of whether a reasonable cause of action is pleaded, there are a number of respects in which the statement of claim is objectionable. They include:
5. the pleading of evidence: paragraphs 9, 10, 21-27 and 42;
6. averments that do not make grammatical sense and therefore lack intelligible meaning: paragraphs 11 and 41;
7. averments that are evasive or ambiguous, or likely to cause prejudice, embarrassment or delay: paragraphs 12, 14-15, 16-20, 28-33, 35, 43, 58-59, 65-66, 73, 74 and 126;
8. averments about other proceedings in respect of which it is not made clear why they are relevant, or how they are relied on in the present case: paragraphs 36-40, 46-53 and 130; and
9. the pleading of case law: paragraphs 60 and 61.
10. From the number of paragraphs affected by those identified problems, it is apparent that the statement of claim is riddled with pleading objections such as to warrant that it be struck out. Most of the objections are the same as, or along the lines of, the objections to the first statement of claim. Whether or not the applicant should be given the opportunity to plead again, taking into account that he is self-represented, will depend on whether a tenable cause of action is discernible in the confusing morass of what he has pleaded.
11. In that regard, it is possible to discern what is at the heart of what the applicant is trying to allege. The core underlying facts apparent from the statement of claim and supplemented by clarification given by the applicant during the hearing are these:
12. The applicant’s company, **Anmol** Holdings Pty Ltd, and the third respondent, **Fobupu** Pty Ltd, entered into a lease of certain premises in October 2006, Anmol being the lessee and Fobupu being the lessor.
13. Fobupu did not have an Australian Business Number (**ABN**) and did not provide invoices for rent, or if it did provide invoices they did not reflect an ABN or a valid ABN.
14. Anmol paid rent in cash.
15. The purpose of the lease was to conduct an enterprise, namely a restaurant.
16. The payment of rent by Anmol was done by the applicant on Anmol’s behalf, and the applicant was ignorant when he paid rent that Anmol as payer was under a legal obligation to withhold a proportion of the rent (about 47%) as withholding tax under s 12-190 of Sch 1 of the *Taxation Administration Act 1953* (Cth) (**TAA53**). That provision relevantly provides as follows:

**12‑190  Recipient does not quote ABN**

(1)  An entity (the *payer*) must withhold an amount from a payment it makes to another entity if:

(a) the payment is for a \*supply that the other entity has made, or proposes to make, to the payer in the course or furtherance of an \*enterprise \*carried on in Australia by the other entity; and

(b)  none of the exceptions in this section applies.

*ABN correctly quoted*

(2)  The payer need not withhold an amount under this section if, when the payment is made:

(a)  the other entity has given the payer an \*invoice that relates to the \*supply and \*quotes the other entity’s \*ABN; or

(b)  the payer has some other document relating to the supply on which the other entity’s ABN is \*quoted.

(2A)  …

*Payer has no reason to believe that ABN has been incorrectly quoted*

(3)  The payer need not withhold an amount under this section if, when the payment is made:

(a)  the other entity has given the payer an \*invoice that relates to the \*supply and purports to \*quote the other entity’s \*ABN, or the payer has some other document that relates to the supply and purports to \*quote the other entity’s ABN; and

(b)  the other entity does not have an ABN, or the invoice or other document does not in fact quote the other entity’s ABN; and

(c)  the payer has no reasonable grounds to believe that the other entity does not have an ABN, or that the invoice or other document does not quote the other entity’s ABN.

*No need to quote ABN*

(4)  The payer need not withhold an amount under this section if:

(a) the payment is made otherwise than in the course or furtherance of an \*enterprise \*carried on in Australia by the payer; or

(b) …

1. Fobupu did not declare the rental received from Anmol and the applicant as income to the **Commissioner** of Taxation, and the applicant knew that all along as he had been informed of it by Dr Khan, the first respondent and a director of Fobupu.
2. In February 2012, Anmol was deregistered and the applicant took over as lessee and continued paying rent in the same circumstances of mistake of law until November 2017.
3. From November 2017, Fobupu provided tax invoices for rent to the applicant which cited an ABN although, to the applicant’s knowledge, the ABN was not valid or was the ABN of a different entity.
4. The applicant knew from that time that he had a withholding tax obligation in respect of each rental payment.
5. Payment of rent in those circumstances continued through to 2019.
6. In 2018, the applicant self-declared to the Commissioner that he had not withheld withholding tax on the rent that Anmol or he paid to Fobupu but the Commissioner has not yet made any claim against the applicant for such withholding tax whether by way of assessment, amended assessment or otherwise.
7. The total amount that should be withheld is approximately $550,000, of which approximately $315,000 was in the period before the applicant became the lessee (i.e., 2006-2012) and $42,000 was in the period after the applicant knew that he had a withholding tax obligation and that the ABN on Fobupu’s tax invoices was incorrect.
8. Out of these essential facts, the applicant identifies three causes of action, namely set-off, money had and received having been paid under a mistake of law, and constructive trust.
9. To plead a set-off is to raise a defence rather than to assert a cause of action: *Piccone v Suncorp Metway Insurance Ltd* [2005] FCAFC 260; 148 FCR 437 at [14] per Dowsett, Jacobson and Greenwood JJ. The alleged set-off therefore provides no foundation to the claim sought to be asserted. The set-off “cause of action” should be struck out and no leave to replead it should be given because, however pleaded, it is untenable.
10. Before dealing with the remaining causes of action, it is worthwhile turning attention to the position of the first and second respondents, Dr and Mrs Khan. They are said to be the directors of Fobupu. In addition, the averments in the statement of claim which come closest to supporting a cause of action against them are these:

14. Respondent number 2 have [sic] also been authorised by the respondent number 1 to receive cash from applicant/family members of applicant.

15. Family members of respondent 1 were also authorised by respondent 1 to receive cash from applicant and family members of applicant.

…

65. Payment was made by me under my directions to Ghulam Akbar Khan or his other family members as per his directions.

66. Hence this claim against personal respondents along with corporate respondents.

1. There is no basis disclosed as to why Dr and Mrs Khan would be liable to the applicant. The payments in question were for rent payable to the lessor. The lessor was, throughout the relevant period, Fobupu. Nowhere does the applicant say that the lessor changed. The fact that the applicant dealt with Dr Khan and paid Dr Khan (or indeed other Khan family members) does not change the character of the payments in law as being from the lessee (first Anmol then the applicant) to the lessor. It was that character of “payment for a supply” that attracted the withholding tax obligation.
2. On any view, on the facts that the applicant identifies there is no reasonable cause of action against Dr and Mrs Khan. It is said in the statement of claim that there was a “deliberate planned tax evasion manoeuvre” by Dr Khan which in his written submissions the applicant characterises as fraud, but no case of fraud is asserted by the applicant against Dr Khan. If on the applicant’s version there was fraud it was fraud on the Commissioner which does not give rise to an independent cause of action by the applicant against Dr Khan. In his oral submissions the applicant said that the money that he gave to Dr Khan for rent may have been pocketed by Dr Khan and not paid to or put through the books of Fobupu. If that was so it may have been a fraud on Fobupu, and possibly the Commissioner, but it would not give the applicant a cause of action.
3. The claims against the Khans should therefore be struck out and no leave should be granted to the applicant to replead them.
4. It is also necessary to consider the position of payments made when Anmol was the lessee. Those payments, even if physically made by the applicant, are properly characterised as payments by Anmol. Anmol was the “payer” for the “supply”, being the provision of the leased premises for occupation.
5. Although it is by no means clear, the applicant appears to rely on *Clayton’s case*, i.e., *Devaynes v Noble* (1816) 35 ER 781, which was adopted by the Supreme Court of New South Wales in *Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008; 59 NSWLR 361 at [24]-[25], to justify him claiming what Anmol would otherwise be able to claim. The applicant seems to wish to say that all the payments made over time would have been appropriated first to discharge the genuine rental obligations and that the current claim is a subsequent claim to which only the later rental payments would be appropriated, i.e., all of which were paid after he became lessee. That only has to be stated to demonstrate that it makes no sense. The withholding obligation was that of the payer, i.e., the lessee, and if it exists it arose on each payment being made. There is no basis to apply the rule that payments are appropriated to the oldest debt first so as to conclude that the applicant can make the claims for the period when Anmol was the lessee.
6. It follows that the statement of claim should be struck out insofar as it asserts a claim for the period prior to February 2012. As no reasonable cause of action can be pleaded in respect of that period, no leave should be given to replead it.
7. It is convenient to deal next with the constructive trust. In essence, the applicant wishes to say that to the extent that the rental payments were overpayments on account of amounts that should have been withheld as withholding tax, Fobupu received and holds those payments on trust for the applicant.
8. The typical scenario where the court might impose, as an exercise of its equitable remedial power, a constructive trust on the parties is where it is unconscionable for a party to retain or maintain ownership of an asset to which the other party has a claim in equity. In those circumstances, the first party is made a constructive trustee of their legal interest for the benefit of the other party. The traditional concept of unconscionable conduct, which underlies fundamental equitable concepts and doctrines, underlies the constructive trust. There must be unconscionable conduct that attracts the intervention of equity for the imposition of a constructive trust. See *Baumgartner v Baumgartner* [1987] HCA 59; 164 CLR 137 at 148-150 per Mason CJ, Wilson and Deane JJ.
9. The relevant circumstances in the present case include that on any view the amount of rent which is said to have been overpaid because it should have been withheld by the applicant is not the applicant’s money; were it to be recovered by the applicant from Fobupu it would have to be paid to the Commissioner. That is the effect of s 16-70(1) of Sch 1 to the TAA53 which provides that an entity that withholds an amount under Div 12 (in which s 12-190 is located) must pay the amount to the Commissioner in accordance with Subdiv 16-B. Section 16-75 defines when the amount must be paid depending on whether the withholder is a “large withholder”, a “medium withholder” or a “small withholder”. The latest applicable period to pay, being for a “small withholder”, is by the end of the 21st day of the month after the end of the quarter in which the money was withheld: s 16-75(3). Section 16-85 provides for how the payment must be made.
10. The point is that either the Commissioner gets the money from Fobupu through Fobupu’s tax obligations or, if it is withheld by the applicant as payer, from the applicant. If the applicant recovers from Fobupu then the repayment will be impressed with a constructive trust in favour of the Commissioner: see ***KAP Motors*** *Pty Ltd v Federal Commissioner of Taxation* [2008] FCA 159; 168 FCR 319 at [41]-[42] per Emmett J which is discussed further below. Thus far, despite the passage of two and a half years since the applicant self-disclosed to the Commissioner, the Commissioner has not pursued the applicant.
11. In those circumstances, it is hard to see what unconscionable conduct there is that might justify the imposition of a constructive trust on the overpayments in favour of the applicant. There is no justification for the intervention of equity.
12. The applicant has therefore failed to identify factual allegations which would justify a cause of action in equity such as to give him the remedy of a constructive trust. That cause of action should accordingly be struck out and there is no basis on which he might be given the opportunity to replead it.
13. I now turn to the applicant’s cause of action in unjust enrichment, namely restitution of money had and received under mistake of law. Such a cause of action was recognised in *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; 175 CLR 353. It is available where the recipient of the monies paid is not legally entitled to receive them: at 376 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ. It is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable; instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake (as in this case), duress or illegality: at 379.
14. The fact that the payment has been caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the respondent to make restitution, although the recipient of a payment which is sought to be recovered on the ground of unjust enrichment is entitled to raise by way of answer any matter or circumstance which shows that their receipt (or retention) of the payment is not unjust: at 379. That would allow Fobupu to raise as a defence, for example, that it did declare the rent as income to the Commissioner or that the applicant is not liable to pay the claimed amount to the Commissioner. There are also other defences that Fobupu may be able to plead, such as change of position. It is not, however, necessary for the applicant to plead that he is liable to pay the amount to the Commissioner.
15. Of course, since the applicant accepts that from November 2017 he was aware of his withholding obligation, and he was aware that the ABN on Fobupu’s invoices was false (see s 12-190(3) of Sch 1 to the TAA53), there can be no basis on which he can maintain his claim in respect of rent paid thereafter.
16. The question arises whether the fact that any payment by Fobupu to the applicant would be impressed with a constructive trust in favour of the Commissioner would defeat the applicant’s claim. Put differently, the question is whether the fact that on no view is the money the applicant’s – either it is to pay a debt to the Commissioner or there is no basis to claim it and it would have to be repaid, because otherwise there would be a windfall for the applicant – means that the unjust enrichment claim cannot be sustained.
17. In *KAP Motors* the applicants were motor vehicle dealers. They had remitted goods and services tax (**GST**) in respect of “holdback payments” to distributors under the mistaken belief that the payments constituted consideration for taxable supplies under the GST legislation. The Commissioner ruled that holdback payments do not constitute consideration for a supply for GST purposes, but refused to give the applicants a refund. One of the questions that the case raised was whether the taxpayers should, as a condition of being entitled to recover the overpaid GST, be required to account for the refunded amount to the distributors.
18. The Commissioner contended that the claim by the motor vehicle dealers for a refund of GST paid by them that should not have been paid could be resisted because any such refund would be subject to a constructive trust in favour of a distributor who had made the holdback payments to which the refund related: at [39].
19. It was held (at [42]) that in circumstances where a dealer received from a distributor a payment of a separate amount described as a tax that the dealer must pay, which the dealer was collecting from the distributor in order to pay to the Commissioner, the dealer may become a constructive trustee of the amount received from the distributor. In such a case, the amount of the tax may be received by the dealer as a fiduciary on the footing that it would apply the money in payment of the tax. If that purpose failed or could not be effected because the tax was not payable, the dealer may hold the monies for the benefit of the distributors who paid them. The same result may ensue if the dealer recovered from the Commissioner a payment that had been made as and for tax that was not payable.
20. The question that was identified was whether the possibility that the dealers might receive the amount of any refund from the Commissioner on constructive trust for a distributor is a matter that can be raised by the Commissioner as a defence to a common law claim for money had and received. It was held (at [43]) that “the action for money had and received is not concerned with the recovery of compensation for loss or damage suffered by the claimant” and (at [44]) that “an action for money had and received is not defeated simply because the claimant has recouped the outgoing from others”. It was concluded (at [44]) that even if there was any equity in favour of the distributors attaching to the fruits of any judgment that the dealers might recover against the Commissioner, that circumstance would be quite irrelevant to the proceedings. The answer to the identified question was therefore “no”: at [45].
21. In the present case, the applicant is in the position of the dealers in *KAP Motors*. It is no answer to the applicant’s case that any recovery by him will be impressed with a trust in favour of the Commissioner. It does however point to the pointlessness of the applicant’s case; any recovery by him will not accrue to his estate. He will hold it as trustee, and if it turns out that he does not have to pay it to the Commissioner, perhaps because the Commissioner has recouped the requisite income tax from Fobupu, he will be under obligation to repay it to Fobupu.
22. For the proposition that restitutionary relief, such as in the claim for money had and received, does not seek to provide compensation for loss, i.e., that the applicant does not have to plead that he has paid or is liable to pay the Commissioner, see *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* [1994] HCA 61; 182 CLR 51 at 75 per Mason CJ. As I have said, it may be that the applicant’s claim will fail because Fobupu’s claim to the money is superior to his such as, for example, if it has accounted to the Commissioner. See *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516 at [27] per Gleeson CJ, Gaudron and Hayne JJ.
23. Notwithstanding that the applicant has had a previous attempt to plead his case, I do not consider that it is right to bar him from having a further attempt but he should expect that he may not be given another one after this. The Court cannot go on interminably striking out a poorly pleaded case and allowing it to be repleaded. I understand that the applicant is unrepresented, but I again urge him to find a lawyer to plead his case in an intelligible way. If the case is pleaded again as poorly as it has been hitherto, a factor that may weigh in the discretion against a further attempt being permitted is that, for the reasons I have explained, the case seems to be pointless – on no view would the applicant be entitled to the recovery from Fobupu for his own benefit. The law would not sanction such a windfall at the expense of Fobupu or the Commissioner.
24. I will hear the parties separately on costs, although as presently understood it would seem that the applicant will have to bear the costs of the respondents’ interlocutory application. My mind nevertheless remains open to submissions in favour of an alternative outcome on costs.

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| I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart. |

Associate:

Dated: 5 May 2021