SUPREME COURT OF QUEENSLAND

CITATION:	*PQ Management Pty Ltd & Ors v McCullough Robertson* [2026] QSC 149
PARTIES:	**PQ MANAGEMENT PTY LTD** ACN 619 030 198 (first plaintiff/respondent) **DONALD NEAL ISON** (second plaintiff) **GREGORY SHANE ELDRIDGE** (third plaintiff) **v** **McCULLOUGH ROBERTSON** (defendant/applicant)
FILE NO/S:	SC No 6541 of 2024
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2026
JUDGE:	Morrison J
ORDERS:	**1. Paragraphs 67, 68, 68A, 69, 69A, 70 and 71 of the Amended Statement of Claim are struck out.** **2. The Plaintiffs have leave to replead as they may be advised.** **3. The Plaintiffs pay the Applicant's costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – FORM OF PLEADING – MATTERS TO BE PLEADED SPECIFICALLY – where the plaintiffs contend that three causes of action arise from the applicant's alleged negligence, breach of retainer and breach of fiduciary duties – where the impugned conducted related to a shareholder dispute, namely where the first plaintiff held 142,102 shares in a company and Mr Leviston held the remaining 60,901 shares – where the plaintiffs and applicant entered into a Shareholders Agreement for the purchase of the Leviston's Shares – where litigation was subsequently commenced and the applicant was retained to act for the first plaintiff – where an Amended Statement of

Claim pleaded loss and damage, however matters were pleaded in an insufficient way – whether parts of the Amended Statement of Claim should be struck out

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where the defendant applies to strike out parts of the Amended Statement of Claim – where the applicant contends that the Amended Statement of Claim is deficient as insufficient facts or quantified amounts were pleaded – whether the deficiencies in the pleadings should effectuate striking out the defective paragraphs of the Amended Statement of Claim

Corporations Act 2001 (Cth), s 232

Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd (1987) 14 FCR 215; [1987] FCA 84, considered
Graham & Linda Huddy Nominees Pty Ltd v Byrne [2016] QSC 221, followed
Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2004] QSC 457, followed

COUNSEL:	A Nicholas for the applicant S Russell for the respondents
SOLICITORS:	Bartley Cohen for the applicant Russells for the respondents

[1] McCullough Robertson is the Defendant in proceedings instituted by PQ Management Pty Ltd (**PQM**) seeking damages for negligent advice. It applies to strike out certain parts of the Amended Statement of Claim.

Background

[2] The Plaintiffs assert three causes of action said to arise from the Applicant's alleged negligence, breach of retainer and breach of fiduciary duties. The impugned conduct relates to a shareholder dispute between the First Plaintiff (**PQM**) and Mr Leviston (**Leviston**) which resulted in litigation.

[3] The Second and Third Plaintiffs, Donald Ison (**Ison**) and Gregory Eldridge (**Eldridge**), are directors of PQM.

[4] McCullough Robertson is a firm of solicitors, of which Mr Dahl (**Dahl**) and Mr Stokes (**Stokes**) were partners.

[5] Treated Waste Agencies Pty Ltd (**TWA**) was a company with an issued capital of 203,003 ordinary shares. The Directors of TWA were Leviston, Ison and Eldridge.

[6] From about 3 August 2017, PQM held 142,102 shares in TWA and Leviston held the remaining 60,901 shares (**Leviston's Shares**).

[7] On 29 July 2017, TWA, PQM, Leviston, Ison and Eldridge entered into a Shareholders Agreement, pursuant to which:

(a) by clause 8.11, any non-compliant transfer of shares was void unless the shareholders unanimously agreed otherwise;

(b) by clause 8.12, Leviston granted PQM the right to purchase all of Leviston's Shares at not less than 2.2 times EBITDA, expressed to be on the terms and conditions set out in Schedule 5 to the Share Sale Agreement (**Call Option**); however, Schedule 5 was left blank;

(c) the Call Option was exercisable by written notice at any time before 3 July 2020; and

(d) by clause 15, the value of a shareholder's shares was to be determined by an independent party agreed by the shareholders or, failing agreement, a professional nominated by the President of the Queensland Law Society, and was not to be less than 2.2 times operating net profit before tax.

[8] On 18 February 2020, a telephone conversation occurred between Ison and Dahl in which Ison said that he and Eldridge wished to acquire Leviston's Shares in TWA and that they had attempted to exercise the Call Option with the assistance of another solicitor.

[9] The Applicant was subsequently retained to act for PQM.

[10] Between 25 February and 5 March 2020, the Applicant prepared a draft call option notice, Share Sale Agreement and share transfer form documents. The firm identified several material concerns with the transaction documents, including the absence of any agreed share sale agreement from Schedule 5, ambiguity as to the EBITDA calculation date, doubt about the validity of the power of attorney and whether a letter from the Plaintiffs' accountant could constitute a compliant determination under clause 15.1.

[11] On 9 March 2020, the Plaintiffs purported to exercise the Call Option by sending Leviston a call option notice, share sale agreement and share transfer form prepared by the Applicant, and a letter from the Plaintiffs' accountant calculating the purchase price at 2.2 times EBITDA using 29 February 2020 as the calculation date.

[12] Between 13 and 24 March 2020, the Applicant exchanged a series of communications with Michael Turner of Black Bear Legal, the firm retained to act for Leviston. In that correspondence, it was contended by Leviston's solicitor that PQM's purported exercise of the call option was ineffective.

[13] On 31 March 2020, Leviston offered to settle all disputes for $480,000 (**March 2020 Offer**). By reference to preliminary calculations performed by his forensic accountant, Leviston contended that his shares were worth "at least, $240,081". The Plaintiffs did not accept the March 2020 Offer.

[14] Further settlement offers were made and not accepted.

[15] On 29 May 2020, allegedly in reliance on the Applicant's advice, the Plaintiffs purported to transfer Leviston's Shares to PQM by:

(a) Ison and Eldridge executing the Share Sale Agreement and share transfer form on behalf of Leviston pursuant to the power of attorney;

(b) Ison executing a notice of share transfer; and

(c) delivering to the Applicant cheques in the sum of $164,163.77 and $20,016.07 for tender to Leviston. PQM also paid the Applicant $33,332.38 in fees.

[16] Leviston commenced proceedings against the Plaintiffs and TWA, claiming various forms of relief, including relief that challenged the exercise of the Call Option, and declaratory relief as to oppressive conduct under s 232 of the *Corporations Act 2001* (Cth).

[17] The Plaintiffs retained the Applicant to act for them in the Federal Court, believing PQM had validly exercised the Call Option.

[18] In the Federal Court proceedings PQM denied that the Call Option had not been validly exercised.

[19] In the Federal Court, Derrington J ultimately declared that the purported exercise by PQM on 9 March 2020 of the Call Option was ineffective to exercise the option.

The pleading

[20] The Amended Statement of Claim pleads loss and damage commencing at paragraph 67.

> "67. As a result of the Call Option Retainer Breaches, the Plaintiffs suffered loss and damage:
>
> (a) they wasted all of the fees paid for the Defendants' services in the Call Option Retainer, since the Call Option was invalidly exercised and there was a total failure of consideration;
>
> (b) they lost the opportunity to acquire Mr Leviston's Shares at a price between the March 2020 Offer of $240,000 and $169,000, the price they tendered;
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> (ba) further and in the alternative to subparagraph (b), they lost the opportunity to acquire Mr Leviston's Shares at a price less than the value that would have been determined had the Call Option been validly exercised, namely $479,020;
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> (c) by tendering the Cheques unconditionally, they lost any opportunity to acquire Mr Leviston's Shares in such a price range; alternatively, their bargaining power in respect of that opportunity was substantially diminished;
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> (d) by the incompetent exercise of the Call Option, the Defendants' obstinate refusal to acknowledge that incompetence in their correspondence with Mr Turner and the unconditional tendering of the Cheques:
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> (i) they rendered the Leviston Litigation practically inevitable;

(ii)they were thereby exposed to the costs of defending the Leviston Litigation; and

(iii) they put Mr Leviston in funds to conduct the Leviston Litigation;

(e) further, they were exposed to the risk that if Mr Leviston pressed his other claims, although such claims failed, they may fail to recover their costs, which was the effect of the orders made on 26 September 2023, pleaded in subparagraph 60(a) above."

[21] As can be seen there are several pleadings of lost opportunity, each relating to the acquisition of Leviston's Shares:

(a) paragraph 67(b) pleads: "at a price between the March 2020 Offer of $240,000 and $169,000, the price they tendered";

(b) paragraph 67(ba) pleads: "at a price less than the value that would have been determined had the Call Option been validly exercised, namely $479,020"; and

(c) paragraph 67(c) pleads: "in such a price range; alternatively their bargaining power in respect of that opportunity was substantially diminished".

[22] There are several observations one can make about those three subparagraphs.

[23] First, to say, as subparagraph 67(b) does, that the lost opportunity was to buy at a price "between … $240,000 and $169,000", does not identify the price that is to be contended as the actual price at which the shares would have been bought. As was accepted by Mr Russell, the pleading does not proceed on the basis of a cascading series of alternative prices, such as X, or alternatively Y, or alternatively Z and so forth.

[24] Secondly, implicit in the pleading is that Leviston would have sold at that actual price. But that should be pleaded specifically.

[25] Thirdly, to say, as subparagraph 67(ba) does, that the lost opportunity was to buy at a price "less than … $479,020", says nothing to identify what is contended as the actual price at which the shares would have been bought.

[26] Fourthly, implicit in that pleading is that Leviston would have sold at that actual price. But that should be pleaded specifically.

[27] Fifthly, to say, as subparagraph 67(c) does, that by tendering the Cheques unconditionally the lost opportunity was to buy at "such a price range", says nothing as to what the "price range" is. The only "range" pleaded is that at paragraph 67(b), but it is not clear if that is what is referred to in paragraph 67(c).

[28] In any event, that cannot be the price range for paragraph 67(c) as one of the breaches said to give rise to the lost opportunity in paragraph 67(b) is the failure to advise PQM to tender the cheque conditionally: paragraph 46(c)(iii).

[29] Therefore, the pleading does not identify the range, nor the actual price which is contended to be the acquisition price. Nor is there anything pleaded to the effect that

Leviston would have sold at that actual price. Those matters should be pleaded specifically.

[30] Paragraph 68(a)(ii) pleads the next lost opportunity:

> "68. As a result of the Defendants' breaches of duty pleaded in paragraph 64 and their breach of duty and breach of contract pleaded in paragraphs 62, 65 and 66, the Plaintiffs suffered further loss and damage:
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> (a) being deprived of the competent and independent advice pleaded in paragraphs 46, 56 and 62, they:
>
> (i) ….
>
> (ii) lost any opportunity to settle the Leviston Litigation;"

[31] Paragraph 68A pleads that the opportunities lost were valuable commercial opportunities:

> "68A. As to the opportunities pleaded in paragraphs 67 and 68 above:
>
> (a) each was a valuable commercial opportunity;
>
> (b) for the following reasons, it was practically certain that the Plaintiffs would have succeeded in exploiting such opportunities;"

[32] The first matter to note from paragraph 68A is that the Plaintiffs' case is that the "opportunities" pleaded in paragraphs 67 and 68, which includes the lost opportunities, were "valuable commercial opportunities". That has some significance in respect of the submission by Mr Russell that the decision of Jackson J in *Graham & Linda Huddy Nominees Pty Ltd & Anor* v *Byrne & Ors*[1] was inapplicable.[2]

[33] His Honour was dealing with the requirements for pleading a lost commercial opportunity. In my view, the principles are applicable to the current pleading:[3]

> **"First,** it is necessary for a plaintiff who alleges loss of a valuable commercial opportunity to plead that the loss it has suffered is a loss of a valuable commercial opportunity, identifying the opportunity with some particularity. **Second,** it is also necessary that the plaintiff pleads what it would have done, where what the plaintiff would have done if the defendant had not been in breach of duty is a necessary causal condition to deciding factual causation. **Third,** it is necessary for a plaintiff who alleges such a loss to plead the percentage or proportion of the opportunity that was lost, in assessing value on the possibilities, in order to plead the amount of the damages claimed, as is specifically required. **Fourth,** where a plaintiff alleges a loss of a 100 per cent possibility or the certainty that they would have obtained

1 [2016] QSC 221.
2 Respondents' outline paragraph 29.
3 [2016] QSC 221 at [50]. Emphasis added.

> the hoped for or expected benefit under a transaction which did not occur, it is to be expected that the plaintiff will allege with some particularity the facts by which that certain outcome would have been achieved."

[34] In respect of the four elements referred to by Jackson J, there is, in my view, an inadequate response in the pleading.

[35] The first requirement is met. Paragraph 68A(a) pleads that each was a valuable commercial opportunity.

[36] The second requirement is not met in my view. It requires that PQM plead what it would have done. That is obscure as no price is identified as the contended price that would have been agreed for the shares. It is not met by pleading ranges or numbers that conflict. For example, the range of prices pleaded in paragraph 67(b) is between \$240,000 and \$169,000, whereas paragraph 67(ba) pleads an unknown price less that \$479,020, and paragraph 69 (which pleads the loss and damage) pleads the price at which he "would have sold" was \$280,000. That sum is greater than the range in paragraph 67(b). Perhaps it is intended that \$280,000 refers to the price in paragraph 67(ba), but that is by no means clear.

[37] Further, when it comes to paragraph 68(a)(ii), there is no articulation of what the settlement would have been had they not been denied the opportunity.

[38] The third requirement is not met, in my view. It is necessary to plead the percentage or proportion of the opportunity that was lost, in assessing value on the possibilities. Neither of paragraphs 67 or 68(a)(ii) do so. Paragraph 68A pleads that "it was practically certain that the Plaintiffs would have succeeded in exploiting such opportunities", but that is somewhat opaque as it pleads it was "practically certain" that they would have succeeded in "exploiting the opportunities", but is that 10 per cent or some lesser, though high, percentage?

[39] In my view, the situation is not saved by the alternative plea in paragraph 68A(c), where it is said:

> "in the alternative to subparagraph 68A(b), the Plaintiffs' chances of successfully exploiting those opportunities were, for the same reasons, strong."

[40] One might ask, what does "strong" mean, and what percentage should be ascribed to it?

[41] The same vice is reflected in paragraph 69A, which pleads:

> "69A. In the alternative to the claim for loss and damage in the sum of \$246,691.37, the loss and damage suffered by the Plaintiffs on that account is, in the premises of paragraphs 67, 68 and subparagraphs 68A(a) and (c) a sum that reflects the Plaintiffs' strong chances of acquiring Mr Leviston's Shares for a price less than \$479,020."

[42] It may be noted that paragraph 69A also suffers from the fact that it pleads that the shares would have been acquired for "a price less than \$479,020", without pleading what that price was. It is not, in my view, saved by reference to paragraph 69 as that

simply pleads line items of loss by way of particulars to the total claim for $921,214.78. It is axiomatic that one does not plead to particulars.

[43] The fourth requirement is not met, in my view. Though the pleading proceeds on the basis that some agreed price would have been achieved to buy Leviston's Shares, nowhere is there a coherent pleading of what that price would have been. The pleading must allege with some particularity the facts by which that certain outcome would have been achieved, and this pleading does not.

What is necessary to plead re causation?

[44] The authorities are well settled as to what is required to plead causation. In short, it is necessary to plead the facts which lead to a reasonable inference that the acts complained of and the alleged later event stand to each other in the relation of cause and effect.

[45] In *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*[4] Chesterman J said:

> "… In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of (here the relevant non-disclosure) and the alleged later event (here the making of the dragline agreement) stand to each other in the relation of cause and effect. Douglas J put it this way in *LBS Holdings Pty Ltd v The Body Corporate for Condor Community Title Scheme 13200 & Ors* [2004] QSC 229 (at para [3]):
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>> '… The principle relied on is that facts must be set out which lead to a reasonable inference that the acts complained of and the loss claimed stand to each other in the relation of cause and effect and that the plaintiff must plead the necessary facts showing that causal link …'
>
> His Honour referred to *Dow Hager Lawrance v Lord Norreys & Ors* (1890) 15 App Cas 210 at 221 and *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215 at 221-222. In the first of those cases Lord Watson had said;
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>> 'There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and injuries complained of stood to each other in the relation of cause and effect.'"

[46] In *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors*,[5] French J said:

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4 [2004] QSC 457 at [15].

5 (1987) 14 FCR 215 at 222.

> "The material facts establishing the necessary causal link should be pleaded. In cases of contravention of s 52 said to be constituted by misrepresentation this will generally require more than appears in the opening words of par 50: 'by reason of such conduct …'.
>
> Some guidance to the proper approach may be derived from the ordinary rule of pleading applicable in cases of fraud of which Lord Watson said in *Dow Hager Lawrance v Lord Norreys* (1890) 15 App Cas 210 at 221:
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>> '… the ordinary rule of pleading applicable to cases of fraud, … was thus expressed by Earle Selborne in *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697: 'general allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.' It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect."

Pleading of causation

[47] The essential facts are set out in paragraphs [2]-[19] above.

[48] The Amended Statement of Claim pleads the first set of breaches in respect of the purported exercise of the Call Option.[6] These are defined as the **Call Option Retainer Breaches** in the pleading.[7] They comprise allegations which can be summarised as follows:

(a) what the Applicant knew or ought to have known;[8] this includes that the Call Option could not be exercised the way it was, and to do so carried a "serious risk of financial loss to the Plaintiffs";

(b) that the Applicant ought to have advised and warned as to those matters;[9]

(c) that the Applicant ought to have advised and warned as to alternative courses that were open to acquire the shares; these included negotiating a better price than Leviston had offered, proposing that the 2017 share sale agreement govern

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6 Paragraphs 44-47.

7 Paragraph 47.

8 Paragraphs 44 and 45.

9 Paragraph 46(a), (b) and (e).

the acquisition, and tendering the cheques conditionally so that if Leviston took them he had to accept that the exercise of the Call Option was valid;[10]

(d) that the Applicant ought to have advised and warned of the substantial costs of litigation involved if they proceeded as they proposed, and that the difference between the parties as to price was substantially less than the costs of litigation;[11] and

(e) if none of those applied, ought to have warned and advised that to exercise the Call Option the steps in the Shareholders Agreement had to be followed.[12]

[49] On 5 June 2020, Leviston started proceedings in the Federal Court. He sought:[13]

(a) declarations that the Call Option notices were invalid;

(b) a declaration that he was entitled to recover an outstanding purchase price of $39,353.49; and

(c) relief under s 232 of the *Corporations Act 2001* (Cth); this relevantly concerns conduct which is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member of a corporation.

[50] The Applicant was retained to act for the Plaintiffs in that litigation.

[51] Leviston ultimately succeeded in the litigation, obtaining declarations that:

(a) the purported exercise of the Call Option was ineffective to transfer the shares;

(b) the share transfer was invalid;

(c) s 232 had been contravened; and an order that PQM purchase the shares at a price to be determined; and

(d) pay a proportion of Leviston's costs.

[52] The pleading of loss and damage is in paragraphs 67-71.

[53] Paragraph 67 pleads loss caused by the Call Option Retainer Breaches. Because of the use of the defined term (in paragraph 47), this loss is said to flow only from those breaches. In essence those breaches are pleaded in paragraph 46 and consist of the failure to warn and advise that:[14]

(a) the shares could not be acquired in the way proposed, and that if that occurred, the exercise of the Call Option would be successfully challenged, at substantial cost to the Plaintiffs;

(b) there were other ways to try to acquire the shares;

(c) the difference in the price offered on each side was much less than the likely costs of defending the exercise of the Call Option; and

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10 Paragraph 46(c).
11 Paragraph 46(d).
12 Paragraph 46(e).
13 Paragraph 48.
14 Paragraph 46.

(d) if none of those applied, warning and advising that to exercise the Call Option the steps in the Shareholders Agreement had to be followed.

[54] The Applicant's submissions is that the pleading of causation in respect of the Call Option Retainer Breaches is deficient because:

(a) the use of the phrase "a result of" in paragraph 67 is a bare assertion followed by six subparagraphs which plead categories of loss;

(b) the words "as a result of" assert the conclusion that the breaches caused loss, without pleading any fact from which causation could be established; and

(c) the six subparagraphs that follow describe varieties of claimed loss, not the facts that connect the breach to each category of loss.

[55] In my respectful view, that contention suffers because, on one level the pleading does plead the facts from which causation could be established with respect to the Call Option Retainer Breaches.

[56] The Call Option Retainer Breaches are all concerned with the pleaded case that:

(a) the Applicant advised that the Call Option could be exercised in the way attempted;

(b) that advise was wrong as it could not be exercised that way;

(c) the Applicant should have warned about that, and the substantial costs that would likely be incurred if Leviston challenged the exercise, and succeeded;

(d) both of those things were certain;

(e) the Applicant should have warned and advised there were other ways to try to get the shares; and

(f) at worst, the Applicant should have warned and advised that the Shareholders' Agreement should be followed.

[57] However, there is a difficulty with paragraph 67, and those paragraphs that lead to it. The pleading fails to plead:

(a) what the Plaintiffs would have, or would likely have, done had the advice or warnings pleaded at paragraph 46 been given; paragraph 46 identifies many varied instances of alleged advice and/or warnings that the Applicant should have provided;

(b) a court cannot assess whether different advice or warnings would have led to a different outcome without a pleading of what the Plaintiffs would have, or would likely have, done;

(c) for example, what steps the Plaintiffs would have, or would likely have, taken to obtain the benefit of the lost opportunity, had they received the alleged advice or warnings;

(d) further, what would the response of Leviston have, or would likely have, been to each scenario of the Plaintiffs' hypothetical response; and

(e) given that response, what would have, or would likely have, followed that led to the alleged loss.

[58] The pleading as it stands, it is silently assumed the Plaintiffs would have accepted whatever advice was given and acted accordingly. But, nowhere is it pleaded what impact that would have had on Leviston, and with what resultant effect.

[59] In my view, once that is understood the pleading is deficient.

Litigation Retainer Breaches

[60] Out of the Applicant's retainer to act for the Plaintiffs in the Leviston Litigation, the second set of breaches is alleged to arise.[15] They may be summarised as follows:

(a) failure to advise that the Applicant's acting in the litigation involved a conflict of duty and interest, and therefore independent advice should be taken;[16]

(b) the Applicant should never have acted for the Plaintiffs in the litigation;[17] and

(c) (a) and (b) were a breach of fiduciary duty to the Plaintiffs.[18]

[61] It appears from the pleading that these breaches are said to have occurred **before** the Applicant commenced to act in the litigation. So much appears from:

(a) paragraph 62(a) which pleads a failure to advise that "by … acting", there "was or may be" a conflict;

(b) paragraph 62(b) which pleads a failure to advise that independent advice and assistance should be obtained "in the Leviston Litigation";

(c) paragraph 65, which pleads further breaches, said to have occurred "in the course of the Leviston Litigation"; and

(d) the fact that the proceedings commenced on 5 June 2020,[19] the retainer was on 18 June 2020,[20] and part of the work under the retainer was to lodge forms in the Federal Court advising of the fact that the Applicant acted for the Plaintiffs in the litigation, and to prepare a response.[21]

[62] However, that assumes the inference drawn above is correct. It may not be what is intended by the pleader. The Applicant should not have to speculate, nor should the Court.

[63] The second component of the litigation breaches is that pleaded in paragraph 65, which are all said to have occurred "in the course of the Leviston Litigation". They may be summarised thus:

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15 Paragraphs 62-66.
16 Paragraph 62(a)-(b).
17 Paragraph 63.
18 Paragraph 64.
19 Paragraph 48.
20 Paragraph 54.
21 Paragraph 49(b).

(a) failure to advise, immediately after receiving the proceedings, that there was no prospect of defending the litigation;[22]

(b) failure to advise that "if (and because)" the Call Option had not been validly exercised, the transfer would be set aside and Leviston would still own the shares;[23] and

(c) "persisted in their defaults pleaded in paragraph 47"; that is, they maintained their defence of the exercise of the Call Option when that defence "was hopeless" or "not reasonably arguable".[24]

[64] The loss and damage pleaded in paragraph 68 (in respect of both these categories of the litigation breaches) is as follows:

(a) because of the breaches in paragraphs 62, 65 and 66, "further loss and damage" was suffered; logically, that phrase can only mean that the paragraph 68 loss and damage is in addition to that pleaded in paragraph 67;

(b) being deprived of "the competent and independent advice" pleaded in paragraphs 46, 56 and 62, they fully committed to the defence of the litigation and lost any opportunity to settle it;

(c) they were exposed to the costs charged by the Applicant in defending the litigation;

(d) those costs were increased by the Applicant's defence of the claims made against TWA, for which the Applicant also acted, because the Applicant charged the Plaintiffs for the defence of those claims;

(e) they will have to pay Leviston the adverse costs orders, in the sum of $134,738.58; and

(f) they "suffered the loss and damage pleaded in subparagraph 67(e) above"; this relates to the exposure to not obtaining an order for costs on issues which were pressed by Leviston and on which he lost.

[65] There are a number of matters to observe about this part of the pleading.

[66] First, whilst paragraph 68 pleads loss and damage that is said to be "further" to the loss and damage pleaded in paragraph 67, that is not necessarily the case. For example, paragraph 68(b) pleads loss by being "exposed to the costs charged by the [Applicant] for defending" the litigation. However, paragraph 67(d)(ii) pleads loss by reason of being "exposed to the costs of defending the Leviston Litigation". The paragraph 68(b) loss is a subset of that in paragraph 67(b)(ii). One struggles to see how it is said the loss be "further" to that in paragraph 67.

[67] Secondly, the same criticism can be made of paragraph 68(e). It pleads that part of the "further" loss is the same loss as is pleaded in paragraph 67(e).

[68] Thirdly, I note that part of the loss and damage is said to be by reason of "being deprived of the competent and independent advice pleaded in paragraphs 46, 56 and

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22 Paragraph 65(a).

23 Paragraph 65(b).

24 Paragraph 65(c).

62". None of paragraphs 46, 56 or 62 make an allegation of "competent" advice. Moreover, paragraphs 46, 56 and 62 do not allege any relevant competent or independent advice. The closest one gets to such a concept is in paragraph 62, where reference is made to an "independent solicitor", but nothing about the quality of the advice being either competent or independent. The vice in such a pleading is manifest.

[69] Fourthly, even if that was a comprehensible plea, nowhere is it pleaded:

(a) what the advice would have, or would likely have, been from the independent solicitor;

(b) what the Plaintiffs' response would have, or would likely have, been; or

(c) what the consequence would have, or would likely have, been of the Plaintiffs' response.

[70] The problems here are the same as those that apply to paragraph 67 and the paragraphs that lead to it.

Pleading of loss in paragraphs 69 and 69A

[71] That then leads to a consideration of paragraphs 69 and 69A.

[72] The Applicant submits in this respect:

> "Paragraph 69 asserts that Mr Leviston "*would have sold*" his shares for $280,000. However, that assertion is not tethered to any pleaded fact. There is no pleaded fact that exposes why Mr Levison would have settled the share issue in isolation from the other disputes which existed between the parties. His offer of $480,000, which included a notional allocation of $240,081 for the shares, was a global figure that incorporated the resolution of the other disputes, including claims for unpaid distributable profits, retained profits, monies paid to TWA, and oppression relief under s 232 of the *Corporations Act 2001* (Cth). No facts are pleaded from which a court could infer that Mr Leviston would have sold his shares at that figure, or indeed only settled part of the many live issues which were in dispute in the Federal Court litigation."

[73] In my view, that submission must be accepted. Reference to the affidavit of Scott filed 3 June 2026,[25] reveals that Leviston's offer comprehended more that just the shares. That puts the particulars in the line item, "Less price for which Mr Leviston would have sold", on a doubtful footing.

[74] The alternative claim to that calculated by the particulars referred to above, is that in paragraph 69A. It pleads:

> "In the alternatively to the claim for loss and damage in the sum of $246,691.37, the loss and damage suffered by the Plaintiffs on that account is, in the premises of paragraphs 67, 68 and subparagraphs 68A(a) and (c) a sum that reflects the Plaintiffs' strong chances of acquiring Mr Leviston's Shares for a price less than $479,020."

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[25] Exhibit MJS-1, at pages 48-68.

[75] As to that, the Applicant submits that the Claim is deficient because:

(a) no facts are pleaded as to what the Plaintiffs would have done or what Leviston would have done had the Applicant advised differently;

(b) paragraph 69A does not plead an amount of damages, i.e. there is no quantified loss in that paragraph; all that is pleaded is a circular description of the exercise the Court is asked to perform; and

(c) a party must plead the amount (or the material facts necessary to calculate it), not simply assert that the Court should assess a sum.

[76] In my view, there is force in this criticism of the pleading. To that may be added:

(a) paragraph 69A incorporates paragraphs 67, 68 and 68A(a) and (c); those paragraphs have their own deficiencies as identified above; those deficiencies are therefore incorporated here;

(b) the phrase "on that account" has its own difficulty; it seems to be the account reflected in the first five lines of pleaded loss in paragraph 69, to which this claim is an alternative formulation; if that be so, the alternative claim proceeds on an equally poor footing, in that it incorporates the failure to plead what would have been done by the Plaintiffs and, in turn, Leviston as dealt with above; and

(c) the sum asserted, $479,020, is the sum that is alleged to have been payable if the Call Option had been validly exercised: see paragraph 67(ba) of the pleading; however, that sum was, on the pleading, something never realisable because: (i) the Shareholders Agreement did not have a Schedule 5 which was supposed to contain the Share Sale Agreement; (ii) there was therefore no agreed process to compel a sale or assess the price; (iii) there is no pleading that Leviston would have agreed to a substitute share sale agreement; in fact the closest it came to that was an offer in March 2020, but that was to settle "all of his claims": see paragraph 32 of the pleading.

Paragraph 71

[77] It is sufficient to observe that this paragraph, by using the phrase "in the premises" to incorporate all that has been previously pleaded, proceeds upon the same deficiencies.

Respondent's submissions

[78] Mr Russell made several points in answer to the application:

(a) Leviston commenced proceedings against the Applicant alleging various forms of relief, including challenging the exercise of the Call Option; however, "Leviston never resisted a sale, so price was the only real issue"; in any event, "by taking his shares using the power of attorney, the [Applicant] put the shares into the ownership of PQM, which cemented price as the only issue";

(b) as a result of the Call Option Retainer Breaches, the Plaintiffs suffered four separate heads of loss, each precisely quantified, only one of which is for a lost opportunity:

(i) the fee paid for the invalid exercise of the Call Option;

(ii) the sum eventually paid for Leviston's Shares exceeded the cheaper price PQM would have been able to persuade Leviston to accept;

(iii) the adverse costs order in the Leviston Litigation; and

(iv) the legal costs paid in the Leviston Litigation.

(c) the Call Option Breaches of duty (failure to warn, erroneous advice and incompetent conduct) were adequately pleaded; no challenge was made to the pleading of the duties and breaches;

(d) the question whether the requisite causal connection exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience;[26]

(e) from a causation point of view, all the alleged breaches caused all the losses (albeit suffered progressively); and

(f) the Plaintiffs here allege wrongful conduct in a long course of complex dealings, where there was negligence consisting both of acts and omissions; all of the acts and omissions relied on are pleaded in detail; that is sufficient to apprise the defendants of the case they must meet.

[79] In my view, reliance on *Medlin* is misplaced. That stands as authority for the proposition that in the court's task of making a finding as to whether causation has been proved, the court does not take a narrow approach but rather the question is essentially one of fact to be resolved on the probabilities, as a matter of common sense and experience.

[80] That is distinct from what is required at the pleading stage, where the object is that a party is entitled to know the case being put against them. The requirement to plead properly is not related to the court's task when making findings as to causation at the end of a trial.

[81] In my respectful view, the error in approach is demonstrated by the Respondent's submission:[27]

> "28. … it is submitted that the pleading at least adequately exposes sufficient facts as to the nature of the obligations and the nature of the breaches so as to permit the Court to decide 'whether the requisite causal connection exists between [those] particular breach[es] of duty and [the] particular loss or damage [alleged] ... on the probabilities, as a matter of common sense and experience' *(Medlin).*"

[82] The Respondent also submitted:[28]

> "30. The only head of loss that is the subject of a claim for lost opportunity is the price for which the plaintiffs would have been able to purchase Mr Leviston's Shares. Assuming that the plaintiffs do not call Mr Leviston or his solicitor, this will be a matter of inference at

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26 Relying on *Medlin v State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1, at 6-7; *Nominal Defendant v Gardikiotist* (1996) 186 CLR 49, at 52, 55.

27 Respondents' outline, paragraph 28.

28 Respondents' outline, paragraph 30. Emphasis added.

> the trial, to be drawn from the extensive documentary record, which is largely uncontroversial."

[83] In my respectful view, that is no satisfactory answer to the defects in the pleading.

Conclusion and Orders

[84] For the reasons set out above the application should be allowed and the defective paragraphs struck out. Leave to replead should be granted.

[85] I therefore order:

1. Paragraphs 67, 68, 68A, 69, 69A, 70 and 71 of the Amended Statement of Claim are struck out.
2. The Plaintiffs have leave to replead as they may be advised.
3. The Plaintiffs pay the Applicant's costs.