

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: Pesec v Consolidated Builders Limited

Citation: [2019] ACTSC 142

Hearing Date: 28 May 2019

Decision Date: 5 June 2019

Before: McWilliam AsJ

Decision: [59]

Catchwords: **PRACTICE AND PROCEDURE** – PRELIMINARY DISCOVERY – Application for discovery to identify right to claim relief and potential defences – whether an arguable cause of action exists

Legislation Cited: *Corporations Act 2001* (Cth) ss 1317H, 1317K, 180, 181, 182, 185, 236, 237
Court Procedures Act 2004 (ACT) Pt 5A
Court Procedures Rules 2006 (ACT) r 651

Cases Cited: *Adler v ASIC* [2003] NSWCA 131; 46 ACSR 504
Barnes v Addy (1874) LR 9 Ch App 244
Bell Group Ltd (in liq) v Westpac Banking Corp (no 9) [2008] WASC 239; 70 ACSR 1
Clark v The Queen [2004] WASCA 217; 50 ACSR 592
Elmaraazey v The Law Society of the Australian Capital Territory [2006] ACTSC 124; 205 FLR 445
Gerard Cassegrain & Co Pty Ltd (in Liq) v Cassegrain [2013] NSWCA 455; 97 ACSR 283
Hall v Commonwealth [2018] ACTSC 79
Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL (1968) 121 CLR 483
Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd [2011] FCA 1154; 86 ACSR 393
Kusa v Vong (trading as Allen Vong & Associates) [2018] ACTSC 254
Minerva (Aus) Pty Ltd v Suburban Land Agency [2018] ACTSC 103
Morton v Nylex Ltd [2007] NSWSC 562
Ngurli v McCann (1953) 90 CLR 425
Waller v Waller [2009] WASCA 61

Parties: Anthony Pesec (Plaintiff)
Consolidated Builders Limited (ACN 008 654 411) (Defendant)

Representation: **Counsel**
R Markham (Plaintiff)
M O'Meara (Defendant)

Solicitors

Adero Law (Plaintiff)

Clayton Utz (Defendant)

File Number: SC 181 of 2019

McWilliam AsJ

1. Mr Anthony Pesec, the plaintiff, is a shareholder of Consolidated Builders Limited, the defendant (**Company**). The Company was formed by a group of Canberra based builders and property developers and is in the business of purchasing, subdividing, developing and managing land assets.
2. The plaintiff has concerns about a series of 11 options to purchase shares in the Company, which were granted to the managing director of the defendant, Mr Josip Zivko, over the period 1 July 2000 to 30 July 2017, some of which have been exercised. The options have been defined in chronological order in the present application as Option 1, Option 2 and so forth and I will use the same terminology for convenience.
3. The concerns are that:
 - (a) Mr Zivko received a substantial body of shares at below market value and without the requisite consent or approval of the shareholders (as set out in the Company's articles of association and constitution);
 - (b) When viewed as part of Mr Zivko's remuneration as managing director, the share options amounted to a total remuneration over the years that was unreasonable having regard to the Company's assets and revenue; and
 - (c) Mr Zivko has otherwise caused the issuing of shares or the exercising of options to parties related to him at unreasonable values.
4. The amounts in question are substantial. The plaintiff alleges that as at 30 June 2017, the value of the shares purchased by Mr Zivko as managing director was more than \$14 million. The Company emphasises that Mr Zivko did pay for the shares he acquired, but the heart of the plaintiff's complaint appears to be how Mr Zivko or his associated entities came to be in a position to acquire the shares over the years in the first place, at the discounted prices he is alleged to have paid.
5. The plaintiff is considering seeking the leave of the Court to bring one or a number of derivative actions on behalf of the Company under ss 236 and 237 of the *Corporations Act 2001* (Cth) (**Corporations Act**), against either the managing director or the board of directors of the Company. He claims that, having made reasonable enquiries, he cannot obtain sufficient information to decide whether to commence the proceedings he has in contemplation.
6. The plaintiff's concerns are known to the Company, who on 11 January 2019 resolved to establish a subcommittee to investigate the allegations of the plaintiff.

The subcommittee comprises three members, being Mr Noel McCann (a director of the Company since 2007), and two shareholders: Mr John Harris and Mr Ross Barrett OAM. All three committee members are said to be independent of both the plaintiff and Mr Zivko. The evidence discloses that Mr McCann is one of the directors whose conduct the plaintiff questions, due to him being a director during the relevant period.

7. The committee is yet to reach any final conclusions as to the concerns raised by the plaintiff, and says that it will be some months before it will do so. To date it has also declined to provide the documents sought by the plaintiff so that he can complete his own enquiries.
8. Accordingly, by Originating Application dated 12 April 2019, the plaintiff seeks orders pursuant to r 651 of the *Court Procedures Rules 2006* (ACT) (**Rules**) requiring the Company to give preliminary discovery of certain documents.

Documents sought

9. The documents sought in the application were in broader terms than what was ultimately sought after the plaintiff's legal representative provided further clarification at the hearing. As pressed, for each Option or at the time when an Option was exercised, the plaintiff now seeks:
 - (1) Any resolution or minute recording the grant of each Option or the exercise of the Option by the Board of Directors of the Company (**Board**).
 - (2) Any accountancy report or other financial information considered by the Board relating to the option in question, including but not limited to:
 - (a) Any valuation, or advice as to valuation, of the share price of the Company for the purposes of a share buy-back;
 - (b) Any valuation, or advice as to valuation, of the share price of the defendant for the purposes of the grant of share Options 1-11;
 - (c) Any valuation, or advice as to valuation, of the Company with reference to the net asset position of the Company, or any other method of Company valuation.
 - (3) In respect of each financial year where an Option was granted or exercised:
 - (a) A copy of the managing director's employment contract;
 - (b) Any statement of total remuneration or group certificate for the managing director (in that capacity);
 - (c) Any position description or document otherwise outlining the roles and responsibilities of the managing director, including any performance reviews or documents otherwise measuring the managing director's performance against a set or targets or job-related criteria; and
 - (d) Any advice or information otherwise considered by the Board with respect to reviewing the remuneration of the managing director.

10. On the evidence before the Court, Options 1-6 have each been exercised by the managing director, over the period 2002–2010. Option 7 was exercised in 2015. Option 8 was not exercised, and it is unclear whether Options 9 and 10 have been exercised. Option 11 has not yet been exercised, but does not expire until 31 December 2019.

The Court's power to order preliminary discovery

11. Rule 651 of the *Rules* is in the following terms:

R 651 Discovery to identify right to claim relief

- (1) This rule applies if –
 - (a) a person (the **applicant**) has, or may have, a cause of action against someone (the **potential defendant**); and
 - (b) either –
 - (i) the applicant, after making reasonable inquiries, cannot obtain sufficient to decide whether to start a proceeding in the court against the potential defendant for the cause of action; or
 - (ii) the following provisions apply:
 - (A) the applicant is a party to a proceeding in the court;
 - (B) the potential defendant is not a party to the proceeding;
 - (C) the applicant, after making reasonable inquiries, cannot obtain sufficient information to decide whether to make a claim for relief in the proceeding against the potential defendant for the cause of action;
 - (D) the claim for relief could properly have been made in the proceeding against the potential defendant if the potential defendant were a party; and
 - (c) the applicant has reasonable grounds for believing that the potential defendant has or has had possession of a document or thing that can assist in deciding whether to start the proceeding, or make the claim for relief, against the potential defendant; and
 - (d) inspection of the document or thing by the applicant would help in making the decision.
 - (2) If subrule (1) (b) (i) applies, the applicant may apply to the court by originating application for an order under this rule (and, if relevant, an order under rule 715 (Inspection, detention, custody and preservation of property – orders etc.)) against the potential defendant.
 - (3) If subrule (1) (b) (ii) applies, the applicant may apply to the court for an order under this rule (and, if relevant, an order under rule 715) against the potential defendant.
...
 - (4) The application must be supported by an affidavit stating the facts on which the applicant relies, and stating the kinds of documents or things in relation to which the application is made.
...
 - (5) The court may order the potential defendant to produce the document or thing to the applicant.
 - (6) An order under this rule in relation to any document or thing held by a corporation may be addressed to any appropriate officer or former officer of the corporation.
12. In exercising the Court's discretion under r 651(5) of the *Rules* in the present case, the parties generally agreed that the plaintiff must show:

- (a) He may have a cause of action;
 - (b) He has made reasonable inquiries and has been unable to obtain sufficient information to decide whether to commence proceedings;
 - (c) He has reasonable grounds for believing the Company has or had possession of a document or thing that can assist in deciding whether to start the proceedings; and
 - (d) Inspection of the document or thing would help in making the decision.
13. The plaintiff bears the onus of satisfying the Court of these matters: *Morton v Nylex Ltd* [2007] NSWSC 562 at [33], cited in *Hall v Commonwealth* [2018] ACTSC 79 (**Hall**) at [22].
14. Consideration has been given to who is the 'potential defendant' in the present case. The documents are sought from the Company itself, although as will be seen, the plaintiff is considering litigation against the managing director and other directors. I am nevertheless satisfied that documents are being sought from an appropriate party because in an application for leave to commence proceedings on behalf of the Company under s 237 of the *Corporations Act*, the Company would be named as the respondent to that application. Accordingly, in the first instance, the Company will be the 'potential defendant', even though, if leave is granted by the Court, the Company will become the moving party in any subsequent action against the managing director or the board of directors.

Issues

15. In the present proceedings, whether reasonable inquiries have been made and whether the Company has or had possession of the documents sought are not in issue.
16. The questions arising are:
- (1) Whether the plaintiff has identified an objectively founded potential cause of action; and
 - (2) Whether the documents sought would assist the plaintiff in deciding whether to start the proceedings contemplated.

Has the plaintiff identified a potential cause of action?

17. The purpose of preliminary discovery is to discover material to support a possible cause of action, not to hopefully discover if any, as yet identified, cause of action might exist: *Hall* at [10]. The plaintiff does not have to show a prima facie case on a cause of action, but he must identify what that cause of action might be: *Hall* at [10], [18].
18. There must be some tangible backing, or objective foundation, that takes the existence of the cause of action beyond a mere allegation, suspicion or assertion: *Waller v Waller* [2009] WASCA 61 at [75]; cited in *Minerva (Aus) Pty Ltd v Suburban Land Agency* [2018] ACTSC 103 at [25] and in *Hall* at [18].

The causes of action identified

19. The application merely recited the requirements of r 651, when the grounds of the application should have included the causes of action in the plaintiff's contemplation. An attempt was made to articulate the causes of action in the affidavit of the plaintiff's legal representative, but the causes of action there described altered somewhat during the hearing. Ultimately, four causes of action were articulated as the basis for seeking discovery:
- (1) A statutory action for breaches of ss 180 and 181 of the *Corporations Act* in respect of what is described as 'Share Option 7', to be brought against all of the directors of the Company in the financial years ending 30 June 2015 and 30 June 2016, excluding the managing director. The relief the plaintiff would seek is that compensation be paid to the Company under s 1317H of the *Corporations Act* (**First Claim**).
 - (2) A separate statutory action against the managing director for breaches of ss 180, 181 and 182 in respect of the same Share Option 7, claiming similar relief (**Second Claim**).
 - (3) A claim against the managing director in respect of the grant and exercise of share Options 1-11. The relief that the plaintiff would seek is a declaration of a constructive trust (**Third Claim**).
 - (4) A statutory claim against the directors of the Company during the period 2001-2019, excluding the managing director, alleging breaches of s 180 of the *Corporations Act* for negligently failing to commence proceedings or otherwise seek to recover compensation against the managing director for losses arising in respect of the grant and exercise of share Options 1-11. Again, the relief that the plaintiff would seek is compensation on behalf of the Company pursuant to s 1317H of the *Corporations Act* (**Fourth Claim**).
20. Section 180 of the *Corporations Act* relates to the obligation on directors to exercise their powers with care and diligence. Section 181 refers to the obligation to act in good faith and in the interests of the Company. Section 182 refers to the obligation on (relevantly here) a director not to improperly use his position to gain an advantage for himself or someone else, or to cause a detriment to the Company.
21. The Company has not put in issue production of the documents sought in respect of the first two causes of action described above, in relation to Option 7.
22. The Company contests whether there is any foundation for a potential claim against the managing director as described in the Third Claim described above. The Company submits that the Third Claim is difficult to understand and on the evidence relied upon by the plaintiff, there does not appear to be an objective foundation for any claim resulting in relief by way of a constructive trust.
23. Due to the language initially used in the Third Claim, namely a reference to a 'fraudulent design', the Company viewed the potential cause of action as being along the lines of the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244 at 251.

However, the plaintiff later eschewed reliance on such a cause of action. Instead, he submitted that the Third Claim was based on representations made by the managing director to the Board which resulted in the grant of Options 1-11, claiming relief by way of a resulting constructive trust. As will be seen below, that formulation has also now altered following the hearing.

24. The Company also raises a potential issue arising out of the six-year limitation period applying to any claim for compensation brought under s 1317H of the *Corporations Act* (see s 1317K of the *Corporations Act*). This is relevant to Share Options 1-6, which were all granted and exercised by 2010 at the latest. That appears to be the explanation for separating out Option 7 in the first two causes of action identified.
25. As the Fourth Claim concerns the failure of the other directors to pursue the managing director for relief arising out of the Third Claim, the Company says that the plaintiff's failure to properly identify the foundation for the third cause of action infects the fourth cause of action, so that it too does not have any objective foundation.

What is the basis of the Third Claim?

26. During the hearing, the plaintiff stepped away from the earlier allegations of a 'fraudulent design', dishonest conduct more generally and the vague description of 'representations' made by the managing director. This then led to some difficulty in ascertaining from the plaintiff's legal representative precisely what cause of action was envisaged by the Third Claim.
27. The claim for a constructive trust, set out in the legal representative's affidavit, articulated a form of relief, but it did not identify a cause of action, such as a claim in equity or under statute. The legal representative for the plaintiff reformulated the cause of action during oral argument, submitting that the Third Claim was better described as relief by way of a constructive trust arising out of breaches of director's duties, which the legal representative submitted was generally supported by the affidavit evidence filed. There was also a brief reference to a breach of a director's fiduciary duty.
28. The Company was understandably aggrieved at the shifting nature of the argument. The reformulation meant that the Company had at no stage prior to the hearing been afforded the opportunity to consider whether the cause or causes of action belatedly articulated had any foundation, nor to give consideration to what attitude it might take to a request for documents directed to the managing director's alleged breach of duty absent the bare allegations of fraud or general allegations of misrepresentation. That may have costs consequences for this application.
29. Rather than simply declining to consider the reformulated cause of action because it did not accord with the initial submissions and description in the evidence, I have adopted a course which I consider is more efficient in terms of costs, time and judicial resources in resolving the dispute (applying s 5A of the *Court Procedures Act 2004* (ACT)). I have considered the correspondence of the plaintiff and his affidavit evidence, with a view to determining whether the cause of action against the managing director which is now based on a breach of director's duties or fiduciary duties has been identified sufficiently in the evidence to satisfy the Court that it is more than mere speculation.

30. The evident concerns that emerge for the plaintiff, arising out of his review of the financial statements for the Company, are firstly, that Mr Zivko has used his position as managing director to secure a commercial advantage for himself, being the grant of each Option to purchase shares.
31. Secondly, the plaintiff alleges the price stipulated in each Option granted meant that each share was purchased by Mr Zivko at a discounted price. Part of the evidence to support that concern is that the Company has engaged in share-buyback programs in 2005, 2007 and 2018. During those processes, the Company bought back ordinary shares at a price significantly higher than that paid by Mr Zivko in exercising the Options granted to him at similar times.
32. There can be no question that a managing director and the directors who comprised the Board from time to time owed fiduciary duties to the Company alongside the duties set out in ss 180-182 of the *Corporations Act* (see s 185 of the *Corporations Act* and *Adler v ASIC* [2003] NSWCA 131; 46 ACSR 504 at [710]).
33. Whether under statute or in equity, it seems fairly well established that these include acting in the best interests of the Company, avoiding conflicts of interest and not improperly using the position of director to obtain a personal advantage. Cases such as *Clark v The Queen* [2004] WASCA 217; 50 ACSR 592; *Gerard Cassegrain & Co Pty Ltd (in Liq) v Cassegrain* [2013] NSWCA 455; 97 ACSR 283; and, *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* [2011] FCA 1154; 86 ACSR 393 confirm that position and the issues arising in those cases appear to be broadly similar to those raised by the plaintiff in his correspondence with the Board and the subcommittee to date.
34. The issue of shares to a managing director in circumstances where there is no genuine commercial need for issuing new shares is also a matter where a breach of either a director's statutory duty or a fiduciary duty may arise, depending on the circumstances: see, for example, *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 at 493; *Ngurli v McCann* (1953) 90 CLR 425 at 445-447 and the discussion as to fiduciary duties more recently in *Bell Group Ltd (in liq) v Westpac Banking Corp (no 9)* [2008] WASC 239; 70 ACSR 1 at Ch 20 and in particular [4552] – [4574].
35. Notwithstanding the difficulties faced by the Company (and the Court) in attempting to understand and address the plaintiff's somewhat fluid arguments on the application, the above principles combined with the affidavit evidence read on the application disclose that the plaintiff has a reasonable basis for believing that the Company *may* have a claim against Mr Zivko in respect of the grant of Options 1-6 and 8-11 (Option 7 having been separately addressed in the First and Second Claims) for potential breaches of director's duties under ss 180-182 of the *Corporations Act* or in equity.
36. The potential cause of action has presently been described with a lack of precision. However, there is a difference in the identification of a cause of action (the substance of the claim) and the proper or detailed articulation of it (the form in which it is presented). The fact that the claim against Mr Zivko might be pleaded or characterised in a number of ways does not mean that the plaintiff is merely speculating or fishing for a cause of action. I am satisfied on the evidence that a cause of action in substance based on breach of a director's statutory or equitable duties has been identified with sufficient evidentiary foundation to enliven the operation of r 651.

37. Although the Third Claim covers all Options, a separate issue arose during the hearing in relation to Options 1-6, being the potential operation of limitation periods as a matter relevant to the Court's discretion under r 651. The parties sought leave to file further submissions on the issue. I declined to grant leave for the principal reason that the operation of a limitation period is only a potential defence to a claim. The limitation defence may not be pleaded by a party, or the time may be extended in certain limited circumstances and it is not for this Court when considering whether to make an order for preliminary discovery to form a concluded view on a limitation issue. Indeed, one of the purposes of preliminary discovery is to permit a potential litigant to assess the merit of any defence that could be raised, as this will be relevant to the decision whether to commence proceedings.

What is the basis of the Fourth Claim?

38. The Fourth Claim is said to potentially arise against the people who were directors from time to time over the period 2001 – 2019. The cause of action is a breach of s 180 of the *Corporations Act* for negligently failing to commence proceedings or otherwise seek to recover compensation against the managing director for losses arising as a result of potential breaches of duties by Mr Zivko which form the basis of the Third Claim.
39. In essence, the plaintiff argues that if Mr Zivko was in breach of his director's or fiduciary duties, then the directors over 2001-2019 may have been in breach of their directors' duties in allowing the grant of the Options and their exercise to occur, and/or, failing to seek redress against Mr Zivko.
40. At this point, the failure to properly articulate the cause of action in respect of Mr Zivko does have consequences for establishing that any potential claim against a director for negligently failing to pursue a remedy against Mr Zivko has a solid foundation.
41. Taking Mr McCann as an example (because he has given sworn, uncontested affidavit evidence on the application), he only became a director of the Company in November 2007. The plaintiff does not say how it is that a person who becomes a director in 2007 was under an obligation to investigate a share option granted to Mr Zivko in 2000 and exercised in 2002 (which was the case with regard to Option 1), let alone why such a director would be negligent in failing to commence proceedings against Mr Zivko seeking compensation.
42. At the other end of the time period, at least with regard to Options 8 to 11 that have either not been exercised or are yet to be exercised, on the evidence before the Court, the present directors comprising the Board are investigating the allegations and may yet decide to take action if they consider there is foundation and utility in doing so.
43. These examples illustrate the difficulty with the rolled up nature of the Fourth Claim as presently articulated. It is difficult to understand what it is the plaintiff says the present or past directors should have done. Part of the reason may well be that the plaintiff does not have the documents setting out what was done by certain directors and what was considered by them during the relevant time period.
44. That may be remedied following the plaintiff reviewing the documents that will be provided as a result of the present application. The plaintiff might be in a better

position to explain the allegations against a particular director or group of directors as a distinct cause of action. There does not appear to be any barrier to a further request for documents, particularly if the request only arises as a result of the documents that are discovered.

45. However, at present, a general allegation that the Company may have a cause of action against every past or present director over almost two decades for failing to sue the managing director for unspecified breaches of either statutory or equitable duties is inadequate to overcome even the very low hurdle of identifying a cause of action with some tangible backing. Unlike the Third Claim, on the current state of the evidence, the Fourth Claim is at this point little more than a theoretical argument.

Will the documents sought assist the plaintiff in deciding whether to start the proceedings contemplated?

46. The Company has not taken issue with the documents to be produced in relation to the First and Second Claims. I have found that there is no foundation for the Fourth Claim. Accordingly, the documents sought (in their more limited form as set out at [9] above) are to be assessed only as against the Third Claim.
47. The approach to be taken is a cautious one, because an application for preliminary discovery is intrusive in nature and the process should be regarded as an extraordinary form of relief: *Elmaraazey v The Law Society of the Australian Capital Territory* [2006] ACTSC 124; 205 FLR 445 at 448; [18]-[19], cited in *Kusa v Vong (trading as Allen Vong & Associates)* [2018] ACTSC 254 (**Kusa**) at [48].
48. Dealing with each category sought in turn, the resolution or minutes recording the grant of each Option or its exercise are likely to assist the plaintiff as they may contain information relevant to the circumstances in which the Option was approved and what was considered, including whether the grant of the Option had consent or approval of the shareholders.
49. Any accountancy report or financial information considered by the Board (including who caused it to be prepared) at the relevant time is likely to be relevant to any allegation that Mr Zivko obtained a commercial advantage for himself as a result of his position as managing director.
50. I also accept that the terms of the managing director's employment contract may be relevant to the assessment of whether Mr Zivko's conduct was in accordance with his statutory or equitable obligations, including if such a contract altered over the period.
51. The next category of documents sought are statements of the total remuneration or group certificates for the managing director for each financial year where an Option was granted or exercised, and any position description or document specifying the roles and responsibilities of the managing director. The plaintiff also seeks performance reviews or documents otherwise measuring the managing director's performance.
52. The plaintiff argues (through the affidavit evidence of his legal representative) that he requires such information to brief an expert to provide an opinion as to the 'reasonableness or otherwise' of Options 1-11. This description is somewhat unsatisfactory in explaining how the documents sought will assist the expert and how the expert report will in turn assist the plaintiff to determine whether to commence proceedings. I have inferred from the language used that the report of an expert

which uses the information contained in group certificates and performance reviews will be relevant to determining whether any of the Options were in the best interests of the Company, or provided a commercial advantage to Mr Zivko.

53. The principle to be applied is that the measure of preliminary discovery should be no more than that which is reasonably necessary in order to overcome the insufficiency of information already possessed by the applicant to enable him to make a decision as to whether or not to commence proceedings: see *Kusa* at [83] and the cases there-cited.
54. Applying that principle to the assumed relevance of the documents, I accept that the group certificates and position descriptions should be produced, but I reject the argument that the performance reviews or documents otherwise measuring the performance of Mr Zivko are reasonably necessary for the purpose of making a decision with respect to the Third Claim.
55. The final category of documents is any advice or information otherwise considered by the Board with respect to reviewing the remuneration of the managing director. The Fourth Claim has been found to be without foundation, and I do not accept that this category of documents is reasonably necessary to assist the plaintiffs in determining whether to seek leave to commence proceedings in respect of the other causes of action.

Conclusion

56. For the above reasons, I am satisfied that it is appropriate to exercise the Court's discretion, contained in r 651(5) of the *Rules*, to require the Company to produce a number of documents as set out in the terms of the order. The parties have agreed to certain undertakings as to confidentiality of the documents to be discovered and they will also be incorporated in the orders to be made.
57. As to costs, the plaintiff will be required to pay the costs of the Company discovering the documents that are the subject of the Court's orders. However, in the event that the plaintiff does commence proceedings, the costs order will be subject to any further order of the Court, including for example, an order that the costs of discovery be costs in the cause.
58. As to the costs of the application, given the way that the case unfolded at the hearing, the parties wished to be heard further by way of a short written submission once the judgment of the Court was delivered. Provision will be made for that to occur and the question of costs will then be determined on the papers.
59. The orders of the Court are as follows:
 - (1) Upon the undertaking of the plaintiff that the documents and the information in them will not be used for any purpose other than the investigation and consideration of the potential causes of action in respect of which the discovery has been obtained and will only be disclosed to the plaintiff, his legal advisers and any experts retained in connection with that purpose, the defendant is to discover the following documents:
 - (a) Any resolution or minute recording the grant of each of Options 1-11 as defined in the application dated 12 April 2019, or the

exercise of an Option by the Board of Directors of Consolidated Builders Limited (**Board**).

- (b) Any accountancy report or other financial information considered by the Board relating to the Option in question, including but not limited to:
 - (i) Any valuation, or advice as to valuation, of the share price of Consolidated Builders Limited for the purposes of a share buy-back;
 - (ii) Any valuation, or advice as to valuation, of the share price of the defendant for the purposes of the grant of share Options 1-11;
 - (iii) Any valuation, or advice as to valuation, of Consolidated Builders Limited with reference to the net asset position of that company, or any other method of company valuation.
 - (c) In respect of each financial year where an Option was granted or exercised:
 - (a) A copy of the managing director's employment contract;
 - (b) Any statement of total remuneration or group certificate for the managing director (in that capacity); and
 - (c) Any position description or document otherwise outlining the roles and responsibilities of the managing director.
- (2) Subject to Order 3, the plaintiff is to pay the defendant's reasonable costs of complying with Order 1.
- (3) The costs referred to in Order 2 are to abide by any further order made in subsequent proceedings, on any cause of action alleged to have arisen out of the information contained in the documents in respect of which preliminary discovery has been ordered.
- (4) The parties are to file written submissions on the costs of the application, limited to 3 pages, within 7 days.

I certify that the preceding fifty-nine [59] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam

Associate:

Date: 5 June 2019