SUPREME COURT OF QUEENSLAND

CITATION:	*Park v Monreacon Pty Ltd & Ors* [2024] QSC 44
PARTIES:	**NIKKI ANGELA PARK** (Applicant) and **MONREACON PTY LTD ACN 112 478 930 AS TRUSTEE OF THE MONREACON TRUST** (First Respondent) and **RISK QLD PTY LTD ACN 131 354 240 AS TRUSTEE OF THE RISK QLD TRUST** (Second Respondent) and **LAURENCE BRUCE COUTTS** (Third Respondent) and **GREGORY REDINGTON** (Fourth Respondent) and **CHRISTOPHER CASTLES** (Fifth Respondent) and **ICHOR ACTIVE PTY LTD ACN 075 917 485 AS TRUSTEE FOR THE LB COUTTS FAMILY DISCRETIONARY TRUST** (Sixth Respondent) and **REDIVE PTY LTD ACN 075 907 532 AS TRUSTEE FOR THE REDINGTON FAMILY DISCRETIONARY TRUST** (Seventh Respondent) and **COSCER INVESTMENTS PTY LTD ACN 133 493 535 AS TRUSTEE FOR THE COSCER INVESTMENT TRUST** (Eighth Respondent) and **888 DISTRIBUTIONS PTY LTD ACN 131 520 815** (Ninth Respondent) and **ZEST FINANCIAL SOLUTIONS PTY LTD ACN 099 556 180** (Tenth Respondent)
FILE NO/S:	482 of 2022
DIVISION:	Trial
PROCEEDING:	Application

ORIGINATING COURT:	Supreme Court of Queensland at Cairns
DELIVERED ON:	22 March 2024
DELIVERED AT:	Cairns
HEARING DATE:	7 & 8 December 2023
JUDGE:	Henry J

ORDERS:

1. Application dismissed.

2. Liberty to apply to be heard as to costs, on the giving of two business days' notice in writing by no later than 22 April 2024.

3. If the liberty conferred by order 2 is not exercised in time, the applicant will pay the respondents' costs to be assessed, if not agreed, on the standard basis.

CATCHWORDS: CORPORATIONS – MEMBERSHIPS, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER – STATUTORY DERIVATIVE ACTION – where the applicant seeks leave per s 237 Corporations Act to pursue a claim on behalf a company – where the applicant is a former principal beneficiary under the trust of which the company is trustee – where the claim would seek an order that equitable compensation be paid to the company on trust for distribution to the applicant – where the foundation for ordering the company to so distribute the compensation would not be properly determined by the claim as proposed – whether there is a serious issue to be tried – whether the applicant is acting in good faith – whether granting leave is in the best interests of the company

Corporations Act 2001 (Cth) ss 236, 237
Trusts Act 1973 (Qld) s 94
Uniform Civil Procedure Rules r 527

ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 followed
Cooper v Myrtace Consulting Pty Ltd [2014] FCA 480 followed
Dwyer v Ross (1992) 34 CLR 463 cited
Fordyce v Ryan & Anor; Fordyce v Quinn & Anor [2016] QSC 307 cited
Foss v Harbottle (1843) 2 Hare 461; 67 ER 189 cited
Goozee v Graphic World Group Holdings (2002) 170 FLR 451 cited
Maher v Honeysett & Maher Electrical Contractors Pty Ltd

[2005] NSWSC 859 cited
Metyor Inc v Queensland Electronics Switching Pty Ltd [2003] 1 Qd R 186 discussed
Re Arthur Brady Family Trust; Re Trekmore Trading Trust [2014] QSC 244 cited
Swansson v RA Pratt Properties Pty Ltd & Anor (2002) 42 ACSR 313 cited
William v Spautz (1992) 174 CLR 509 cited

COUNSEL: J Greggery KC, with S Kelly, for applicant
APJ Collins for first respondent
M Hickey, with H Lilley, for second to tenth respondents

SOLICITORS: Connolly Suthers Lawyers for applicant
Harding Richards Lawyers for first respondent
James Conomos Lawyers for second to tenth respondents

[1] The applicant, Ms Park, is a former financial advisor. Monreacon Pty Ltd, the company through whom her financial advice services were provided, was deprived of income. She went bankrupt. She lost control of Monreacon. She was removed as principal beneficiary of the trust of which Monreacon is trustee. She endured psychiatric illness. Having emerged from the debilitation of her illness she seeks financial redress against those she blames for the deprivation of Monreacon's income.

[2] To that end she does not bring her own claim. Rather, she seeks leave to pursue a claim on behalf of Monreacon, alleging it was the victim of a dishonest and fraudulent design, including by the person now controlling Monreacon.

[3] The proposed claim seeks an order requiring the payment of equitable compensation to the company. However, the same order would also require that payment be on trust for distribution to Ms Park as a former beneficiary of the Monreacon trust, without regard to the company's obligations to any persons or entities other than her. The claim she seeks leave to pursue for the company is really one for herself.

[4] Leave should be refused for the reasons which follow.

What are the issues for determination?

[5] Section 236 *Corporations Act* 2001 (Cth) permits Ms Park to bring the proceedings on Monreacon's behalf, if Ms Park has the standing stipulated in s 236 and is granted leave of the court to do so pursuant to s 237.

[6] As to standing, Ms Park was formerly Monreacon's sole shareholder and director. Section 236(1)(a) lists former members and officers of a company amongst those who have standing. Ms Park therefore has standing under s 236 to bring proceedings on Monreacon's behalf.

[7] As to whether the court should grant her leave to do so, s 237(2) relevantly provides:

> "The Court must grant the application if it is satisfied that:

> (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them …; and
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> (b) the applicant is acting in good faith; and
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> it is in the best interests of the company that the applicant be granted leave; and
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> (c) it is in the best interests of the company that the applicant be granted leave; and
>
> (d) … there is a serious question to be tried; …"

[8] Dealing immediately with the matters in s 237(2)(a), Monreacon is now controlled and owned by an alleged party to the alleged wrong. It has declined to bring the proposed proceeding, asserting Ms Park's allegations "lack foundation and are scurrilous". I am therefore satisfied the company will not itself bring the proceeding or take responsibility for it.

[9] It is not in issue that I should be so satisfied. The issue is whether I should be satisfied of the matters in s 237(2)(b), (c) and (d).

[10] Approaching consideration of those three matters in reverse order, the questions for determination therefore are:

1. Is there a serious question to be tried?

2. Is it in the best interests of the company that Ms Park be granted leave?

3. Is Ms Park acting in good faith?

Is there a serious question to be tried?

[11] The "serious question to be tried" test of s 237(2)(d) imports the language of a test applied in interim injunction applications.[1] The test only requires that there be at least a probability of success, for it is a test being deployed at a preliminary rather than final stage. Nonetheless, the success gauged in this context is success in securing final relief. Thus, as was confirmed by the High Court's decision in *ABC v Lenah Game Meats Pty Ltd*,[2] it is necessary that the facts alleged are at least capable of sustaining a right to final relief at trial. If they do not have that quality, then proof of them might sustain some sense of moral vindication but there would be no serious issue to be tried.

[12] In the present case, as will be seen, there is much wrongdoing alleged but the basis for granting a key aspect of the relief sought is not apparent from the proposed pleaded case. It is therefore convenient to take a two-staged approach and consider:

(a) Is there a probability of proving the proposed pleaded case?

(b) Could proof of the proposed pleaded case ground entitlement to the ultimate relief sought?

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1 *Goozee v Graphic World Group Holdings* (2002) 170 FLR 451, 459.

2 (2001) 208 CLR 199.

Is there a probability of proving the pleaded case?

[13] The human protagonists in the proposed case are, on the one hand Ms Park and, on the other, the third to fifth respondents, Messrs Coutts, Redington and Castles. Direct or indirect controlling interests are held: by Coutts over the sixth corporate respondent, Ichor Active; by Redington over the seventh and ninth corporate respondents, Redive and 888 Distributions; and by Castles over the eighth and tenth respondents, Coscer Investments and Zest Financial Solutions.

[14] The first corporate respondent, Monreacon, was once controlled by Park but is now controlled by Coutts.

[15] The protagonists all shared a direct or indirect interest in the second corporate respondent, Risk Qld. That was the company conceived to own a financial advice business operated by Park to the intended benefit of all the protagonists through their corporate guises.

[16] Ms Park worked in the financial advice and planning industry, with her services to others being provided by Monreacon, of which she was sole shareholder. From its inception in 2005, Monreacon was also trustee of the Monreacon Trust. Ms Park was the principal beneficiary of that discretionary trust. This structure carried the legal consequence that the income generated by the company's service provision was the income of the company, not of Ms Park. It was at one point submitted for Ms Park that it is clear "Monreacon was Ms Park's company",[3] presumably because she was once Monreacon's shareholder. In truth that holding was ever subject to disposition and acquisition and the company, as a legal entity, was always distinct from Ms Park as a legal entity.

[17] Ms Park doubtless assumed she would control the structure she put in place and did not think it likely that the company's shareholding would fall into the hands of another, as it later did. She doubtless thought it unlikely that the terms of the trust she established, would be deployed to remove her as a beneficiary, as later occurred. But such risks were inherent in the structure she chose to deploy, presumably because of its financial advantages to her. That structure and the distinction between her and the legal entity which owned and controlled what might otherwise have been her income, matters in a case like the present.

[18] In April 2008 Ms Park relocated from Brisbane to Townsville, where Messrs Coutts, Redington and Castles worked in the financial industry as accountants: Coutts and Redington as Coutts Redington Chartered Accountants and Castles as a principal of Coscer Accountants. Their respective accountancy practices would refer their clients to Zest Financial Solutions, a company of which Castles was a director. It conducted a financial services advice business.

[19] Park was drawn to Townsville by an agreement for the development of a new financial advisor business, which would subsume the business of Zest Financial Solutions and be conducted under a newly established entity, Risk Qld Pty Ltd, as trustee of the Risk Qld Trust. Under the alleged agreement, the respective accountancy practices of Coutts, Redington and Castles would refer their clients to Risk Qld for financial services advice from Park whose company, Monreacon,

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[3] T1-89 L 46.

would manage the business in return for a management fee of 25 per cent of revenue. The businesses' clients were to be recorded as Monreacon's clients with Monreacon's dealer group, Lonsdale Financial Group Ltd. Monreacon was an authorised representative of Lonsdale Financial Group, with Park being the associated financial advisor.

[20] When Risk Qld was incorporated in May 2008, Monreacon held 50 of the 100 issued ordinary shares. The balance was held in smaller proportions by companies variously controlled by Coutts, Redington and Castles.[4] The same proportionate holdings were mirrored in the trust deed's proportionate designation of the share of units to the respective entities as unit holders.

[21] Monreacon's interests in the new business were protected by restraint clauses in a unitholders' agreement preventing Risk Qld's other unitholders and representatives from soliciting clients of the business or causing them not to do business with it.

[22] The business evidently functioned satisfactorily in the early years, developing a portfolio of over 500 clients. Park ran the business from the offices of Coutts Redington Chartered Accountants. However, by late 2012 interpersonal tensions developed and Park moved the operation of the business to her home in suburban Townsville.

[23] Under a new Risk Qld Trust unitholders' agreement entered into on 6 March 2013, Castles ceased being a director of Risk Qld and was replaced by Park, and Monreacon became manager of Risk Qld's business. Under that agreement, a restraint clause precluded the soliciting, persuasion or acceptance of the clients of the business away from it for three years. Further, clients of the Risk Qld business were supposed to be recorded as Monreacon's clients with Lonsdale Financial Group.

[24] Subsequently, contrary to the unitholders' agreement, the clients of the business were recorded with Lonsdale Financial Group as clients of Risk Qld. Also, Coutts Redington Chartered Accountants and Coscer Accountants ceased referring their clients to Risk Qld, contrary to the initial agreement.

[25] In late 2013 Coutts allegedly told Park that the unitholders of the Risk Qld Trust, other than Monreacon, would take control of the business and would not buy out Monreacon's shares in Risk Qld because they would more than likely get the business for nothing in the fullness of time. He allegedly also told Park he was going to make her bankrupt.

[26] On 20 January 2014, against that background of disharmony and a delay in distribution of income from the business, solicitors acting for Park and Monreacon wrote to Coutts, Redington and Castles, giving notice of a dispute under the unitholders' agreement. The letter advised Park had appointed a forensic accountant to review accounts and undertake a valuation of the business. It also sought to utilise a clause in the unitholders' agreement for the signing of a circular petition giving "special approval" for the sale of the business.

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[4] Virchow Pty Ltd, a corporate shareholder in Zest Financial Solutions, of which Castles was a director; Tracles Pty Ltd, also a corporate shareholder in Zest Financial Solutions; Ichor Active, a company controlled by Coutts; and Redive Pty Ltd, a company controlled by Redington.

[27] Two days later Coutts, Redington and Castles were appointed as directors of Risk Qld and their lawyers' correspondence disputed the giving of notice under the unitholders' agreement by Park and Monreacon's lawyers.

[28] On 3 February 2014, in a meeting of directors of Risk Qld, only attended by Park and Coutts, a resolution terminating the forensic accountant's appointment and installing Risk Qld as the manager of the business in place of Monreacon was purportedly passed on the votes of Coutts plus votes Coutts made on behalf of the absent Redington and Castles. The resolution was allegedly invalid because a director could not attend a meeting by way of power of attorney given to another; and the purported meeting was a meeting of the directors of Risk Qld, not a meeting of unitholders pursuant to the unitholders' agreement; and the resolution could only be passed with "special approval" of the unitholders, that is, an affirmative vote of 70 per cent of the unitholders present and voting.

[29] Subsequently, in an alleged breach of the restraint clause in the unitholders' agreement, Risk Qld, Zest Financial Solutions and Castles caused clients of the business to request a change of their financial advisor from Park to Castles and they were consequently recorded with Castles' dealer group, Magnitude, as clients of Zest Financial Solutions.

[30] On 5 March 2015 Coutts, Redington and Castles attended a meeting of directors of Risk Qld and passed a number of resolutions, effectively further advancing the process by which Monreacon was stripped of any potential benefit of its interest in the business despite its 50 per cent unit holding. This included resolving to pursue recovery of all business information and client lists and all Risk Qld funds received since 3 February 2014. Again, it is alleged these resolutions were invalid because the purported meeting was a meeting of the directors of Risk Qld, not a meeting of unitholders pursuant to the unitholders' agreement and the resolution could only be passed with "special approval" of the unitholders.

[31] The allegedly unlawful displacement of Monreacon from the business and the diversion of Risk Qld's client base, all without consideration, continued to take hold. Monreacon had initially been replaced as manager by Risk Qld, then effectively controlled by Coutts, Redington and Castles and was subsequently replaced by Zest Financial Solutions. The business effectively diverted its client base to Zest Financial Solutions. Further, all of the clients of the business were no longer recorded as clients of Monreacon and were recorded under the auspices of the dealer group, Magnitude, with Castles as the associated financial advisor.

[32] It appears the respondents might characterise what occurred as the result of a loss of confidence in Ms Park but of itself that could not justify the alleged unlawfulness of the conduct deployed. That the conduct may have founded a claim for breach of contract is irrelevant in that it would be long out of time. However, if proved, the conduct appears to have involved breaches of fiduciary duty, owed to Monreacon by the second respondent company, Risk Qld, and Messrs Coutts, Redington and Castles. The alleged conduct would, if proved, support inferences that Risk Qld was assisted by the other respondents in a deliberate scheme to deprive Monreacon of its lawful financial entitlements, to the benefit of Messrs Coutts, Redington and Castles and or entities associated with them.

[33] The respondents highlighted the obviously significant memory problems exhibited by Ms Park in cross-examination during the present application. However, the proposed case looms as turning largely upon documentary records, and the apparent unlawfulness of the meeting decisions driving the conduct was not itself placed in significant issue.

[34] The respondents also highlighted the challenges the proposed action would face in playing the accumulating loss forward after a time when Ms Park was in no position to aid in Monreacon's potential accumulation of income. That appears to bears upon the prospective quantum of the claim rather than liability.

[35] Given the apparent unlawfulness of the resolutions driving the conduct and the accompanying disregard of Monreacon's lawful holding in the business, there is at least a probability the proposed case will be established. But could that ground an entitlement to the ultimate relief sought?

Could proof of the proposed pleaded case ground entitlement to the ultimate relief sought?

[36] The proposed proceeding would claim relief in the form of the following orders:

> "1. Pursuant to r 527 *UCPR*, an order that an account be taken of the financial affairs of the first defendant [Risk Qld] and the ninth defendant [Zest Financial Solutions] including an account of profits, for the period 30 June 2014 to date.
>
> 2. That a special referee be appointed for the taking of the accounts set forth in paragraph 1 above.
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> 3. Further and in the alternative to the relief sought by paragraphs 1 and 2 above, that the first to ninth defendants pay equitable monetary compensation in a sum to be determined by the Court to Monreacon <u>on trust for distribution to Park as former beneficiary</u> of the Monreacon Trust. …"[5] (emphasis added)

[37] The relief in order 3 refers to Ms Park as a "former beneficiary". In the aftermath of the alleged wrongdoing, Ms Park was declared bankrupt on her debtor's petition on 15 August 2017. She consequently lost control of Monreacon, being replaced as its sole director by Mr Coutts on about 4 September 2018. At that time the sole shareholding in Monreacon, which had been held by Ms Park, was acquired by the ninth respondent company, 888 Distributions, of which Mr Redington was sole director and shareholder. Risk Qld resolved to keep the unpaid present entitlements of Monreacon, along with its future entitlements, paying them into a general reserve under the control of Coutts. On 12 October 2018 Ms Park was advised she had been removed as beneficiary of the Monreacon Trust.

[38] Returning more generally to the content of the proposed orders, does the factual foundation of the case meet the requirement that it is at least capable of sustaining a right to final relief at trial? The answer is yes, as it relates to orders 1 and 2, but no as it relates to order 3.

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5 The proposed claim also seeks orders as to interest, costs and "Such other relief as the Court deems fit".

[39] At first blush, the orders align with the pleaded foundation of the proposed case, in that they are calculated at Monreacon recovering money it was unlawfully deprived of. The taking of an account of profits, per order 1, and the appointment of a special referee to do so, per order 2, appear to be unremarkable mechanisms for pursuing that object. The proposed case founds an entitlement to such forms of relief. The proposed case also appears to found an entitlement to the payment of equitable monetary compensation to Monreacon. But that is not what order 3 would require.

[40] Order 3 would require the compensation be paid "to Monreacon on trust for distribution to Park as former beneficiary of the Monreacon Trust". Put simply, it would require Monreacon to on-pay its compensation to Ms Park. Such an order presents as a surprising sortie into the internal affairs of a company in a case alleging wrong-doing external to the company's affairs, in which Ms Parks is not a party.

[41] By way of illustration, Ms Park's position might in one sense be likened to that of the minority shareholders in *Metyor Inc v Queensland Electronics Switching Pty Ltd*[6] where there had allegedly been fraud upon the minority shareholder plaintiffs by the majority shareholders. The Court of Appeal there held s 237 empowered the court to authorise the bringing of proceedings in which the company was joined as a co-defendant rather than a co-plaintiff. As McPherson JA explained, ss 236 and 237 were designed to serve the purpose formerly served by the exception to the rule in *Foss v Harbottle*[7] permitting the pursuit of derivative proceedings,[8] so that:

> "[A]ny judgement for relief or recovery that might be given would both bind and operate in favour of the company found to have been wronged. … Otherwise the practical effect of the judgment would be to transfer property of the company to individual members and, to that extent, result in an unauthorised dividend or distribution of corporate assets to shareholders."[9]

However, unlike the minority shareholders in *Metyor*, Ms Park would not be a party to the very action by which she seeks the court's ordering of a distribution of corporate trustee assets to her.

[42] The distinction in legal personalities earlier highlighted matters here. Ms Park chose to deploy a legal structure by which the income generating potential of her work was a service provided by Monreacon. It was Monreacon which was entitled to the income generated by provision of that service. Yet order 3 would involve the court ordering compensation for Monreacon's loss to be paid as a payment "on trust", to be distributed to Ms Park.

[43] Why should the company which suffered the loss have its receipt of the compensation for that loss specifically conditioned as received "on trust" and effectively be ordered to pass the compensation for the loss on to Ms Park?

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6 [2003] 1 Qd R 186.
7 (1843) 2 Hare 461; 67 ER 189.
8 [2003] 1 Qd R 186, 191.
9 [2003] 1 Qd R 186, 190.

[44] Ms Parks' answer is, in effect, that she was the primary beneficiary of the trust of the trustee company which suffered the loss, when it suffered the loss, so it was therefore she who was deprived of the loss to be compensated. But that answer is to treat the company's loss as her own, when it was the company's, as just explained. The answer is also necessarily based on three inferences which are unsupported by any pleaded material facts in the proposed statement of claim.

[45] The first unsupported inference is that, despite it being a discretionary trust, all company income would inevitably have been distributed to Ms Park when or soon after the company should rightfully have received it. The assumption is both that the company would exercise its discretion to make a distribution and that the distribution would be to Ms Park in the amount of the compensation paid to the company. The proposed pleading says nothing as to that supposed probability. It merely pleads at the final paragraph, prior to the prayer for relief, having alleged a long array of misconduct by others against the company:

> "84. The conduct of:
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> (a) Risk Qld, as pleaded by paragraphs 78, 79 and 81 herein:
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> (b) Coutts, Redington and Castles as pleaded by paragraphs 78 and 82 herein; and
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> (c) Ichor, Redive, Coscer Investments, Zest and 888 as pleaded by paragraph 82 herein,
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> indirectly caused Park to suffer financial detriment as by reason of the said conduct, Monreacon was unable to discharge its duties as trustee of the Monreacon Trust, to make distributions to Park."

[46] That is the high point. The material factual foundation for the supposed "duties…to make distributions to Park" is not pleaded. The relevant terms of the Monreacon trust deed or their effect are not pleaded. Indeed, none of the terms of the trust deed or their effect are pleaded. Nor is any pattern of past distribution pleaded so as to identify the material facts relied upon in support of the inference that, despite it being a discretionary trust, all income would in the normal course have been distributed to Ms Park as a beneficiary.

[47] The second unsupported inference is that Ms Park is the only person to whom the money ought potentially be distributed. No material facts are pleaded as to whether there existed other beneficiaries under the terms of the trust deed in the era of the loss or as to whether any past distributions were made to other beneficiaries.[10] Nor is the conduct of the present beneficiary pleaded as disentitling that person from eligibility for a distribution.

[48] The third unsupported inference is that there are no other financial or fiduciary obligations to be met by the company, so as to support an order which simply requires the distribution of the money to Ms Park. There is obviously a real prospect of the company having some financial obligations to be met, before it could as trustee determine what, if any, distribution is appropriate. It is not apparent whether those obligations involve substantial repayment obligations to creditors or,

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[10] The filed evidence suggests some distributions were made to Ms Park's children.

as was also argued, to respondents still owed money by Monreacon. However, it remains that the company's financial obligations, however modest, could not simply be ignored. Similarly, the company may have a fiduciary obligation as trustee to make a distribution to the present primary beneficiary. The absence of relevant financial or fiduciary obligations potentially precluding the distribution of the amount of the compensation payment to Ms Park would need to be pleaded, and of course established. There would otherwise be no potential basis for the court to order the company to distribute its compensation for its loss in the manner contemplated by order 3.

[49] These are collectively clear and determinative indicators that the proposed case could not found an entitlement to proposed order 3. I so find.

[50] The respondents also argued that relief ordering payment of equitable compensation to Monreacon on trust for distribution to Park as former beneficiary, would necessarily be a reference to a distribution that should have been made from a time before or during Ms Park's bankruptcy, from which she was discharged on 16 August 2020. It was submitted that because such funds ought to have been received by Ms Park when she was among the trust beneficiaries, the funds, were she now entitled to them, would not be receivable by her but would be distributed to the trustee in bankruptcy to pay her creditors. Ms Park countered with the argument that a future order for equitable compensation to be paid to Monreacon and distributed to Ms Park does not equate to a distribution of income or capital made before or during Ms Park's bankruptcy, from which she was discharged in 2020. Reliance was placed upon the reasoning of Davies J in *Dwyer v Ross*[11] to the effect that if a distribution of money or property is made to a bankrupt during the period of the bankruptcy, the trustee in bankruptcy will be entitled to it as after acquired property, but an ongoing right to enforce the due administration of a trust is not property which passes to the trustee in bankruptcy and is a personal right that remains with the bankrupt.

[51] It is unnecessary to reach a concluded view about those arguments because they go to an issue which would only arise in consequence of it being decided the company's compensation should be distributed to Ms Park. They would not bear on the merits of that decision. Ms Park's obligations to her former creditors and trustee in bankruptcy is a matter between her and them, not between her and the company. Indeed, if Ms Park were entitled to such a distribution it would appear perverse to refuse the making of it on the basis that it would then have to be deployed to fulfill her own responsibility to her old creditors.

[52] The respondents also argued, in effect, that Ms Park, having been removed as beneficiary, could have no beneficial interest in or entitlement to any equitable compensation received by the trustee. That argument was not persuasive per se. As a matter of fact, cl 15(d) of the trust deed provides (albeit that it is not in the proposed pleadings):

> "The removal of a person as a Beneficiary should not effect any rights accruing to that Person before their removal as a Beneficiary, including any rights to Income or capital of the Trust."

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11 (1992) 34 FCR 463; discussed by Jackson J in *Fordyce v Ryan & Anor; Fordyce v Quinn & Anor* [2016] QSC 307, [29].

Further, s 94(1) *Trusts Act 1973* empowers a court to confer a power upon a trustee, not already vested in the trustee, to expend, release or dispose of trust property in a way which is expedient in the management or administration of the trust or in the best interests of those beneficially interested under the trust.

[53] The argument need not be resolved. The better point is that the events arising from the administration of the bankruptcy gave rise to competing interests vis-à-vis the corporate trustee's administration of the compensation payment. Ms Park's trustee in bankruptcy sold Ms Park's shareholding in her trustee company. The benefit acquired by the new shareholder for good consideration, included the power under the trust deed to instal, and operate the trust to the benefit of, a new beneficiary. Doubtless, the consideration for that sale was applied in reduction of the financial cost wrought by Ms Park's bankruptcy. Putting it another way, even if indirectly, the consideration was applied to the benefit of Ms Park. Yet, without a pleaded basis for doing so, the proposed order 3 would entirely ignore the benefit acquired by the new shareholder and the benefit which the acquisition delivered on behalf of Ms Park, to additionally deliver to her the entire benefit of Monreacon's compensation. This is a significant flaw. It compellingly illustrates the flaw in order 3's assumption, without a pleaded basis, that the wrongs which resulted in the loss of Monreacon to be compensated are all that need to be considered to conclude the full benefit of that compensation ought to flow personally to Ms Park.

[54] It should be appreciated the conclusion the proposed case could not found an entitlement to proposed order 3 says nothing as to the competency of the pleader of the proposed pleading. The absence of pleaded support for order 3 reflects the reality which confined the pleader: Ms Park is not a party in the proposed proceeding. The proposed plaintiff is the company, Monreacon. True it is, in naming the company as plaintiff the proposed claim names the company "as trustee for the Monreacon Trust". But it remains that the proposed plaintiff is a company, not Ms Park. It is the facts material to the company's entitlement as against the proposed respondents, not Ms Park's personal entitlement as against the company, which fell to be pleaded as the material facts. It would not be relevant to plead facts material to her personal entitlement as against the company, or her direct entitlement to equitable compensation from the company and the presently proposed defendants, in a case in which she is not a plaintiff.

[55] It follows from the reasons given above that I am satisfied there is a serious question to be tried as to that part of the proposed case relating to orders 1 and 2 but not as to order 3. The facts of the proposed pleaded case are incapable of sustaining an entitlement to the relief sought by proposed order 3.

[56] On one view, that conclusion as to order 3 could found a conclusion that there is no serious issue to be tried generally, that is, in connection with any of the orders, because it is only order 3 which purports to expressly make a monetary award. However, whether order 3's problem renders the relief sought in order 1 and 2 academic, so that there is no serious issue to be tried generally, was not specifically argued. Further, I need not resolve that specific point because the problems with proposed order 3 clearly expose that the granting of leave is not in the best interests of the company.

Is it in the best interests of the company that Ms Park be granted leave?

[57] The requirement that it is in the best interests of the company that leave be granted goes to the company's "separate and independent welfare".[12] It is readily apparent from the problems identified above in respect of order 3 that the separate and independent welfare of the company is no concern of the proposed action.

[58] Those problems expose that Ms Park wants to conduct the proceeding on behalf of the company in order for it to recover compensation for its loss:

- only for the company to in turn be required to distribute that compensation to her;
- without the court having any regard to the company's financial and fiduciary obligations bearing upon whether and how the money should be applied.

[59] The responsibility in a discretionary trust for determining the disposition of money received by the trustee is ordinarily that of the trustee, not the court. As already mentioned, the court does have the power per s 94 *Trusts Act 1973* (Qld) to make orders empowering a trustee to expend or dispose of money in a particular manner, even a manner beyond the power conferred by the trust instrument. That requires the court's determination of whether such action is expedient in the management or administration of trust property or in the best interests of persons beneficially interested under the trust. Ms Park's counsel emphasised that s 94's criterion of expediency is of wide import,[13] but that is not to the point. Section 94 only operates to confer power upon a trustee which the trustee would not otherwise have in dealing with trust property. Order 3 would involve an exercise of court power in dealing with trust property. If a court in deciding a trustee's entitlement to equitable compensation is to go beyond that decision and determine the compensation, in turn, be distributed to an allegedly beneficial interested person, the conventional constraints of decision making on such a determination still apply.

[60] To make such a determination, in the context of a claim, material facts as to the interests of beneficially interested persons and the obligations informing the expedient management and administration of the trust would first need to be properly pleaded, evidenced and weighed by the court.

[61] That will not occur if Ms Park conducts the litigation on the company's behalf in the manner proposed. To the contrary, the proposed proceeding would assume the only relevant interest in the compensation ordered is that of Ms Park. The assumption of a complete alignment between her interests and the company's interests ignores the company's own potential financial obligations and ignores the rival potential entitlement of other past or present beneficiaries.

[62] It is no answer to that flaw to say that the proposed respondents have an interest in arguing against order 3. They may have an interest to the extent of arguing against the ordering of the payment of compensation, but the party responsible for the disposition of the company's financial entitlement is Monreacon. It is not the respondents' responsibility to argue about the conditions that ought apply to the disposition of the monetary compensation ordered to be paid to the company. The relevant parties to any argument about the pros and cons of that process should

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12 See *Cooper v Myrtace consulting Pty Ltd* [2014] FCA 480, [19] and the authorities there cited.

13 Citing *Re Arthur Brady Family Trust; Re Trekmore Trading Trust* [2014] QSC 244.

logically include the corporate trustee, which has a responsibility to all potential beneficial interests, and Ms Park, who seeks to solely advance her own interest. But Ms Park is not a party and instead seeks to entirely avoid the argument by running the company's case to secure relief for herself via order 3.

[63] It is also no answer to the above flaw to say that it will be the court which, in effect, makes the decision for the company as to how the compensation ought be dealt with, as if the court is somehow "all knowing" of matters not litigated before it. The court would need to make its decision guided by consideration of the whole of the company's obligations. But the court would have no such guidance. The person seeking to advance the case for the company proposes to advance it without consideration of the company's obligations to any persons or entities other than her. As much is demonstrated by my earlier finding that the proposed statement of claim does not plead facts material to the court's consideration of the company's financial and fiduciary obligations relevant to the appropriate disposition of the monetary compensation.

[64] The proposed proceeding is calculated at establishing the company's right to monetary compensation for the purpose of that compensation being distributed to another, without litigated consideration of the company's right to deal with its own compensation or of its obligations in dealing with it. I am therefore not satisfied it is in the best interests of the company to grant leave.

[65] That conclusion is determinative of the application.

[66] Other arguments were advanced as to why it is not in the best interests of the company to grant leave. One went to the risk that one or more of the proposed defendants would initiate a counterclaim. It is difficult to give that possibility weight of material relevance to the issue of the company's best interest where years have evidently gone by without such a claim having been initiated.

[67] Another argument was that it was against the company's interests to be lumbered with the cost of pursuing an action it does not wish to pursue and be exposed to the risk of an adverse costs order against the company. While this argument consumed some evidentiary attention there was obviously such substance to it that the real issue was whether it could be satisfactorily neutralised. It was conceded the means of neutralising it would require two inter-related steps. One is an undertaking, which Ms Park gave, to indemnify the company for its own costs of the proceeding as well as for any adverse costs orders made against it. The other is the provision of security for that indemnity. Such security was not forthcoming by the time of the hearing of the application, indeed Ms Park's then capacity to meet significant legal costs was doubtful. It was suggested for her that she might be able to raise sufficient security within some months. Her counsel conceded if leave were to be granted it would have to be granted conditionally upon the security being provided within a short deadline set as part of the order granting leave. Given that leave is being refused for other reasons the inevitably substantial quantum of the required security need not be determined and whether Ms Park would have met it will remain unknown.

[68] A further argument went to Ms Park's personal suitability to conduct the litigation. To the extent that argument related to Ms Park's psychological vulnerability it was

adequately met by her counsel's point that, if needs be, a litigation guardian could be appointed for her.[14]

[69] However, another feature of that argument went to Ms Park's poor judgment, exhibited by her testimony about her dealings with a substantial total and permanent disability pay-out of $1.4M, received by her on 9 July 2018. She testified she ultimately arranged for that amount to go from her trust fund into her own bank account, but that she subsequently paid it out to woman working for NATO who was going to make Ms Park money by investing it in real estate overseas. No documentary evidence was provided about the occurrence of these objectively risky monetary dealings or the fate of the money. This account suggests a concerning lack of the level of sensible judgment required to pursue complex litigation on behalf of a company.

[70] It may well be, as her counsel emphasises, that Ms Park will be legally represented and that there is no direct evidence to suggest Ms Park would do other than follow advice. It is conceivable that any grant of leave could be conditioned upon Ms Park continuing to be legally represented in pursuing the company's action. But it is the client, not the lawyer, who decides whether legal advice is followed. Further, her lawyer would be confronted with the client's conflict that she is acting on behalf of the company, not herself, in a case in which she seeks an order distributing the company's award to her.

[71] Is the lawyer's advice to be determined by reference to her best interests or the company's? Let it be assumed, for the sake of argument, that the lawyer correctly concludes it must be the latter, given the client is as a matter of law conducting the action on behalf of the company. This is the kind of case in which, beyond liability, the quantum of any award will be in issue and the prospect of settlement offers needing to be properly considered in the company's interests in the course of the litigation is a real one. Such a prospect does not arise solely in the form of the proposed defendants making settlement offers. There is a real prospect, given the inevitable progressive emergence of competing financial advantages and risks in commercial litigation of this kind, that a responsible litigant acting in the best interests of the company would also conclude a reasonable offer or offers of settlement ought be made. There is thus a real prospect that her lawyers will give Ms Park advice to make or accept a settlement offer which, having regard to the company's afore-mentioned obligations, it is in the best interests of the company to offer or accept but may be substantially less than the amount Ms Park wants to be distributed to her by the company.

[72] Ms Park's exhibited poor judgment and her self-interested purpose in pursuing the litigation mean it cannot be assumed she would follow such advice. Whether that consideration, inimical to the granting of leave being in the company's best interests, could be neutralised by the imposition of conditions about compliance with legal advice and whether the imposition of such conditions can properly occur, was not argued. Absent such argument and given I have already decided that I am not satisfied it is in the best interests of the company to grant leave, I express no view about that.

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[14] A course noted as rendering mental fitness an irrelevant consideration in *Maher v Honeysett & Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859, [46].

Is Ms Park acting in good faith?

[73] The respondents unsurprisingly contend the collateral object of the proceeding evidences a lack of good faith. They place emphasis upon Palmer J's analysis of the assessment of good faith in *Swansson v RA Pratt Properties Pty Ltd & Anor.*[15] His Honour relevantly observed:

> "[T]here are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of section 237(2)(b) are satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly held such a belief would not simply be a matter of bold assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process."[16]

[74] In the present case the first factor is not problematic insofar as it relates to the forms of relief sought in proposed orders 1 and 2. As already explained, the proposed case appears to provide factual foundation for the compensation of the company sought in order 3. That rationally supports an inference Ms Park would believe, at least to that extent, a good cause of action exists and has a reasonable prospect of success. But the above-discussed problems with order 3 herald a difficulty with the second factor. Ms Park may very well honestly believe that she has a moral entitlement to the equitable compensation which the proposed action may deliver to the company. But by order 3 she seeks that compensation for herself.

[75] Ms Park is thus pursuing the proceeding for that collateral purpose. As earlier explained, the proposed statement of claim demonstrates the proceeding is an appropriate means of securing compensation of Monreacon. However, the pleading of it does not support the additional step of the Court ordering that compensation be paid on trust to Monreacon for distribution to Ms Park. To adapt the language of the plurality in *Williams v* Spautz[17] about abuse of process, Ms Park is seeking to abuse a process apparently apt for the recovery of Monreacon's compensation to obtain a collateral advantage for which that proceeding offers no lawful basis. That legally unfounded advantage is the on-payment of the compensation to herself, effectively without Monreacon having a say in the matter. This is an obstacle to satisfaction she is acting in good faith.

[76] In trying to surmount that obstacle, her counsel submitted:

> "If equitable compensation is paid to Monreacon, it would make a mockery of the grant of that relief to allow Monreacon's current director, Mr Coutts, to exercise a trustee's discretion about how that money would be distributed, particularly in circumstances where Mr Coutts removed Ms Park as a beneficiary of the Monreacon Trust. Accordingly, the second step of the relief sought by Monreacon is

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15 (2002) 42 ACSR 313, 320-321.
16 *Swansson v RA Pratt Properties Pty Ltd & Anor* (2002) 42 ACSR 313, 320.
17 (1992) 174 CLR 509, 526-527.

> entirely appropriate in the unusual circumstances of this case. Equity's relief is necessarily wide and equity will not see a wrong without a remedy. The relief sought obviates the need to bring subsequent proceedings seeking to impugn the trustee's exercise of discretion on the basis of bad faith or collateral purpose."[18]

[77] The submission does not engage with the reality that Ms Park is not a proposed party to the litigation. Under cover of acting on behalf of the company, she seeks distribution of the company's compensation to her without the company, as the corporate trustee, deciding or indeed even arguing about the act of distribution.

[78] In other words, the reference in the abovementioned submission to the relief obviating the need to bring subsequent proceedings is, in reality, a reference to the proposed relief depriving the company of its power as trustee to exercise its discretion in determining its dealings with that relief or indeed to even argue about how that discretion ought be exercised.

[79] Ms Park's counsel placed reliance upon the observation of Brereton J in *Maher v Honeysett & Maher Electrical Contractors Pty Ltd* [19] that:

> "[T]he existence in an applicant of a personal interest in the outcome of a proposed derivative action, or even of a personal animus against the company, or other members of it, cannot be significant, let alone decisive; they are usual concomitants of the types of disputes which lead to derivative actions, and few if any such actions would be brought but for the personal interest on the part of the relevant applicant in the absence of animus against the company or other shareholders."

[80] Those observations are unassailable. But nor are they to the point. The presence of the motivating contribution of personal interests in pursuing a derivative action is unremarkable. The remarkable feature of the proceeding proposed here is that it would pursue such an action on behalf of the company to the complete exclusion of the company's interests in how its award is dealt with.

[81] *Maher v Honeysett & Maher Electrical Contractors Pty Ltd* was unlike the present case. In the context of a potential winding-up and resulting distribution of assets as between the two warring shareholders, the proposed derivative action was calculated, by proving breaches of fiduciary obligation and obtaining equitable compensation for the company, at enhancing the company's assets available for distribution between the shareholders. The manner of that distribution, however, was to turn upon the enforceability of an agreement as between the shareholders which would also fall for determination within the claim and cross-claim being pursued. Whether the relief sought by the derivative action for the company should ultimately advantage the party acting on the company's behalf thus depended upon the determination of the accompanying litigation of the issues bearing upon the distribution entitlements of the potentially interested parties.

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18 Applicant's outline of argument pp 8-9.

19 [2005] NSWSC 859, [45].

[82] In contrast, Ms Park's object here is to avoid such an accompanying determination, contrary to the company's interests, and bind the company to the unlitigated premise that any award secured on its behalf is Ms Park's. The case of *Maher* is not an outlier. No case cited in argument suggests such an accompanying determination is unnecessary.

[83] Ms Park's object of avoiding such an accompanying litigated determination has the consequence I am not satisfied Ms Park is acting in good faith.

[84] That conclusion is of itself determinative of the good faith element but there is an additional reason why I should not be satisfied of the good faith element. It relates to Ms Park's mysterious use of her TPD pay-out of $1.4M on 9 July 2018. After she received it, there followed a long period during which she would have had that money available to her and been able to set an amount of it aside for pursuit of the proposed action or indeed an action of her own once discharged from bankruptcy. That she did not do so is a piece of circumstantial evidence also weighing against satisfaction that she is acting in good faith.

[85] Another component of her past conduct said to evidence a lack of good faith was her earlier delay in initiating a proceeding. On 7 August 2015, Risk Qld initiated proceedings in the Supreme Court against Monreacon and Lonsdale Financial Group seeking declaratory and other relief regarding the termination of Monreacon's management of Risk Qld's business, the payment of business revenue out of Lonsdale's bank accounts to Risk Qld, the transfer of clients and an account and payment to Risk Qld by Monreacon. That proceeding, which was brought by Ms Park's opponents, evidently sought to quell the controversy driving Ms Park's present application but it did not progress with any haste. Ms Park's opportunity to properly litigate that matter was curtailed after she broke her neck in January 2017, resulting in psychiatric problems, and she was declared bankrupt in August 2017. Her official trustee in bankruptcy was replaced upon payment of $15,000 by Coutts Redington Pty Ltd and, as earlier explained, on 4 September 2018 the replacement sold her shareholding in Monreacon to none other than 888 Distributions. Mr Redington was its director and Mr Coutts was appointed director of Monreacon. On 8 October 2018 the newly controlled Monreacon consented to orders that Lonsdale pay all money in accounts containing the business income to Risk Qld and Monreacon pay Risk Qld's costs of the Supreme Courts proceeding which was then discontinued.

[86] Against that remarkable background, it would be unreasonable to regard Ms Park's failure to initiate action or her trustee in bankruptcy's failure to initiate action on her behalf in that era, as evidencing a lack of good faith now. Nor, for completeness, would I regard the delay's potential to support a defence of laches as so compelling as to bear materially upon the earlier discussed element of a serious issue to be tried.

[87] Finally, while academic to the result, something should briefly be said of the significant reliance placed by the respondents upon Ms Park's rejection of an offer to provide Ms Park's expert accountant with open access to the books of account of Risk Qld. The respondents placed reliance upon that rejection as evidencing an absence of a serious question to be tried but the argument advanced about it appeared more relevant to the issue of good faith.

[88] The offer was made on 4 December 2020. A further such offer was made on 22 November 2022. It advised that the profits of the trust earned since 2014, after payment of management fees, operating costs and legal and accounting fees, had been banked to quarantined accounts and remained there in the amount of $340,132.28. The letter invited Ms Park to engage a forensic accountant to review Risk Qld's accounts and undertook to preserve the funds. Importantly, the proposal contemplated not merely Ms Park's engagement of a forensic accountant to review the accounts, but that in that process her accountant "should also bring to account the profits that had been retained by [Ms Park] from commissions received by Monreacon and which should have been, but were not, remitted to Risk Qld".

[89] In other words, the proposed process was to be confined to Risk Qld's books and was to take into account monies allegedly owing by Monreacon. It is unremarkable that Ms Park rejected a proposal which did not extend to open access to Zest Financial Solutions' books and which was in any event qualified by the requirement of a process which would bring into account profits allegedly retained by Ms Park from commissions received by Monreacon. The rejection of such a proposal does not suggest an absence of good faith on Ms Park's part.

Conclusion

[90] These reasons have explained why I am not satisfied of all of the matters listed in s 237(2). Such satisfaction being a pre-requisite to the granting of leave, the application for leave must be dismissed.

Orders

[91] It is unlikely there exists good reason why costs would do other than follow the event on the standard basis. I will therefore make a costs order but, as a matter of caution, also confer a brief period of liberty to apply to be heard as to costs.

[92] My orders are:

1. Application dismissed.

2. Liberty to apply to be heard as to costs, on the giving of two business days' notice in writing by no later than 22 April 2024.

3. If the liberty conferred by order 2 is not exercised in time, the applicant will pay the respondents' costs to be assessed, if not agreed, on the standard basis.