



Supreme Court New South Wales

Medium Neutral Citation:	Kevin as the Public Officer of the Wat Buddhalavarn Incorporated Prakoonehang v Thonsoun Phanthoudomm, Abbot of the Wat Buddhalavarn Monastery [2016] NSWSC 305
Hearing dates:	26 February 2016, 1 March 2016 (additional submissions)
Date of orders:	22 March 2016
Decision date:	22 March 2016
Jurisdiction:	Equity
Before:	Slattery J
Decision:	Declarations made as between the plaintiff and the first defendant that the resolutions of the June 2012 and January 2013 meetings are invalid and of no legal force and effect. Leave granted to amend the Statement of Claim as proposed apart from the pleaded claim for false and misleading representations.
Catchwords:	<p>ASSOCIATIONS – Association incorporated under the Associations Incorporation Act 1984 and continues under the Associations Incorporation Act 2009 – association conducts Buddhist temple with connections to the Laotian community – plaintiff dismissed from position as Public Officer of the association in June 2012 and existing management committee dissolved by resolutions in which the first defendant participated – first defendant expelled by further meeting of association held in January 2013 and a new management committee appointed.</p> <p>PLEADINGS AND PROCEDURE – application to amend statement of claim – whether part of amendments alleging mental anxiety are embarrassing in form – whether amendments should be allowed.</p> <p>EQUITY – declarations – whether making of declarations lacks utility – where not all parties served in proceedings – where other parties may need to be joined before final hearing – where two parties, the principal antagonists in</p>

the proceedings, accept that the alleged meetings of the association of June 2012 and January 2013 were not properly convened.

Legislation Cited:

Associations Incorporation Act 1984 (NSW)
Associations Incorporation Act 2009 (NSW)
Civil Procedure Act 2005 (NSW), s 56
Corporations Act 2001 (Cth), s 1322(2)

Cases Cited:

AON Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27
Baltic Shipping Co v Dillon (1993) 176 CLR 344
Eastmark Holdings Pty Ltd v Kabraji [2013] NSWSC 1763; (2013) 97 ACSR 161
Fawzi El-Saiedy v NSW Land and Housing Corporation (2011) NSWSC 820
Godly v Perry Burton & Sons (Bermondsey) Ltd [1961] All ER 36; [1961] WLR 9
Goodwin v Vietnam Veterans Motor Cycle Club Australia NSW Chapter Incorporated (2008) 72 NSWLR 224; [2008] NSWSC 154
John Alexander's Clubs Pty Limited v White City Tennis Club Limited (2010) 241 CLR 1; [2010] HCA 19
Khan v Khan; Re Islamic Association Western Suburbs of Sydney Inc [2015] NSWSC 638
Watts v Morrow [1991] All ER 937; [1991] 1 WLR 1421

Texts Cited:

P W Young, Declaratory Orders (2nd ed 1984, Butterworths)

Category:

Principal judgment

Parties:

Plaintiff: Kevin Prakoonheang as Public Officer of the Wat Buddhalavarn Incorporated

First Defendant: The Venerable Thongsoun Phanthoudon, Abbot of the Wat Buddhalavarn Monastery

Second Defendant: The Venerable Santithitto, Ronald Wagner, Deputy Abbot of the Wat Buddhalavarn Monastery

Third Defendant: The Commissioner for Fair Trading, Department of Finance and Services, Government of NSW

Fourth Defendant: Wat Buddhalavarn Incorporated

Representation:

Counsel:

Plaintiff: L. Young

First and Second Defendants: M. Condon SC; J. Simpkins

Fourth Defendant: n/a

Solicitors:

Plaintiff: Barrie Goldsmith, Goldsmith Lawyers

First and Second Defendants: Matthew Fisher, Thurlow Fisher

Third Defendant: Colleen Dorn Dreis

Fourth Defendant: n/a

File Number(s): 2013/204918

Publication restriction: No

JUDGMENT

- 1 The fourth defendant, the Wat Buddhalavarn Incorporated (referred to in these reasons as “the Wat”) was incorporated in 1987 under the *Associations Incorporation Act 1984* (“*the 1984 Act*”) and subsequently registered as an Incorporated Association with the New South Wales Department of Fair Trading. Its affairs are now governed by the *Associations Incorporation Act 2009* (“*the 2009 Act*”).
- 2 The Wat is the corporate form of a Buddhist organisation holding to the Tehravada tradition. The Wat has strong ties to the Laotian community in Australia. It is the registered proprietor of land in Wedderburn, New South Wales, on which is located the Wat Buddhalavarn Forest Monastery and Meditation Centre.
- 3 The Wat was founded by a number of its present members, including the plaintiff, Mr Khamson “Kevin” Prakoonheang, and the first defendant, The Venerable Thongsoun Phantha-oudom. A significant number of people from Laos settled in Australia in 1976. They soon planned the construction of a Buddhist temple. By 1981 the Wat was established as an unincorporated organisation. And then in 1985 the organisation sponsored the first Laotian Buddhist monk to migrate to Australia to assist in the temple. The lay management committee of the Wat registered the organisation as an Association under the *1984 Act* in 1987.
- 4 Prior to the events in June 2012, in issue in these proceedings the plaintiff had since 1987 been the Wat’s Public Officer, a formal position recognised under both *the 1984 Act* and *the 2009 Act*. During the same period the first defendant was the President of the Wat and the Abbot of the Wat Buddhalavarn Forest Monastery (“the Monastery”).
- 5 The second defendant, The Venerable Santithitto Ronald Wagner, was a monk at the Monastery and the deputy Abbot. But he died on 28 August 2014 after these proceedings were commenced in July 2013. The Venerable Wagner had been involved with the Wat from about 1996 until his death. The plaintiff seeks no relief against his estate. The third defendant, the Commissioner for Fair Trading, Department of Finance and Services NSW, has never been served with initiating process and has not taken an active role in these proceedings. The fourth defendant, the Wat itself, was first joined as a defendant in accordance with Stevenson J’s orders of 20 February 2015. But it has not been served with any process since its joinder, nor have any steps been taken to

ascertain whether it should be represented. Given the disputes between its members it is not anticipated that had it actually been served that it would be able to resolve to appear and take its own independent role in the proceedings.

- 6 In these proceedings two competing groups of members of the Wat each seek the legal authority to manage the Wat: one group is associated with the plaintiff (pursuing the Summons) and the other group is associated with the first defendant (pursuing the Cross Summons).
- 7 The proceedings are now before the Court upon the plaintiff's motion to amend his Summons to plead new issues. The first defendant resists the amendment of the pleadings. But a number of concessions have now been made by each party about the invalidity of meetings that each side had originally contended in the Summons on the Cross Summons were valid meetings. And so the parties also debated on the motion, whether any final relief could now be given within the proceedings, as they are presently constituted.
- 8 The principal questions for decision therefore are: (1) whether any form of final relief should now be given in the proceedings; and (2) whether leave should be granted to amend the plaintiff's Summons. These questions require an overview of the main issues presently in dispute.

Overview of the Issues on the Existing Pleadings

- 9 In his original Summons the plaintiff sought declaratory relief in relation to two groups of meetings of the Wat that have spawned the two competing management committees of the Wat, a competition which presently paralyses the Wat's governance. The first group of meetings is the foundation of the first defendant's claim that he and a management committee associated with him are now legally authorised to govern the affairs of the Wat.
- 10 The plaintiff seeks in his Summons to declare the first group of meetings invalid and of no effect. The first group of meetings were meetings convened on 2 June 2012 ("the 2 June 2012 Meeting") and on 10 June 2012 ("the 10 June 2012 Meeting"). At the 2 June 2012 Meeting, the members of the monastic panel of members of the Wat, which included the first and second defendants, resolved to dismiss the plaintiff from his position as Public Officer, and from a number of other roles he is alleged to have held such as Treasurer, Secretary and, somewhat surprisingly, even as a Justice of the Peace. Unusually, the form of the resolution at the 2 June 2012 meeting speaks of having the plaintiff "resign" from these various roles, rather than be dismissed from them, which might be thought the more apt language for a non-consensual removal of the plaintiff from his post.
- 11 Then acting on the 2 June 2012 resolution, at what was said to be a special general meeting of the Wat, again including the first and second defendant, at the 10 June 2012 Meeting, dismissed the plaintiff from his position as Public Officer and from his other roles. But again this seems to have been a constructive dismissal as the notice refers

to the plaintiff's resignation and the cancellation of his positions. In addition, the 10 June 2012 Meeting passed resolutions dismissing the Wat's then current Management Committee. In consequence of the removal of the Management Committee a new Management Committee was purportedly appointed on 16 June 2012 in its place.

- 12 As these proceedings were originally pleaded, the first defendant contended in his Cross Summons that the June 2012 meetings and the plaintiff's consequent dismissal were valid. As will be seen, by the time the present motion was heard the first defendant abandoned this contention.
- 13 The plaintiff also sought relief in his Summons in respect of an alleged general meeting of the Wat on 27 January 2013. This meeting purported: to reinstate the plaintiff to his various positions (on the assumption that he had been dismissed); to install a management committee that was favourable to the plaintiff; and, to amend the Constitution. This meeting also purported to expel the first and second defendants from the Wat. The plaintiff sought declaratory relief that this meeting was validly convened and that its resolutions were proper and lawful.
- 14 Not surprisingly the first defendant opposed that relief, claiming that the alleged reinstatement of the plaintiff and the appointment of a committee of Management at the 27 January 2013 meeting were both invalid.
- 15 The plaintiff now seeks to file a proposed Amended Summons seeking relief in relation to a number of ancillary matters, two of which have been debated. The first ancillary matter arises from the proposed pleading of an alleged misrepresentation the first defendant is said to have made at the June 2012 Meetings to the effect that the first plaintiff had resigned from his position as Public Officer and from his other positions he is alleged to have held, which representations the plaintiff contends constituted a breach of the statutory contract made between the members and the association. The second ancillary matter raised in the proposed Amended Statement of Claim arises out of the alleged withdrawal of \$4,270 by the first defendant from the Wat's Westpac Banking Account, for his personal use.
- 16 The first defendant's cross-claim sought relief that was the converse of the relief the plaintiff sought in his summons. On the cross claim the first defendant/cross-claimant sought declarations: that the June 2012 meetings were both validly convened and passed valid resolutions; and that the January 2013 meeting was not validly convened and did not pass valid resolutions.

Some Relevant Procedural History

- 17 The procedural history of this matter is more complex than it should be. But this is in part because this dispute is more intractable than it should be. At their conclusion these reasons raise the prospect of these proceedings being referred to a Court annexed mediation.

These proceedings commenced almost 3 years ago. On 5 July 2013 the plaintiff, then apparently believing that there was no other solution to the Wat's then management impasse, commenced the proceedings by Summons, seeking the relief identified. On 10 December 2013 the first defendant filed his Cross-Summons seeking declarations that: the plaintiff was not the properly elected Public Officer of the Wat, the 10 June 2012 Meeting was properly convened and passed valid resolutions; and that the 27 January 2013 Meeting was not properly convened and that its resolutions were invalid and that the plaintiff's alleged expulsion of the first and second defendants from the Wat at the 27 January 2013 meeting was of no effect.

- 19 On 17 November 2014 the first defendant filed a Motion seeking to join the Wat as a fourth defendant and also to join all those persons said to constitute the Management Committee of the Wat, who were elected at the 27 January 2013 Meeting.
- 20 On 20 February 2015 Stevenson J made orders in relation to the first defendant's Motion, joining the Wat as the fourth defendant. His Honour also ordered that the matter proceed by way of pleadings and that a solicitor, Mr John Emmett McDermott, be appointed as referee to determine who were the members of the Wat at all times since January 2012.
- 21 Pursuant to Stevenson J's orders the plaintiff filed and served a Statement of Claim on 27 February 2015 joining the Wat as the fourth defendant and fully pleading the relief sought in the Summons. The first defendant filed and served Points of Defence and Points of Cross-Claim on 6 March 2015 and the plaintiff filed and served a Defence to the Cross-Claim on 13 March 2015.
- 22 On 1 April 2015 the plaintiff's then solicitors, BTF Lawyers, wrote to Mr McDermott conceding that the 27 January 2013 Meeting had not been properly constituted and that any business transacted at the meeting was null and void. This concession was made to the first defendant's solicitors, Thurlow Fisher Lawyers, in a letter sent the following day.
- 23 On 14 April 2015 the first defendant's solicitors wrote to BTF Lawyers advising that as a result of the plaintiff's concession there was probably only limited utility in proceeding with the reference with Mr McDermott. About the same time the first defendant ceased contending that the 2 June 2012 and 10 June 2012 Meetings had been properly convened and had resulted in the passing of valid resolutions.
- 24 This seemed to augur well for a peaceful resolution of the disputes between these parties. But on 28 April 2015 the plaintiff retracted his early April concessions and signalled that he wished to contend once again that the 27 January 2013 meeting had been properly convened.
- 25 On 1 May 2015 directions were made for the plaintiff to serve any draft Amended Statement of Claim and Amended Defence to Cross Claim by 8 May 2015. But nothing was served pursuant to this order.

On 7 May 2015 BTF Lawyers ceased to act for the plaintiff. On 14 May 2015 the plaintiff retained Goldsmith Lawyers.

- 27 On 15 May 2015 the first defendant filed a Motion seeking orders, including for an alteration of the terms of the questions referred to the referee. This Motion was in part the result of the referee's own concerns that the questions being asked of him were too wide and should be narrowed. The first defendant contended on this motion that the questions for the referee should be reduced to two: first, who were the members of the Wat at the time of the purported meeting on 27 January 2013; and secondly, who were the present members of the Wat determined in accordance with the 1988 Constitution. The Court has not heard this motion.
- 28 On 1 June 2015 Goldsmith Lawyers wrote to Thurlow Fisher conceding on behalf of the plaintiff once again, that the 27 January 2013 Meeting had not been validly convened. On 1 July 2015 Thurlow Fisher responded advising that as the 27 January 2013 Meeting was invalid, the first defendant would need to amend his pleadings in the event that the proceedings did not resolve by negotiation.
- 29 On 13 July 2015 Goldsmith Lawyers proposed in correspondence that in light of the deadlock between the competing management committees that the Wat be wound up. On 23 July 2015 Thurlow Fisher responded on behalf of the first defendant opposing this proposal.
- 30 On 5 August 2015 Stevenson J made orders requiring the plaintiff to serve a proposed Amended Summons, Amended Statement of Claim and Affidavit. The plaintiff did so on 7 September 2015. On 21 September 2015 Thurlow Fisher confirmed that the first defendant did not consent to the proposed amendments arguing: that the amendments were not particularised; and as they still sought relief regarding the June 2012 meetings, no explanation had been provided for the delay in seeking the amendment.
- 31 On 22 September 2015 the plaintiff served a Notice to Produce. The solicitors for the first defendant objected to production on 23 September 2015. On 24 September 2015 orders were made that the first defendant indicate which paragraphs of this notice to produce were in contest. On 1 October 2015 Thurlow Fisher wrote to Goldsmiths Lawyers substantially detailing the first defendant's grounds of objection to the proposed Amended Statement of Claim and proposed Amended Summons.
- 32 On 19 November 2015 the plaintiff filed a Motion seeking leave to withdraw his April 2015 concession about the invalidity of the 27 January 2013 meeting resolutions, and seeking leave to amend his pleadings. This was the motion heard on 26 February 2016. Ms L. Young appeared for the plaintiff on the motion. And Mr M. Condon SC and Mr J. Simpkins appeared for the first defendant.

Background to the Wat's Constitution and Management – 1987 to June 2012

- 33 Some further general background of relevant events prior to the events of June 2012 is useful at this point.

As indicated earlier in these reasons, in 1987 the plaintiff, the first defendant and several others founded the Wat. On 17 August 1987 the Wat was incorporated and its Constitution was filed with the office of the Commissioner for Fair Trading. The Constitution was amended on 24 November 1988 (“the 1988 Constitution”).

- 35 On 23 August 1987, closely following upon the Wat’s incorporation, the first defendant was made the Abbot of the Wat Buddhalavarn Forest Monastery at Wedderburn. On 24 November 1988 the plaintiff was appointed the Public Officer of the Wat. The Wat’s 1988 Constitution, clause 9 provided for a Management Committee of the Wat comprised of monastic members and lay members.
- 36 On 4 February 1996 a resolution was passed amending the Constitution at an annual general meeting of the members of the Wat (“the 1996 Constitution”). But the 1996 Constitution was never registered with the Commissioner for Fair Trading: see the *2009 Act*, ss 10 and 14. And the first defendant contends that the resolution purporting to effect this amendment was not a special resolution as required by the *1984 Act*, ss 5 and 20.
- 37 At the time these proceedings first came on for directions before me, the parties disagreed which of these two constitutions represented the current Constitution of the Wat. The issue as to the prevailing Constitution has now been resolved. Both parties are now agreed that the failure to ensure the proper registration of the 1996 Constitution in accordance with the *1988 Act* means that the 1988 Constitution has remained validly in force.
- 38 On 27 August 2005 various appointments for the governance of the Wat were made at a general meeting of the Wat. On this occasion the Wat appointed four Monastic Office Bearers, five lay Office bearers, and sixteen lay committee members. The four Monastic Officer bearers appointed were the first and second defendants, the Venerable Khamphaeng Saenprasent, and the Venerable Thitathammo Khampet Vandvivong. The plaintiff, as the Public Officer of the Wat, constituted one of the five lay Office bearers. From about 2005 it is alleged in these proceedings that the Wat failed to lodge its annual reports with the Department of Fair Trading.
- 39 On 23 December 2007 some adjustments were made as to the appointments of the Wat’s officebearers. But the first and second defendant and the plaintiff maintained their respective positions within the association. From 23 December 2007 through to December 2011, no changes were made to the Management Committee of the Wat. But it is contended in these proceedings that no annual general meetings of the Wat were convened during this period.
- 40 The evidence before the Court on the Motion suggests that up until 2007 the plaintiff informally maintained and kept lists of members of the Wat. In 2007 the then Management Committee resolved that a formal register of members should be maintained and anyone wishing to be a member should complete and lodge a

prescribed membership application form. Following that resolution, the plaintiff maintained a formal register of members during the period from November 2007 until June 2012.

41 The plaintiff submitted on the hearing of this motion that in 2008 only 5 persons applied to be members, and there were no applications for membership from 2009 until May 2012.

42 With this background the two main questions can now be considered.

Question 1: Should any Final Relief be Granted Now?

43 The plaintiff and the first defendant, the only active parties in these proceedings, eventually by the morning of the hearing of the motion reached the position that each was prepared to accept the invalidity of the meeting of the Wat which each had previously contended to be valid. The plaintiff no longer propounded the validity of the 27 January 2013 meeting. The first defendant no longer propounded the validity of the meetings in June 2012.

44 Although some of the main differences between the parties were thereby eliminated, that did not mean that the proceedings had settled or that there was agreement about the precise form of relief, if any, that should follow from this consensus. The plaintiff sought the making of declarations as formulated in the original Summons and the Amended Summons declaring the resolution at the June 2012 meetings invalid. The first defendant resisted this course on the grounds that declarations were not necessary: (1) as there was now no real dispute remaining between the parties; and (2) the declarations lacked utility because at this stage they could not bind the fourth defendant, which although joined as a party had not yet been served with process, and it was argued that the members of the various management committees that had purported to act in the affairs of the Wat since mid-2012 would still need to be joined as defendants. As the fourth defendant has not been served in the proceedings neither party contended that it would be bound by any declarations that might now be made.

45 The plaintiff contends that there is a dispute that now justifies the making of declarations. Based on Black J's observations in *Khan v Khan; Re Islamic Association Western Suburbs of Sydney Inc* [2015] NSWSC 638 at [82], Ms Young submits for the plaintiff that s 1322(2) of the *Corporations Act* 2001 (Cth) creates a statutory presumption of the validity of the June 2012 meetings, and that if declarations invalidating the resolutions of the June 2012 Meetings are not made they are presumed by statute to remain valid and in force.

46 The first defendant submits that *Corporations Act*, s 1322 does not have the automatic validating effect for which the plaintiff contends and that it has no operative effect where there is no longer any dispute. And the first defendant submits that the present consensus between the parties about the invalidity of resolutions at both sets of meetings means there is no existing dispute which would attract the Court's jurisdiction

to grant declaratory relief; especially as no relief consequent upon the declaration is immediately sought: P W Young, *Declaratory Orders* (2nd ed 1984, Butterworths), at [707].

- 47 The Court does not need to decide the s 1322 issue. The plaintiff has changed positions a number of times on the question whether he should concede the invalidity of the resolutions passed at the January 2013 meeting. Even up until just before the hearing of the Motion he was formally seeking leave to withdraw his April 2015 concessions about that issue. On this history it seems there is sufficient instability in the present apparent consensus between these parties that the making of the declarations is warranted; the declarations will prevent further destabilising changes of position about the validity of these meetings.
- 48 The first defendant also disputes that declarations should be made which purport to affect the fourth defendant, who has not been served with proceedings and that to be fully effectively any declarations should only be made after all members of the competing management committees have been joined as parties. The plaintiff submits in reply that declaratory relief can be granted irrespective of the joinder of persons who may have been members of the Management Committee of the first defendant since January 2012. The plaintiff also points out that on 13 March 2015 by agreement and pursuant to orders of Stevenson J on 20 February 2015 the plaintiff and the first defendant notified all persons who may have been a member of either Management Committee.
- 49 In my view there is utility in making declarations both on the Summons and on the Cross Summons, even if at this stage the declarations only bind the two active parties, the plaintiff and the first defendant: see *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1; [2010] HCA 19 at [131] and [132]. The making of declarations binding these two parties will almost certainly quell the main dispute between the principal protagonists within the Wat. In the course of this Motion the Court has examined sufficient evidence to reach the conclusion that if the principal protagonists to these proceedings are bound by these declarations that other persons associated with the Wat are less likely to pursue further disputes without the leadership of the plaintiff and the first defendant. Thus, it seems to me that there is real utility in making the declarations even between the plaintiff and the first defendant. And it is still open to the parties to seek to extend the binding effect of the declarations to the fourth defendant in the future should that be seem to be a desirable course.
- 50 There is sufficient evidence before the Court of irregularities in the procedure associated with the June 2012 meetings and the January 2013 meeting to make the declaration. The starting point of the logic is that the Wat's 1988 Constitution, clause 17 requires "the general nature of the business to be transacted at the meeting" to be given in advance of both Management Committee and General Meetings of the Wat. For example, it is said that on 10 June 2012 a 70th birthday party was held for the first defendant in the Wat's grounds in Wedderburn. The plaintiff received an invitation to

this event but he did not attend. The invitation did not contain any notice that a General Meeting of the Wat was to be held at this social gathering. But on this date the first and second defendants apparently purported to convene a General Meeting, at which the decision to dismiss the plaintiff as, among other things, Public Officer of the Wat, and dismiss the Management Committee was ratified by the members of the Wat present. A Mr Vongchanh Chanthavong was elected as Public Officer in the plaintiff's stead. The plaintiff's evidence was that a vast majority of persons present were not financial members and could therefore not validly vote on any resolutions put before them.

51 Equally there are procedural difficulties with the 27 January 2013 Meeting. On that date the Management Committee that had been ousted at the 10 June 2012 Meeting convened a Special General Meeting at the Glen Alpine Community Centre, NSW. The first and second defendants did not attend this meeting. There is evidence that they were given insufficient notice of the business that was to be transacted at this meeting and there are doubts as to the plaintiff's authority to convene this meeting under the 1988 Constitution.

The Declarations on the Cross Summons

52 The plaintiff at first contested the first defendant's contention that the 27 January 2015 meeting was invalid. It later withdrew its opposition and conceded the invalidity of the resolutions at that meeting. By Motion it sought to withdraw that concession but ultimately abandoned that attempted withdrawal in the written submissions filed before this matter came on for hearing. The Court can also act on that admission. As earlier indicated given the changeable nature of the plaintiff's position on this issue, it is highly desirable that declarations be made binding at least the plaintiff and the first defendant to what is now a consensus about the invalidity of that meeting.

Question 2: Should Leave be Granted to make the Amendments?

Exercising the Discretion to Grant leave to Amend

53 The amendments raise a number of matters. The first issue is whether the Court should entertain an application to amend in these circumstances.

54 The defendant argues that the Court should not exercise its discretion to allow these amendments in part because they are obviously futile but also because there is a clear explanation for the delay in making the amendments: *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 at [12] and [103].

55 But in my view, the amendments sought, with one exception discussed below, are not obviously futile. Moreover, a proper appreciation of the circumstances of this application for amendment shows: it has come fairly soon (six months) after a change of solicitors; it stands in the midst of a number of other procedural steps; and, it is being applied for well before any final hearing of the proceedings. This is not a last-minute amendment prior to an imminent trial. It will not result in an adjournment of a final hearing.

Moreover, the issues raised appear to be genuine issues, supported by at least some evidence and which if not resolved in these proceedings may arguably have to be resolved in future proceedings. The overriding objective of 'just, quick and cheap' resolution of the real questions in dispute suggest the amendments should be allowed: *Civil Procedure Act 2005 (NSW)*, s 56.

The Claim for False and Misleading Representations

56 Paragraphs 11, 12, 12A and 12B of the plaintiff's proposed Amended Statement of Claim are as follows:

"The false and misleading representations

11. On or about 10 June 2012, the first defendant represented, at a special general meeting of the fourth defendant, that:

A. The plaintiff was the Secretary and Treasurer of the fourth defendant, and

B. The plaintiff had resigned from his positions as Public Officer, Secretary and Treasurer of the fourth defendant. (collectively referred to as "the representations")

12. The representations were false and misleading

Particulars

A. The plaintiff was not, as at 10 June 2012, the Secretary or Treasurer of the fourth defendant.

B. The plaintiff had not resigned as Public Officer, the Secretary or the Treasurer of the fourth defendant.

12A. Those present at the special general meeting:

A. Relied upon the representations:

B. Discussed the role and performance of the plaintiff within the fourth defendant in light of the representations;

C. Decided that the plaintiff should resign from his various positions within the fourth defendant or, alternatively, that he should be dismissed from those positions.

12B. The discussion by those present at the special general meeting of the plaintiff's role and performance, and the ensuing decision made by those present caused considerable embarrassment, hurt, distress and anxiety to the plaintiff and the plaintiff claims damages against the first defendant."

57 The first defendant submits that these paragraphs do not plead a cause of action. The plaintiff disavows any claim in defamation through this pleading. It does not plead any imputations in conformity with the rules. Nor is it obvious what other cause of action is intended. The pleading claims "hurt, distress and anxiety" to the plaintiff, for which the plaintiff claims damages. The plaintiff explains this is arguable on the basis of a breach of the statutory contract between shareholders and is sustainable on that basis: *Goodwin v Vietnam Veterans Motor Cycle Club Australia NSW Chapter Incorporated* (2008) 72 NSWLR 224; [2008] NSWSC 154 at [32] – [36] and the *1984 Act*, s 11(2).

58 But there are two problems with this. First, the representations are not pleaded as a breach of a statutory contract. Secondly, even if some kind of breach of statutory contract were relied upon, in order for damages for hurt, distress and anxiety to be claimed as a result of breach of contract, damages will ordinarily only be recoverable in

a limited number of circumstances, none of which appears to be pleaded or obviously relied upon here. The first is whether the breach of contract caused personal injury to the plaintiff: *Godly v Perry Burton & Sons (Bermondsey) Ltd* [1961] All ER 36; [1961] WLR 9 at 13. The second is whether the plaintiff has suffered actual physical discomfort and inconvenience and the mental suffering is directly related to that inconvenience: *Watts v Morrow* [1991] All ER 937; [1991] 1 WLR 1421 and *Fawzi El-Saiedy v NSW Land and Housing Corporation* (2011) NSWSC 820. The third is that such damages are recoverable when an object of the contract is the provision of pleasure and enjoyment, or freedom from mental distress: *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; [1993] HCA 4.

59 Were the amendments contemplated in paragraphs 11, 12, 12A and 12B to be allowed they would immediately be struck out as an embarrassing in form. For that reason the amendments should not be permitted.

The Alleged Misappropriation of the Wat's Funds on 4 June 2012

60 On 4 June 2012 the plaintiff alleges that the first defendant allegedly wrongfully withdrew for his own personal use and benefit the sum of \$4,270 from the Wat's bank account with Westpac Banking Corporation.

61 The plaintiff has alleged that some of those funds and possibly other monies of the Wat were used to pay the first defendant's legal costs in these proceedings. The first defendant through his legal representatives strongly contests these allegations. His evidence is that his defence of the proceedings is being funded by the donations of his supporters.

62 Whatever be the true factual situation it is a matter which is available to be contested at the suit of the plaintiff on behalf of the association, on principles analogous to those discussed by Darke J in *Eastmark Holdings Pty Ltd v Kabraji* [2013] NSWSC 1763; (2013) 97 ACSR 161. Although the monies claimed are relatively minor, the disputes about the payment of legal fees may be larger than these sums.

Other Relief

63 It is unlikely the plaintiff will now seek any relief in respect of the 1996 Constitution on which neither party now seeks to rely. The other relief sought seems in my view appears to be available and not obviously futile. The plaintiff says that the winding up order which is sought is only sought in the alternative to the principle relief that he seeks. In those circumstances it is not an inappropriate addition to the Summons. None of the other objections to the relief claimed appear to me to have substance.

Costs and Other Directions

64 Counsel for both parties indicated that once the Court had made a decision about whether or not declarations would be made the parties wanted an opportunity to take stock about a number of issues: (1) whether the questions being asked of the referee,

Mr McDermott, should be varied; (2) whether it may not even now be possible to resolve the remaining disputes in the proceedings; and (3) if complete resolution is not possible, some agreement may be able to be reached in relation to the future course of the proceedings.

65 These proceedings were commenced almost 3 years ago. They should either be brought on for hearing or resolved.

66 Unsuccessful attempts that the resolution of these proceedings have already taken place. Nevertheless the Court may still be prepared to order a Court annexed mediation before any further steps are taken in the proceedings, including the joinder of other parties, in light of the declarations that have now been made.

67 On the issue of costs, both sides have had a measure of success in the argument before the Court on 26 February and in their supplementary 1 March submissions. The costs orders which in the circumstances suggest themselves in this case are: (1) order that the plaintiff pays any costs thrown away by reason of the amendment of the pleadings ordered today; and (2) otherwise the costs of this Motion shall be each party's costs in the proceedings. Of course parties are free to contend for a different costs order but they will be at risk as to costs, if they fail to achieve a costs order more favourable than that which is set out in this paragraph.

Conclusion and Orders

68 For the reasons given, the Court will in substance make the declarations on the Summons in relation to the June 2012 meetings but in the form proposed by the first defendant. And the Court will in substance make the declarations sought on the Cross Summons in relation to the 27 January 2013 meeting. The Court will allow each of the amendments which the plaintiff seeks on his motion, except for the claim for misleading conduct. The Court has indicated a possible costs outcome on the plaintiff's Motion but will hear further from the parties in relation to costs if required. The Court has given other directions to the parties to plan the future conduct of these proceedings.

69 The Court orders:

1. The Court declares on the Summons, as against the first defendant, that the resolutions passed by the monastic members of the Wat Buddhalavarn Incorporated on 2 June 2012, insofar as they concerned the plaintiff, were invalid and of no legal force or effect.
2. The Court declares on the Summons, as against the first defendant, that the resolutions passed at the purported special general meeting of the fourth defendant held on 10 June 2012 were invalid and of no legal force or effect.
3. The Court declares on the Summons, as against the first defendant, that the appointment by the first defendant of a management committee of the Wat Buddhalavarn Incorporated on 16 June 2012 was invalid and of no legal force or effect.
4. The Court declares as against the cross-defendant that the purported special general meeting of Wat Buddhaiavarn Inc held at Glen Alpine Community Centre on 27 January 2013 was improperly convened and that the resolutions passed at that meeting are invalid and of no legal force and effect.

5. The Court declares on the Cross Summons as against the cross-defendant that the appointment of the officers and the Management Committee at the purported special general meeting of the Wat Buddhaiavarn Inc held at Glen Alpine Community Centre on 27 January 2013 was invalid and of no legal force and effect.
6. Grant leave to the plaintiff to amend his Statement of Claim by making amendments substantially in the form of the draft amendments provided for in Annexure "A" to the affidavit of Barrie Goldsmith sworn on 19 November 2015, except for the amendments in paragraphs 11, 12, 12A and 12B that are set out in the said Annexure "A" under the heading "The False and Misleading Representations".
7. Direct the parties to consult with a view to reaching consensus on future orders and directions to allow Mr McDermott, the referee to complete his work on the reference and otherwise to bring these proceedings to final hearing, and to provide agreed orders and directions or their respective competing orders and directions to my Associate by 4.00pm on Thursday, 14 April 2016.
8. If the parties cannot reach agreement about costs by 1 April 2016 then they are directed to file with my Associate and exchange submissions as to costs by 4.00pm on Monday, 18 April 2016.
9. List the proceedings for argument on any outstanding issues at 9.30am on Tuesday, 19 April 2016.
10. Grant liberty to apply.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 22 March 2016