

# Charles Fice Solicitors (a firm) v XL Brockbank Ltd

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## CHARLES FICE SOLICITORS (a firm) v XL BROCKBANK LTD (Managing Agent of Syndicate 861 of Lloyd's of London and Syndicate 1209 of Lloyd's of London) BC200201108

Unreported Judgments Vic · 21 Paragraphs

SUPREME COURT OF VICTORIA COMMERCIAL AND EQUITY DIVISION

HABERSBERGER J

2092 of 2001

15 March 2002, 22 March 2002

Charles Fice & Anor v XL Brockbank Ltd & Ors [2002] VSC 77

### Headnotes

**Discovery — r29.08 — Categories of documents in dispute — Employee's authority denied — Relevance of documents containing reason for termination of employee's employment — Documents containing complaints about employee's conduct in other matters not relevant — Similar fact evidence.**

Charles Fice Solicitors (a firm) and Expense Insurance Pty Ltd (liquidators) (Plaintiffs)

XL Brockbank Ltd (the Managing Agent of Syndicate 861 of Lloyd's of London and Syndicate 1209 of Lloyd's of London), Dornoch Ltd (the Nominated Representative of Syndicate 861 of Lloyd's of London and Syndicate 1209 of Lloyd's of London) and Coss (Defendants)

### Habersberger J

[1] This is an application by the plaintiffs for further and better discovery by the defendants. They seek an order, pursuant to r29.08 of Ch 1 of the Supreme Court (General Civil Procedure) Rules 1996, that the defendants make and serve an affidavit of documents responding to 26 different categories of documents identified by the plaintiffs.

[2] As set out in the affidavit of Christopher Anthony Charles sworn 12 March 2002 in support of this application, the claims in this proceeding are for damages for breach of contract and for misleading or deceptive conduct under the Trade Practices Act 1974 (Cth) and/or the Fair Trading Act 1999. It is said that the plaintiffs negotiated almost exclusively with the third defendant, Justin Coss, who was a Lloyd's underwriter employed by the first defendant, XL Brockbank Ltd ("XLB"), which acted as the managing agent for Syndicates 861 and 1209 of Lloyd's of London, to engage XLB to use the second plaintiff's product to provide litigation funding for insolvency practitioners in Australia, in place of GIO Insurance Ltd. The first plaintiff, a firm of solicitors, was to administer the product for XLB. The plaintiffs contend that a final and binding agreement ("the Agency Agreement") was reached between the parties on or about 15 March 2001, after approximately five months of negotiations, and that both parties commenced acting under the Agency Agreement. It is further alleged that in or about September 2001 XLB repudiated the Agency Agreement, which repudiation was accepted by the plaintiffs on 11 September 2001.

[3] Mr Wheelahan of counsel, who appeared for the defendants, informed me that the defendants did not accept that their discovery was deficient. However, he said that the defendants accepted that many of the 26 categories of

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documents were relevant and that in order to short circuit a tedious fight about discovery, the defendants were prepared to provide a list of documents stating what documents they had which fell within the relevant categories. Mr Wheelahan stated that the defendants expected that most of the documents identified would have already been discovered. Mr Wheelahan did not oppose the suggestion by the plaintiffs that at this stage of the proceeding an affidavit of documents would be more appropriate than a list.

**[4]** Subject to some minor amendments with respect to the wording of some of the categories of documents, which Mr Crutchfield of counsel, who appeared for the plaintiffs, accepted, Mr Wheelahan stated that there was no dispute about 19 of the 26 categories of documents. A further two categories were opposed only because the defendants indicated that they would be seeking to amend their Defence by deleting reliance on the events in New York on 11 September 2001. Mr Wheelahan proffered two substitute categories which were limited to match the proposed amended pleading. Mr Crutchfield was content to adopt those two substitute categories.

**[5]** Thus, there were in fact only five categories of documents in dispute. The first of these was category (g) in Mr Charles' affidavit which, after amendment by the plaintiffs, read as follows:

"XLB's personnel file on Coss in so far as it relates to the suspension of Coss' underwriting duties or the termination [of] Coss' employment with XLB."

In his affidavit in support of the application, Mr Charles deposed that he had been told that, in about August or September 2001, Mr Coss had been relieved of his underwriting duties and suspended and that his employment with XLB had subsequently been terminated. It was suggested that this was a consequence of Mr Coss' unsatisfactory performance in this matter and other insurance matters.

**[6]** In support of this category of documents, Mr Crutchfield referred me to para38 and para56 of the Amended Statement of Claim, in which it is alleged that XLB, alternatively Mr Coss, represented to the plaintiffs that Mr Coss was authorised:

- (a) to enter into the Negotiations on behalf of XLB,
- (b) to conclude and enter into the Agency Agreement on behalf of XLB, and
- (c) to bind XLB to the Agency Agreement.

These allegations have been denied by the defendants. Mr Crutchfield submitted that it was "centrally relevant" to know whether or not XLB did authorise Mr Coss to bind XLB to the Agency Agreement. He submitted that the reason for Mr Coss' dismissal (whether it was because he went outside what XLB regarded as his authority or whether it was because of some other default), was directly relevant to that issue in the proceeding. Secondly, Mr Crutchfield submitted that if Mr Coss was dismissed because he went outside his authority on other occasions, in relation to similar matters, this was also relevant to the issue of whether Mr Coss did act outside his authority in relation to the plaintiffs' contract.

**[7]** Mr Wheelahan pointed to the way in which the defendants had dealt with this issue in their Defence. First, he referred me to para6(c) of the Amended Statement of Claim which pleaded that at all relevant times Mr Coss had actual, alternatively apparent, authority of XLB:

- (a) to enter into the Negotiations referred to in para13 of the Amended Statement of Claim ("the Negotiations"),
- (b) to enter into the Agency Agreement referred to in para14 of the Amended Statement of Claim ("the Agency Agreement") and to bind XLB to the Agency Agreement, and
- (c) to make the Representations referred to in para24 of the Amended Statement of Claim ("the Representations").

In para6 of the Defence, the defendants have denied the Negotiations, the Agency Agreement and the Representations referred to in para6(c) of the Amended Statement of Claim, and have otherwise not admitted any of the allegations therein. However, the defendants continue in para6(d) of their Defence as follows:

"They say further that at all relevant times, Coss was authorised to -

- (i) negotiate with the plaintiffs and their broker the terms of the proposed litigation expense insurance scheme;

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- (ii) negotiate the terms of a slip with the plaintiffs and their broker; and
- (iii) sign a slip on behalf of XLB."

In response to para38 and para56 of the Amended Statement of Claim, the defendants, in para47 and para65 of the Defence, have denied the Negotiations and the Agency Agreement and otherwise denied each and every allegation in the relevant paragraph.

**[8]** Mr Wheelahan submitted that this issue only arose because the defendants did not accept the plaintiffs' definition of the Negotiations and the Agency Agreement. Relying on para6(d) of the Defence, he submitted that the issue with respect to Mr Coss' authority had been confined to the question of Mr Coss' authority to enter into the Negotiations and the Agency Agreement. Moreover, he submitted that to the extent that there remained any dispute between the parties about Mr Coss' authority, any documents relevant to that issue would be picked up by category (i), which was concerned with documents relating to Mr Coss' authority to act on behalf of XLB in dealing with the plaintiffs, and was not one of the categories in dispute. Mr Wheelahan also submitted that the fact that in other matters Mr Coss may have engaged in conduct of which XLB disapproved was not probative of any issue in dispute in this proceeding. On the question of similar fact evidence in civil cases, he relied on the decision of Northrop J in *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd*<sup>1</sup>.

**[9]** It is clear that one of the important issues in this proceeding is whether Mr Coss was authorised by XLB to enter into the Negotiations and the Agency Agreement. It seems to me that it is relevant to that issue to know whether or not the reason or reasons given by XLB for its termination of Mr Coss' employment was because XLB had formed the view that Mr Coss had exceeded his authority in his dealings with the plaintiffs. If, for example, Mr Coss' employment was terminated because XLB said he had exceeded his authority in entering into the Negotiations and entering into the Agency Agreement and binding XLB to the Agency agreement, this would be relevant to some extent to that issue in the proceeding. On the other hand, if Mr Coss' employment was terminated for reasons totally unrelated to any alleged exceeding of his authority in negotiating insurance contracts, either generally or with the plaintiffs, this would be information which might assist the plaintiffs' case or damage part of the defendants' case. Either way, it seems to me that any document in Mr Coss' personnel file relating to XLB's reason or reasons for suspending his underwriting duties and/or terminating his employment is discoverable. Viewed in this way, it can be seen that the suggestion that any relevant document would also be picked up by category (i) is not necessarily correct, because the suspension and/or termination may have been brought about for reasons totally unrelated to issues of Mr Coss' authority to act on behalf of XLB.

**[10]** The wording of the category which I propose to order is narrower than the amended version sought by the plaintiffs. The defendants were correct, in my opinion, in objecting to discovering all documents relating to the suspension and/or termination of Mr Coss' employment with XLB. Documents disclosing the amount paid to Mr Coss on termination, for example, would not be relevant to any issue in this proceeding. Further, by narrowing the category in the way I propose, it becomes unnecessary to deal with the submissions by the parties relating to the similar fact evidence point (whether or not Mr Coss exceeded his authority in negotiating the terms of other insurance policies). If a document in Mr Coss' personnel file discloses or relates to XLB's reason or reasons for suspending his underwriting duties and/or terminating his employment (whatever those reasons might be), it is discoverable. Otherwise, it is not.

**[11]** The second category of documents in dispute was as follows:

"(h) documents passing between XLB and Lloyd's of London regarding the termination of Coss' employment with XLB."

Mr Crutchfield submitted that this category of documents was relevant for the same reasons as category (g). Mr Wheelahan disputed this, but his main point was that there was no evidentiary basis for the Court to order, under r29.08, that the defendants respond by affidavit to this category of documents. There was nothing in the affidavit of Mr Charles nor in the nature or circumstances of the case nor in any document filed in the proceeding to suggest that there had been documents passing between XLB and Lloyd's of London regarding the termination of Mr Coss' employment with XLB and therefore no reason to believe that the defendants' discovery was deficient in this respect. In my opinion, this submission is correct and there will be no order for discovery in respect of this category.

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**[12]** The third category of documents in dispute was category (j) in Mr Charles' affidavit which, after amendment, read as follows:

"Documents relating to the authority of XLB to act on behalf of Syndicates 861 and 1209 of Lloyd's of London in:

- (i) negotiating or contracting with the plaintiffs; or
- (ii) making representations to the plaintiffs,

in relation to LEI."

The agreed definition of "LEI" was "a proposed liquidator's expense insurance scheme to be administered by the plaintiffs."

**[13]** Mr Crutchfield submitted that this category of documents was relevant because there was still an issue remaining with respect to the authority of XLB to act on behalf of the Syndicates. In para3 of the Amended Statement of Claim it has been pleaded that XLB:

"(b) is and at all relevant times was the managing agent of Syndicate 861 at Lloyd's of London acting for and on behalf of each of the underwriting members of Lloyd's of London comprising Syndicate 861 as constituted for the 2000 Year of Account and the 2001 Year of Account;

(c) is and at all relevant times was the managing agent of Syndicate 1209 at Lloyd's of London acting for and on behalf of each of the underwriting members of Lloyd's of London comprising Syndicate 1209 as constituted for the 2000 Year of Account and the 2001 Year of Account; and

(d) as the managing agent of Syndicate 861 and Syndicate 1209 at Lloyd's of London (collectively known as the 'Underwriters'), at all relevant times had actual, or, alternatively, apparent, authority of the Underwriters to:

- (i) enter into the Negotiations referred to in para13 below;
- (ii) enter into the Agency Agreement referred to in para14 below and bind them to the Agency Agreement; and
- (iii) make the Representations referred to in para24 below."

**[14]** In para3 of their Defence, the defendants had admitted para3(b) and para3(c) of the Amended Statement of Claim but had denied "the Negotiations, the Agency Agreement and the Representations referred to in subpara(d)" of para3 of the Amended Statement of Claim and had "otherwise" not admitted any of the allegations therein. Mr Wheelahan submitted that the difficulty was brought about by the way in which the Amended Statement of Claim had been pleaded by using definitions. He argued that the plaintiffs either instead of, or in addition to, pleading the authority to enter into the Negotiations and the Agency Agreement should have pleaded the authority point in more general terms.

**[15]** However that may be, in my opinion, on the current state of the pleadings there remains an issue in dispute between the parties as to the authority of XLB to act on behalf of Syndicates 861 and 1209 of Lloyd's of London and this category of documents is relevant to that issue. Unless and until the pleadings have been amended to remove any suggestion that there is such an issue in dispute, discovery of documents going to that issue is required. Therefore, in my opinion, it is appropriate to include category (j) in the proposed order.

**[16]** The next category of documents in dispute read as follows:

"(u) The letter from Miller Insurance Group to XLB which includes a Schedule detailing a number of insurance matters involving Coss and the Miller Insurance Group (including LEI), dated in August or September 2001."

Mr Charles said in his affidavit that he had been informed that the Miller Insurance Group sent a letter to XLB in about August/September 2001 to complain about Mr Coss' conduct in relation to LEI and various other insurance matters in which the Miller Insurance Group had allegedly had unsatisfactory dealings with Mr Coss. Mr Charles said that when he was in London in December 2001 he very briefly sighted a copy of that letter but that it had not been discovered by the defendants, despite his request. In the Amended Statement of Claim it is alleged that the

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Miller Insurance Group were involved in the Negotiations and the making of the Agency Agreement, although I was informed that their exact role was a matter of some dispute between the parties.

**[17]** In my opinion, if this letter deals with LEI then it is clearly discoverable because it may provide a train of inquiry or information which might assist the plaintiffs' case or damage the defendants' case. It is not to the point that it might deal with other matters apart from LEI.

**[18]** However, in my opinion, the letter must contain some reference to LEI for it to be discoverable. Mr Crutchfield submitted that these other insurance matters were relevant because if Mr Coss had exceeded his authority in one or more of these other matters then that would be relevant to the issue of whether or not Mr Coss had the authority to deal with the plaintiffs in this transaction. Mr Wheelahan submitted that what Mr Coss did in other insurance matters was not logically probative of the issue of his authority in this case.<sup>2</sup> I consider that Mr Wheelahan's submission is correct. Further, I note that there is no evidence that the complaints by the Miller Insurance Group about Mr Coss' conduct in other matters related to Mr Coss exceeding his authority. Accordingly, I propose that the wording of this category be slightly changed, to make it clear that the obligation to discover this letter depends on there being some reference to LEI in it, as follows:

"The letter from Miller Insurance Group to XLB, dated in August or September 2001, which includes a Schedule detailing a number of insurance matters involving Coss and the Miller Insurance Group, so long as the letter contains reference to LEI."

**[19]** The final category of documents in dispute was as follows:

"(u) XLB's files relating to each of the insurance matters (other than LEI) referred to in the letter in preceding subpara(u)".

For the reasons given in the preceding paragraph, I consider that the plaintiffs have not established that these files are discoverable.

**[20]** The Schedule to the order requiring the defendants to make an affidavit of discovery will therefore be as follows:

"

## **SCHEDULE**

(a) Documents from the third defendant ('Coss') to a person or persons at the first defendant ('XLB') enclosing or referring to the report that is document 717 in Schedule 1 Pt1 of the defendants' Amended List of Documents.

(b) Documents from a person or persons at XLB to Coss commenting on the report that is document 717.

(c) Files or documents kept by any of the following relating to a proposed liquidators expense insurance scheme to be administered by the plaintiffs ('LEI') for the period 1 October 2000 to 12 March 2002:

- (i) David James;
- (ii) Helen Bradley;
- (iii) Richard Whitfield;
- (iv) Melanie Breakell;
- (v) James Weatherstone;
- (vi) Dawn Murtagh;
- (vii) Paul Giordano;
- (viii) Rhic Webb;
- (ix) Mark Smith;
- (x) Bob Goold;
- (xi) Simon Rich;
- (xii) Nick Metcalfe.

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- (d) Document 1 of Schedule 1 Pt1 of the defendants' Amended List of Documents with original annotations.
- (e) Documents relating to the defendants' consideration or evaluation of whether LEI constituted a financial guarantee.
- (f) Documents sent by a person or persons at XLB to any other persons at XLB, regarding LEI, from 15 August 2000 to 12 March 2002.
- (g) XLB's personnel file on Coss in so far as it relates to XLB's reason or reasons for suspending his underwriting duties and/or terminating his employment with XLB.
- (h) Documents relating to Coss' authority to act on behalf of XLB in:
  - (i) negotiating or contracting with the plaintiffs; or
  - (ii) making representations to the plaintiffs,in relation to LEI.
- (i) Documents relating to the authority of XLB to act on behalf of Syndicates 861 and 1209 of Lloyd's of London in:
  - (i) negotiating or contracting with the plaintiffs; or
  - (ii) making representations to the plaintiffs,in relation to LEI.
- (j) Notes of meetings between any of the persons mentioned in (c) above relating to liquidators expense insurance.
- (k) The originals of the documents listed in Schedule 1 Pt1 of the defendants' Amended List of Documents as copies where, according to the description of the documents, the documents were addressed to Coss, XLB or one of the persons mentioned in (c) above.
- (l) Documents comprising any legal analysis of LEI conducted by XLB or Coss during the period 1 October 2000 to 31 August 2001.
- (m) Documents comprising any actuarial analysis of LEI conducted by XLB during the period 1 October 2000 to 31 August 2001.
- (n) Documents comprising any insurance analysis of LEI conducted by the first defendant during the period 1 October 2000 to 31 August 2001.
- (o) Documents recording the comments of XLB's legal department referred to in document 518 of Schedule 1 Pt1 of the defendants' Amended List of Documents.
- (p) Correspondence between Coss or XLB on the one hand and Pamela Madafiglio on the other, relating to LEI from 1 October 2000 to 31 August 2001.
- (q) The first seventeen pages of the facsimile of which document 571 of Schedule 1 Pt1 of the defendants' Amended List of Documents forms a part.
- (r) The entire facsimile of which documents 586 and 587 of Schedule 1 Pt1 of the defendants' Amended List of Documents form a part.
- (s) File notes relating to the meetings, and documents circulated between Rhic Webb, Nick Metcalfe and/or Coss in relation to the matters referred to in document 954 of Schedule 1 Pt1 of the defendants' Amended List of Documents.

- (t) The letter from Miller Insurance Group to XLB dated in August or September 2001, which includes a Schedule detailing a number of insurance matters involving Coss and the Miller Insurance Group so long as the letter contains reference to LEI.
- (u) Notes of meetings and telephone conversations between XLB and Paula Singleton of Lloyd's of London during August and September 2001 regarding LEI and financial guarantees.
- (v) Notes of meetings and telephone conversations between representatives of XLB and the Miller Insurance Group in August and September 2001 regarding LEI and financial guarantees.
- (w) Documents relating to the decision by XLB to discontinue writing litigation expense insurance.
- (x) Documents regarding the termination by XLB of policies, contracts or negotiations as a consequence of the decision by XLB to discontinue writing litigation expense insurance."

## Order

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[21] I will hear counsel further on the question of the time for the making of the defendants' affidavit and the appropriate order in respect of costs.

Counsel for the plaintiffs: Mr P Crutchfield

Solicitors for the plaintiffs: Charles Fice

Counsel for the defendants: Mr M Wheelahan

Solicitors for the defendans: Lander & Rogers

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**1** (1981) 36 ALR 23

**2** Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23 at 28-30