

SUPREME COURT OF QUEENSLAND

CITATION: *Palmer v Palmer & Anor* [2018] QSC 217

PARTIES: **RYAN ANDREW PALMER AS A TRUSTEE OF THE
ROSS LESLIE PALMER TESTAMENTARY TRUST**
(applicant)
v
**IAN LINDSAY PALMER AS A TRUSTEE OF THE
ROSS LESLIE PALMER TESTAMENTARY TRUST**
(first respondent)
**ROSS LESLIE PALMER AND IAN LINDSAY
PALMER AS EXECUTORS AND TRUSTEES OF THE
ESTATE OF LESLIE HAROLD PALMER
(DECEASED)**
(second respondents)

FILE NO: BS9305 of 2017

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 28 September 2018

DELIVERED AT: Brisbane

HEARING DATE: 11 September 2018

JUDGE: Mullins J

ORDER: **The application filed on 9 July 2018 is dismissed.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPOINTMENT,
REMOVAL AND ESTATE OF TRUSTEES –
RETIREMENT AND REMOVAL – REMOVAL BY THE
COURT – GROUNDS FOR REMOVAL – where a
beneficiary of a discretionary testamentary trust applies to be
substituted as one of the co-trustees of the trust – where the
co-trustees are currently the beneficiary’s son and brother –
where the beneficiary’s brother proposes to resign as trustee,
when the other co-trustee relocates to Australia – where most
of the adult beneficiaries do not support the application –
where the beneficiary’s son has concerns over the ability of
his father to cooperate with him if they were co-trustees –
where communication difficulties exist between the father
and the son – whether it is expedient and in the interests of
the beneficiaries to order the substitution of trustee

EQUITY – TRUSTS – DISCRETIONARY TRUST –
REMOVAL OF APPOINTOR – where the beneficiary of a
discretionary testamentary trust seeks to remove and
substitute the appointor given power under the deceased’s

will to appoint and remove trustees of the three testamentary trust established under the will – where the beneficiary seeking his removal is the only beneficiary under any of the testamentary trusts who seeks to alter the role of the appointor – whether the court has the power to remove the appointor – whether the appointor should be removed as the appointor

Trusts Act 1973 (Qld), s 80

Hancock v Rinehart [2015] NSWSC 646, considered
Jenkins v Ellett [2007] QSC 154, followed
Mercanti v Mercanti (2016) 50 WAR 495; [2016] WASCA 206, considered
Miller v Cameron (1936) 54 CLR 572; [1936] HCA 13, considered
Porteous v Rinehart (1998) 19 WAR 495; [1998] WASC 270, considered
Tempest v Lord Camoys (1882) 21 Ch D 571, cited

COUNSEL: S J Lee for the applicant
W A Hickey (*sol*) for the first respondent and one of the second respondents
Mr Ross Leslie Palmer (the other second respondent) in person

SOLICITORS: Holding Redlich for the applicant
HWL Ebsworth Lawyers for the first respondent and one of the second respondents

- [1] Mr Ross Leslie Palmer who is one of the second respondents in this proceeding filed an application on 9 July 2018 seeking to remove his brother Mr Ian Lindsay Palmer (who is the first respondent and the other second respondent) as trustee of the Ross Leslie Palmer’s Testamentary Trust (RLPT Trust) and that he be appointed as trustee in lieu of his brother.
- [2] Mr Ross Palmer also seeks to substitute De Groot Nominees Pty Ltd for Mr Yusuf Hussein as the appointor who removes any trustee and appoints new trustees in respect of the testamentary trusts established under the will dated 31 August 2001 of the late Leslie Harold Palmer who died on 27 October 2009. Mr Hussein is named as appointor in clause 9(j) of the will. The RLPT Trust is one of the testamentary trusts. Mr Ross Palmer, Mr Ian Palmer and Ms Nola Palmer are the three children of Mr Les Palmer whose wife predeceased him. Apart from the RLPT Trust, Mr Les Palmer’s will established the Ian Lindsay Palmer’s Testamentary Trust of which Mr Ian Palmer was appointed the trustee and the Nola Margaret Palmer’s Testamentary Trust of which Mr Ian Palmer was also appointed the trustee. (There was a dispute with Ms Nola Palmer over the estate that was resolved by Mr Hussein being appointed as trustee of that testamentary trust in lieu of Mr Ian Palmer, but subsequently Mr Ian Palmer was reappointed the trustee.) Mr Ross Palmer and Mr Ian Palmer were appointed as the

executors and trustees under Mr Les Palmer's will. A grant of probate of that will was made to them on 10 August 2010 and they remain the executors and trustees.

- [3] Under the terms of Mr Les Palmer's will, Mr Ross Palmer was appointed the trustee of the RLPT Trust. On 13 April 2013 Mr Ross Palmer was removed by Mr Hussein as trustee of the RLPT Trust and replaced by Mr Ian Palmer. On 19 February 2014 Mr Ross Palmer became bankrupt. On 15 February 2017 one of Mr Ross Palmer's sons, the applicant Mr Ryan Palmer, was appointed by Mr Hussein as an additional trustee of the RLPT Trust. When this proceeding was commenced, Mr Ryan Palmer and Mr Ian Palmer were the trustees of the RLPT Trust and they continue in that role. Mr Ross Palmer is not seeking in any way to affect the continuation of Mr Ryan Palmer as a trustee of the RLPT Trust.
- [4] When Mr Les Palmer signed his last will, he also signed a statement of intention addressed to Mr Hussein that expanded on Mr Les Palmer's intention in appointing Mr Hussein as the appointor with power to appoint and dismiss the trustee of each testamentary trust. Mr Les Palmer set out that he expected Mr Hussein to use the power if he considered the assets of the trust were at risk other than from the normal exercise of a trustee's powers and that any replacement trustee should be independent of all family connections and he expected a public trustee company to be the replacement trustee. The only other risk that Mr Les Palmer set out in the statement of intention that he perceived might require the use of the power was "the unlikely event that Ross or Ian is incapable of managing the affairs of the trust". The statement of intention included:
- "I do not want what I have said above to be interpreted as directing you to adopt a particularly protective approach. **Ross** and **Ian** must be trusted to look after themselves and their interests and those of their respective families. Accordingly, I would not expect an intervention by you unless the reasons were compelling."
- [5] Clause 9(j) of the will also expanded on the appointment of successors to Mr Hussein:
- "If the appointment of **Yusuf** as appointor fails then his successors shall be a principal, partner or director for the time being of Cranstoun & Hussein (or the firm or company which may succeed to its business or the larger or largest part of its business) appointed by Cranstoun & Hussein, it being my intention always to have a principal, partner or director for the time being of Cranstoun & Hussein as the appointor in lieu of **Yusuf**."
- [6] The fact that this proceeding was commenced by Mr Ryan Palmer and remained current facilitated the filing of the application by Mr Ross Palmer that was heard on 11 September 2018. The concerns that prompted Mr Ryan Palmer to commence the proceeding had, effectively, been resolved, in the sense of an agreement being reached, at least by Mr Ryan Palmer with Mr Ian Palmer, on exchange of information and documents that were relevant to the concerns raised by Mr Ryan Palmer and a means for resolving disputes that may arrive as a result of the exchange.
- [7] It is apparent from Mr Ross Palmer's affidavit and oral submissions that he has concerns about the administration of his father's estate that range far wider than the specific concerns he relies on for the purpose of the relief sought in the application filed

on 9 July 2018. He also has concerns about how this proceeding has been conducted and that he wants to fulfil his duties as an executor and trustee of his father's estate, but feels he is being denied the opportunity to do so in connection with this proceeding.

- [8] As I endeavoured to point out to Mr Ross Palmer during the hearing, his application filed on 9 July 2018 was seeking specific relief in respect of the RLPT Trust and did not give him the opportunity to pursue other issues with the administration of his father's estate. As Mr Ross Palmer's affidavit filed on 9 July 2018 in support of his application delineated the factual matters on which he based his claims for relief which was the basis of Mr Ian Palmer's response to the application, it is appropriate to focus on those matters.
- [9] As Mr Ryan Palmer presently resides in the United States, his affidavit was not sworn in time to be filed and served by 4 September 2018, in accordance with directions made to facilitate the exchange of material for the purpose of the application. A copy of Mr Ryan Palmer's unsworn affidavit in its final form was made available to Mr Ross Palmer on 5 September 2018. Mr Lee of counsel who appears for Mr Ryan Palmer submitted the application should be adjourned, so Mr Ross Palmer had an opportunity to reply to Mr Ryan Palmer's late affidavit. I pointed out to Mr Ross Palmer that, if he did not file any further affidavit, he would be limited by the material that was already filed in responding to the allegations in Mr Ryan Palmer's affidavit which would mean that most of the allegations in Mr Ryan Palmer's affidavit would be unanswered. Despite this position being made clear, Mr Ross Palmer was adamant he wanted the hearing to proceed.

RLPT Trust

- [10] The RLPT Trust is a discretionary trust established under clause 8 of the will. One-third share of the residue of Mr Les Palmer's estate is given to each of the testamentary trusts. Clause 8(a) relevantly provides:
- “As to a one-third share to be held by **Ross** as trustee (‘the trustee’) upon the terms set out in clause 9 with ‘the principal beneficiary’ referred to in that clause being **Ross** – to be collectively known as ‘Ross Leslie Palmer’s Testamentary Trust’. ...”.
- [11] The term “beneficiaries” is defined in clause 9(a)(i) of the will to mean the principal beneficiary and “any natural and/or lawfully adopted child, grandchild or other issue of the principal beneficiary”.
- [12] Apart from Mr Ross Palmer, the other beneficiaries of the RLPT Trust are Mr Ryan Palmer and his siblings Mr Darren Palmer, Mr Ben Palmer, Ms Vanessa Palmer Saleh, Ms Sara Palmer Prindable and Ms Jessica Palmer and the grandchildren who are the two children of Ms Vanessa Saleh.
- [13] A wide discretion is given to the trustee of the RLPT Trust under clause 9(b) of the will to distribute in each year until the vesting day “the whole or any part of the income and capital of the trust fund from time to time to such one or more of the beneficiaries as the trustee may select”.

[14] It is relevant to observe that, although the three children of Mr Les Palmer would be the natural beneficiaries of his generosity under the will, instead of benefiting them directly, Mr Les Palmer decided to establish three testamentary trusts named after the children in which each child is respectively designated the principal beneficiary of the testamentary trust named after that child. There is nothing in the terms that apply to each testamentary trust to suggest that the child who is designated as the principal beneficiary has any greater claim on the exercise of the relevant trustee's discretion than any of the other beneficiaries under that trust. In the case of the RLPT Trust, the designation of Mr Ross Palmer as the principal beneficiary is for the purpose of identifying, with ease, all the beneficiaries under the RLPT Trust, as the beneficiaries are identified by their relationship to the principal beneficiary. To the extent that the wishes of the beneficiaries of the RLPT Trust have any relevance on the matters raised on this application, Mr Ross Palmer is merely one of a number of beneficiaries under the RLPT Trust.

[15] It is also necessary to refer to an agreement that is evidenced between the second respondents as executors and the trustees of each of the three testamentary trusts by a letter dated 28 November 2012 sent by solicitor Ms Houlihan to each of the trustees of the testamentary trusts. Ms Houlihan had acted for Mr Ross Palmer and Mr Ian Palmer in their role as executors of the will, but had ceased acting in or about the middle of 2012, when Mr Ross Palmer raised issues regarding the management of the estate assets and the assets of the Palmer Group of companies. Then in November 2012, Ms Houlihan was consulted by Mr Ross Palmer, Mr Ian Palmer and Mr Hussein and instructed to record the agreement they had reached. Although in the course of the hearing of the application, Mr Ross Palmer denied that he entered into this agreement, Ms Houlihan exhibits to her affidavit filed on 29 September 2017 the consent signed by Mr Ross Palmer on 30 November 2012 addressed to the executors in the following terms:

“I, **ROSS LESLIE PALMER** as trustee of the Ross Leslie Palmer Testamentary Trust consent to the distribution of the Palmer Family Assets comprising the Estate of Leslie Harold Palmer Deceased and the entities associated with the Deceased in accordance with the attached Schedule of Proposed Distribution to be adjusted as to amounts and values of undistributed assets at the time of final distribution.

Further I acknowledge I have had the opportunity to obtain independent legal and financial advice as to the proposed distribution.”

Mr Ian Palmer and Mr Hussein signed identical consents in their respective capacities as trustee of the Ian Lindsay Palmer's Testamentary Trust and the Nola Margaret Palmer's Testamentary Trust.

[16] It seems that the November 2012 agreement followed on from an earlier agreement minuted by the second respondents on 11 October 2011 (as a result of a meeting at which they were present together with Mr Hussein) to record an even earlier oral agreement to distribute the assets of Mr Les Palmer, including the assets held by various trusts associated with him, equally amongst the three testamentary trusts as per an attached schedule. Mr Les Palmer had been a director of Palmer Properties Pty Ltd as trustee of the Palmer Properties Trust which is also referred to as the 12 Trusts. A

number of transactions are then listed in the minutes of 11 October 2011 as intending to be effected by the second respondents including:

- “1. The Ross Leslie Palmer Testamentary Trust will accept the forgiveness by Palmer Steel Industries Pty Ltd of the sum of \$2,500,000.00 owing by IBC in part satisfaction of the entitlement of the Ross Leslie Palmer Testamentary Trust in the deceased’s estate.
2. The Ross Leslie Palmer Testamentary Trust will accept the forgiveness by Palmer Properties Pty Ltd of the sum of \$754,334.00 owing by Intercolonial S.P.A. Pty Ltd in part satisfaction of the entitlement of the Ross Leslie Palmer Testamentary Trust in the deceased’s estate.”

[17] IBC is a shorthand reference to Intercolonial Boring Company Pty Ltd which is now known as Poolrite Pty Ltd. It is the holding company of Intercolonial S.P.A. Pty Ltd which became known as Poolrite Australia Pty Ltd.

[18] The first of those transactions is repeated in the schedule attached to the document that Mr Ross Palmer signed on 30 November 2012. A distribution of \$2.5m is shown in favour of the RLPT Trust as “Loan from PSI to IBC (forgiven)”. The second of those transactions is incorporated in the schedule attached to the document that Mr Ross Palmer signed on 30 November 2012 as “Benefit of unpaid rent owing by Poolrite to 12 Trusts (estimate \$800,000 for 2012)” for a total amount credited to RLPT Trust of \$1,554,335. It appears that Poolrite Australia Pty Ltd owed Palmer Properties Pty Ltd the sum of \$754,334 for rent for 2011 and it was anticipated that another \$800,000 was owing for rent for 2012. These are the transactions also referred to in paragraph 8(a) and (b) of Mr Ian Palmer’s affidavit filed on 29 September 2017. Mr Ross Palmer responds to these paragraphs of Mr Ian Palmer’s affidavit in paragraph 8(b)(ii) of his affidavit filed on 9 July 2018:

- “(ii) I never agreed, nor would I agree, to that matters sworn in 8(a) and 8(b) of Mr Palmer’s affidavit. Palmer Steel Industries Pty Ltd and Palmer Properties Pty Ltd are companies that are in the directorship of Mr Ian Lindsay Palmer. Forgiving debts owed to those company is not in the interests of me as a beneficiary. I deny I agreed to forgive those debts;”

[19] Mr Hussein offers an explanation in paragraph 17 of his affidavit filed on 29 September 2017 for why those two transactions were the subject of forgiveness and treated as a distribution for the amount of the forgiven debts in the schedule attached to the consent signed by Mr Ross Palmer on 30 November 2012.

[20] Despite Mr Ross Palmer’s assertion that he would never have agreed to the matters that are referred to in paragraph 8 of Mr Ian Palmer’s affidavit, his signed consent of 30 November 2012 does evidence his agreement. Mr Ross Palmer misses the point in alleging that he would never have agreed to the forgiveness of debts owed to the companies in the directorship of Mr Ian Palmer as that would not be in his interests as a beneficiary and mistakenly asserts that he denied he agreed “to forgive those debts”. Those debts were forgiven by the companies to which the debts were owed by

companies associated with Mr Ross Palmer. No doubt the question for the RLPT Trust is not whether it was in Mr Ross Palmer's interest as a beneficiary to agree to the value of the forgiveness of those debts to be credited as a distribution to the RLPT Trust, but whether it was in the interests of the beneficiaries of that trust for Mr Ross Palmer as trustee to agree to the trust being credited with the value of benefits received by companies associated with Mr Ross Palmer. This is particularly so, as at the time the consent was signed on 30 November 2012, one of those companies Poolrite Australia Pty Ltd had been in administration since 11 October 2012. The administrators were then appointed the liquidators of that company in a creditors' voluntary winding up that commenced on 26 March 2013. For the purpose of Mr Ross Palmer's application, his mere assertion (without supporting evidence) that he never entered into the agreement for which there is his written consent does not displace the objective evidence of his written consent.

Grounds relied on for removal of Mr Ian Palmer as trustee

- [21] The grounds set out in Mr Ross Palmer's affidavit filed on 9 July 2018 for seeking the removal of Mr Ian Palmer as a trustee of the RLPT Trust are:
- (a) decisions made by Mr Ian Palmer as a director of companies in which the RLPT Trust has interests are not in the interests of the beneficiaries of the RLPT Trust;
 - (b) the decision by the trustees of the RLPT Trust to reduce the weekly allowance payable to Mr Ross Palmer and to cease paying the mortgage on the property in which he was living was not a decision in Mr Ross Palmer's best interests;
 - (c) Mr Ian Palmer acts with the advice of Mr Hussein and in recent years the relationship between Mr Hussein and Mr Ian Palmer on the one hand and Mr Ross Palmer on the other has broken down to such an extent that it is impossible/impracticable and not in the interests of the beneficiaries of the RLPT Trust to have Mr Ian Palmer as trustee.

Disputed evidence

- [22] The hearing of the application was heard in a summary way with submissions being made by reference to the evidence in the affidavits relied on by the parties. No deponent was cross-examined. Mr Lee raised whether he should cross-examine Mr Ross Palmer, in order to put to him the allegations in Mr Ryan Palmer's affidavit. I indicated that I did not consider cross-examination was required, where Mr Ross Palmer declined the opportunity to answer by affidavit the allegations in the affidavits relied on by the other parties against him.
- [23] There are a number of peripheral matters in dispute, but they do not need to be decided for the purpose of the application.
- [24] One of those matters is the nature of Mr Ross Palmer's medical condition. Mr Ross Palmer accepts that he has been diagnosed with Asperger's and post traumatic stress disorder. He denies ever having been diagnosed with bipolar disorder. In fact, Mr Lee of counsel concedes that the evidence before the court does not permit a finding that Mr

Ross Palmer has bipolar disorder. Mr Ryan Palmer relies on an affidavit from psychiatrist Dr Andrew Nielsen who prepared a report providing expert opinion setting out the symptoms of Asperger's, PTSD and bipolar disorder and responding to various statements made by Mr Ross Palmer that purported to explain the nature of his condition. What is relevant is not how Mr Ross Palmer's condition is labelled, but how he conducts himself in his dealings with family members. That is dealt with in the affidavits of Mr Ross Palmer, Mr Ryan Palmer and Mr Ian Palmer. In addition, Mr Ryan Palmer's solicitor Ms Xavier has exhibited to her affidavit filed on 5 September 2018 a bundle comprising 129 pages of various emails received by her firm from Mr Ross Palmer since 27 November 2017 which are relevant to the issue of how Mr Ross Palmer deals with others.

- [25] Mr Ross Palmer exhibits to his affidavit minutes of a meeting of directors of Palmer Properties Pty Ltd and Longon Pty Ltd dated 28 June 2017 at which Mr Ian Palmer, Mr Hussein and Mr Darren Palmer were present. There is reference made in those minutes to requiring that a loan made by Longon Pty Ltd (which is a company in which the shares were distributed to the RLPT Trust and the other two testamentary trusts) to Naluky Homes Pty Ltd as trustee for \$1m to be paid within four months. Naluky Homes Pty Ltd is a company of which Mr Ian Palmer is the sole director. Mr Ross Palmer also exhibits the loan agreement made on 29 July 2016 relating to this loan of \$1m. There is no evidence about whether the loan was repaid. All Mr Ross Palmer asserts is that he has "always raised concerns regarding the loans and repayment time lines which are decisions made purely by the trustees" and uses that loan to Naluky Homes Pty Ltd as an example. The only attack on Mr Ian Palmer is in relation to a decision of directors to which he was a party made about the timing for the repayment of the loan. In oral submissions, Mr Ross Palmer claimed there was a breach of fiduciary duty and the *Corporations Act* 2001 (Cth) in making the loan, but did not develop the argument. There is not sufficient evidence put before the court by Mr Ross Palmer to raise a case to answer by Mr Ian Palmer about his conduct as a trustee of the RLPT Trust in connection with that transaction.
- [26] Mr Ross Palmer also claims that the same minutes show that his weekly allowance was to be reduced and a decision was made to cease payments by the Remlap 7 Trust for the mortgages, insurance and other expenses for the house where he was residing. No doubt that decision was of concern to Mr Ross Palmer, but the fact that he was adversely affected by it does not by itself indicate any misconduct or mismanagement by Mr Ian Palmer as a trustee of the RLPT Trust.
- [27] Mr Ross Palmer exhibits to his affidavit copies of trust documents relating to the Remlap 7 Trust that was created on 27 February 2014 which was immediately after he became bankrupt. In fact, Mr Ross Palmer is named as the primary beneficiary under that discretionary trust. The mere fact that Mr Ross Palmer states that "The creation and situation surrounding the creation of these trusts concerns me" does not reflect on the conduct of Mr Ian Palmer as a trustee of the RLPT Trust.
- [28] The concerns that Mr Ross Palmer expresses in his affidavit are largely in general terms and fall far short of putting a case before the court that could establish misconduct or mismanagement by Mr Ian Palmer in his capacity as a trustee of the RLPT Trust that could be relied on to pursue seriously a claim for removal of Mr Ian Palmer as trustee.

Concerns about the appointment of Mr Ross Palmer as trustee

- [29] Mr Ryan Palmer sets out in paragraph 28 of his affidavit sworn on 5 September 2018 a summary of his concerns, if Mr Ross Palmer were appointed as trustee of the RLPT Trust. These include:
- (a) Mr Ross Palmer's ability to act impartially towards all the beneficiaries of the RLPT Trust due to his belief that the RLPT Trust assets belong to him;
 - (b) Mr Ross Palmer's ability to act jointly with Mr Ryan Palmer, because of Mr Ross Palmer's belief that he should be the one to make the decisions;
 - (c) communication difficulties between Mr Ross Palmer and Mr Ryan Palmer;
 - (d) animosity displayed by Mr Ross Palmer towards the other beneficiaries of the RLPT Trust;
 - (e) potential for mismanagement of trust assets on the basis of the manner in which Mr Ross Palmer managed the assets of the RLPT Trust during the period he was sole trustee.
- [30] Mr Ryan Palmer's concerns are shared by his siblings Mr Darren Palmer, Mr Ben Palmer, Ms Vanessa Palmer Saleh and Ms Sara Palmer Prindable who do not support Mr Ross Palmer's application because of those concerns.

The relevant law on substitution of a trustee

- [31] Although Mr Ross Palmer's application refers to both s 80 of the *Trusts Act 1973* (Qld) (the Act) and r 645(5) of the *Uniform Civil Procedure Rules 1999* (Qld), the relief that Mr Ross Palmer is seeking in respect of Mr Ian Palmer's removal as a trustee and the appointment of himself in his place is based either on s 80 of the Act or the court's inherent jurisdiction to deal with removal and appointment of a trustee.
- [32] Section 80(1) of the Act provides:
- “The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.”
- [33] The guidelines or principles applying to the exercise of the court's discretion to remove or substitute a trustee, whether under the statutory or inherent jurisdiction of the court, are well settled: *In Re Tempest* (1866) 1 Ch App 485, 487-8; *Miller v Cameron* (1936) 54 CLR 572, 575, 579, 580-581; *Porteous v Rinehart* (1998) 19 WAR 495, 507; and *Hancock v Rinehart* [2015] NSWSC 646 at [120]-[124]. The overwhelming consideration is the interests of the beneficiaries which will be facilitated by the efficient management and implementation of the trust and ensuring the preservation of the trust property.

Should Mr Ross Palmer be substituted for Mr Ian Palmer as trustee?

- [34] There are two steps involved in Mr Ross Palmer's application. The first is whether Mr Ian Palmer should be removed as trustee and, if so, should Mr Ross Palmer be substituted for him.
- [35] Mr Ryan Palmer is currently in the process of relocating from the United States to Australia to resume residence in Australia from on or about 25 October 2018. Whilst Mr Ryan Palmer has been a resident of the United States, it has been essential to have an Australian based trustee. Mr Ryan Palmer's intended return to Australia obviates the need for Mr Ian Palmer to continue as a trustee of the RLPT Trust. Mr Ian Palmer acknowledged in his affidavit filed on 4 September 2018 that he anticipated that as Mr Ryan Palmer became familiar with the business and investments of the RLPT Trust, the time would come when it would be appropriate for Mr Ian Palmer to step away from being a trustee. In fact, Mr Hickey who is the solicitor who appeared for Mr Ian Palmer on the hearing of the application was instructed to confirm that it was the case that Mr Ian Palmer intended to resign as trustee in the not too distant future. It is obvious that if Mr Ryan Palmer proposes to pursue the matters that prompted the bringing of this proceeding in the first place that concern decisions made by Mr Ian Palmer and Mr Ross Palmer as executors of Mr Les Palmer's estate, Mr Ian Palmer should not continue as a trustee of the RLPT Trust.
- [36] In view of the necessity for an Australian based trustee until 25 October 2018, and the expressed intention of Mr Ian Palmer to resign at an appropriate time, it is not expedient to remove Mr Ian Palmer as a trustee of the RLPT Trust so close to his imminent resignation.
- [37] Mr Ryan Palmer sets out at paragraphs 79 to 83 of his affidavit his concerns about Mr Ross Palmer's consenting on 30 November 2012 to the forgiveness of the rent owing by Poolrite Australia Pty Ltd being treated as an asset already taken by the trust. Mr Ryan Palmer expresses his concern that Mr Ross Palmer consented to that benefit in his capacity as the trustee of the RLPT Trust. That is obviously a transaction that Mr Ryan Palmer presently proposes to pursue, but it will be pursued against Mr Ross Palmer in his capacity as an executor with Mr Ian Palmer of Mr Les Palmer's estate. For the same reason that Mr Ian Palmer should not continue as a trustee of the RLPT Trust, when Mr Ryan Palmer returns to Australia, it is inappropriate for Mr Ross Palmer to be appointed as a trustee to the RLPT Trust, when a transaction to which he was a party is proposed for review by Mr Ryan Palmer on behalf of the RLPT Trust.
- [38] If Mr Ryan Palmer decides not to pursue this transaction against both Mr Ross Palmer and Mr Ian Palmer as executors, of all the other concerns expressed by Mr Ryan Palmer, the one that is easiest to address is the difficulties that Mr Ryan Palmer and other family members have in communicating with Mr Ross Palmer. The content of the emails that are exhibited to Ms Xavier's affidavit and Mr Ryan Palmer's affidavit speak for themselves. They support the conclusion that Mr Ross Palmer is incapable of acting cooperatively with Mr Ryan Palmer as trustees of the RLPT Trust. Since Mr Ryan Palmer became a trustee of the RLPT Trust, he deposes to experiencing the erratic behaviour of and the difficulty in making arrangements with Mr Ross Palmer in respect of even basic matters, such as purchasing a battery for his vehicle. Mr Ryan Palmer and Ms Xavier give examples of Mr Ross Palmer's argumentative and unreasonable emails. It is a significant consideration that most of the adult beneficiaries, other than Mr Ross

Palmer himself, do not support Mr Ross Palmer's application to be substituted as a trustee for Mr Ian Palmer. Because of these patent communication difficulties and the opposition of the other beneficiaries, it would be neither expedient nor in the interests of all beneficiaries for Mr Ross Palmer to be substituted as trustee for Mr Ian Palmer at the present time.

- [39] To the extent that Mr Ryan Palmer relies on alleged mismanagement of the RLPT Trust by Mr Ross Palmer from its establishment until 19 April 2013, it is not possible to reach any conclusion merely by reference to the payments made by the Trust during that period without the benefit of evidence dealing with the purpose and circumstances of the transactions and considering any resolutions or other recorded decisions made by Mr Ross Palmer as the trustee during that period.

Removal of appointor

- [40] It is only Mr Ross Palmer who seeks the removal of Mr Hussein as appointor under the RLPT Trust and the other testamentary trusts. There is no suggestion that at the present time any other beneficiary under the RLPT Trust or the other testamentary trusts seeks to alter the role of Mr Hussein as appointor or the provision made for his successor set out in the will.
- [41] In any case, the submission made on behalf of Mr Ryan Palmer that the court does not have the power to remove Mr Hussein as appointor is well made at the present time. The use of an appointor in the set up of a family discretionary trust is a means to provide some external control on the discretionary trust through the removal and appointment of trustees. Under Mr Les Palmer's will, the position of the appointor is an entrenched role in respect of the RLPT Trust and the other testamentary trusts.
- [42] The only power of amendment that is conferred on the trustee of each testamentary trust under clause 9(i) of the will permits the trustee by deed to add, delete, amend or vary any of the powers given to the trustee under the provisions that apply to each of the testamentary trusts set up under the will, subject to a restriction that is not relevant to the role of the appointor. Mr Ryan Palmer relies on the decision in *Jenkins v Ellett* [2007] QSC 154 to submit that the power to add, delete, amend or vary any of the powers given to the trustee under the testamentary trust does not extend to a power to replace the appointor.
- [43] In *Jenkins*, the question was whether the power in the deed given to the trustees of a family discretionary trust to vary the trusts declared pursuant to the deed included a power to remove or change the identity of the Principal who was the person given the power under the deed to appoint and remove trustees and was equivalent to an appointor. The deed included a scheme in its schedule for the Principal's replacement on his death relevantly by his executor. Mr Jenkins was one of two trustees and the Principal. He was a primary beneficiary together with his children and grandchildren. Before he died he removed the other trustee as a trustee and appointed his daughter Ms Ellett as his co-trustee and then he and Ms Ellett as trustees purported to remove Mr Jenkins as the Principal and to appoint Ms Ellett to be the Principal. His granddaughter

became his executor after his death and purported to appoint herself and her brother as new trustees with Ms Ellett as a continuing trustee.

- [44] The clause under which Mr Jenkins and Ms Ellett purported to remove Mr Jenkins as Principal and appoint Ms Ellett in lieu relevantly provided:

“The Trustee may by Deed revoke add to release or vary all or any of the Trusts declared or any Trusts declared by any variation, alteration or addition made from time to time and may by the same or any other Deed declare any new or other trusts or powers concerning the Trust Fund ...”

The power to vary was subject to qualifications that are not relevant for the purpose of this analysis. Clause 1 of the trust deed contained the definition of “trust” as “the trust constituted by and comprised in” the deed and its schedule. The declaration of trust in the deed was found in clause 2 that provided that the trustee holds the trust fund “upon the trusts subject to the powers and provisions contained in this Trust”.

- [45] Douglas J at [16] found as a matter of construction of the trust deed that the power to amend in clause 11 was not to amend “the trust constituted by and comprised in this Deed and the Schedule” but the “Trusts declared” which were namely those declared in clause 2. Douglas J concluded at [17]:

“The limitation of the trustee’s power of amendment to the trusts declared, where those trusts were subject to the powers and provisions contained in ‘this Trust’, has led me to the view that cl. 11 should be construed so that its powers of amendment do not extend to a provision such as the definition of the Principal in the schedule to the deed.”

- [46] Douglas J at [19] observed that the Principal’s ability to remove and replace a trustee was one of the fundamental features of the structure of the deed setting up a family discretionary trust and to allow the power in clause 12 to be subverted by the trustee it was designed to supervise purporting to use clause 11’s powers to amend the deed, rather than the trusts declared by the deed, was not permissible as it was “akin to destroying the substratum of the deed”. Douglas J therefore declared that the deed poll that had been made by Mr Jenkins and Ms Ellett purporting to substitute Ms Ellett for Mr Jenkins as the Principal was invalid.

- [47] *Jenkins* was distinguished on the facts in *Mercanti v Mercanti* (2016) 50 WAR 495 at [153] and [358]. In *Mercanti*, the power to amend a trust deed for a family discretionary trust found in clause 28 applied to “the trusts terms and conditions hereinbefore contained”. The appointor was defined in clause 1(15) as the person named in the schedule to the deed or determined according to the provisions of the deed. The schedule was attached to the deed after clause 28. Buss P held at [153] that the relevant provision of the schedule was embodied in the definition of the appointor in clause 1(15) and therefore fell within the terms and conditions of the deed appearing before clause 28. Newnes and Murphy JJA held at [358] that, unlike in *Jenkins*, clause 28 included the power to vary the terms and conditions of the deed and not merely the trusts expressed in the deed.

- [48] It is therefore a matter of construction of the trust instrument, whether the power to vary the terms of the trust extends to a power to change the identity of the appointor or amend the term of the trust that provides for the appointor.
- [49] As a matter of construction of clause 9(i) of Mr Les Palmer's will, the trustee of each testamentary trust is given power to amend the powers given to the trustee under the relevant clauses of the will. The trustee has no power to amend clause 9(j) in the will pursuant to which no powers are conferred on the trustee, but pursuant to which the appointor and the powers of the appointor are specified.
- [50] That is not to say that in appropriate circumstances, the court in its inherent jurisdiction would be unable to act, if the appointor were to abuse the powers conferred on the appointor or exercise the powers for an improper purpose: see the *dictum* of Jessel MR in *Tempest v Lord Camoys* (1882) 21 Ch D 571, 578.
- [51] Mr Ross Palmer deposes to his relationship with Mr Hussein having broken down and then asserts:
- “Furthermore, it is not in the interests of the beneficiaries of the estate of the late Leslie Harold Palmer to have Mr Hussein as appointor of the family trusts pursuant to the estate as questions and concerns have been raised by me for a very long time regarding his influence and advice provided to the beneficiaries of my father's estate.”
- [52] The mere fact that Mr Ross Palmer considers his relationship has broken down with Mr Hussein and that he personally has concerns about Mr Hussein's influence and advice falls far short of establishing the circumstances that would enable the court to exercise the jurisdiction to prevent the appointor's power being exercised for an improper purpose. Mr Ross Palmer also complains that the appointment of his son Mr Ryan Palmer and his brother Mr Ian Palmer as trustees of the RLPT Trust by Mr Hussein was not in compliance with Mr Les Palmer's statement of intention. The statement of intention set out Mr Les Palmer's wishes as to the manner in which he anticipated Mr Hussein would exercise his power of appointment, but it was not a binding direction. At the respective times at which Mr Hussein appointed Mr Ian Palmer as a trustee and Mr Ryan Palmer as a trustee of the RLPT Trust, Mr Hussein had to exercise the power of appointment in the circumstances that prevailed at that time. Impropriety is not shown by merely pointing to a discrepancy between the appointment and the non-binding statement of intention.
- [53] Mr Ross Palmer's application to appoint De Groot Nominees Pty Ltd as appointor under clause 9(j) of Mr Les Palmer's will in substitution for Mr Hussein cannot succeed at the present time.

Orders

- [54] I have dealt with Mr Ross Palmer's application on the basis of the affidavits that were relied on by all parties for the purpose of hearing the application filed on 9 July 2018. If circumstances change, such as Mr Ian Palmer declining to resign as a trustee of the RLPT Trust that is anticipated as being imminent after Mr Ryan Palmer's return to

Australia (if it remains appropriate that he do so), it is always open for any beneficiary of the RLPT Trust to bring a fresh application in relation to the removal of Mr Ian Palmer as a trustee.

- [55] In the meantime, as Mr Ross Palmer has been unsuccessful in establishing that the relief he seeks should be granted, the order which I will make is:

The application filed on 9 July 2018 is dismissed.

- [56] I will hear submissions on the issue of costs after the parties have had an opportunity to consider these reasons.