SUPREME COURT OF QUEENSLAND

CITATION:	*Williams v Nathan* [2019] QSC 127
PARTIES:	**DANIEL WILLIAMS** (plaintiff) **v** **JULIAN NATHAN** (first defendant) **NATHAN LAWYERS BRISBANE PTY LTD (IN LIQUIDATION) ACN: 154 104 426** (second defendant)
FILE NO/S:	No 12663 of 2018
DIVISION:	Trial Division
PROCEEDING:	Civil trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2019, 14 March 2019
JUDGE:	Boddice J
ORDER:	**I shall hear the parties as to the form of orders and costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – GENERALLY – where the second defendant was an incorporated legal practice, of which the plaintiff and first defendant were its directors and equal shareholders – where the second defendant, was wound up on the just and equitable ground – where there was no suggestion the second defendant was insolvent – where the second defendant was operating two legal practices, of which one was operated by the plaintiff and one by the first defendant – whether, as the plaintiff contends, the practice operated by him is held by the second defendant on constructive trust for him and that the other practice is held by the second defendant on constructive trust for the first defendant *Legal Profession Act 2007* (Qld), s 117 *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 *Council of the Law Society of NSW v Wehbe* [2018] NSWCATOD 14 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498

Grant v Edwards [1986] 2 All ER 426
Green v Green (1989) 17 NSWLR 343
Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41
Iman Ali Islamic Centre v Iman Ali Islamic Centre Inc [2018] VSC 413
Muschinski v Dodds (1985) 160 CLR 583
Nelson & Anor v Nelson & Ors (1995) 184 CLR 538
Raulfs v Fishybite [2012] NSWCA 135
Shepherd v Doolan [2005] NSWSC 42

COUNSEL: A Crowe QC, with L Copley, for the plaintiff
P O'Brien for the first defendant
C A Wilkins for the second defendant

SOLICITORS: Clarke Kann Lawyers for the plaintiff
Mullins Lawyers for the first defendant
K&L Gates for the second defendant

[1] The second defendant, an incorporated legal practice, was incorporated on 4 November 2011. The plaintiff and first defendant were its directors and equal shareholders.

[2] On 27 November 2018, the second defendant was wound up on the just and equitable ground. There was no suggestion at the time of the making of that order, or subsequently, that the second defendant was insolvent.

[3] The present proceedings do not challenge the winding up of the second defendant. Instead, the plaintiff seeks declaratory and other relief in relation to assets of the second defendant.

[4] At the time of the winding up order, the second defendant was operating two legal practices. One of those legal practices operated almost exclusively in personal injuries law. It was conducted by the plaintiff from premises at Oxley (***"the Oxley practice"***). The second legal practice operated primarily in commercial law. It was conducted by the first defendant from premises at West End (***"the West End practice"***).

[5] The plaintiff contends the Oxley practice is held by the second defendant on constructive trust for him and that the West End practice is held by the second defendant on constructive trust for the first defendant.

[6] The first defendant and the liquidators of the second defendant resist the relief sought by the plaintiff. They contend the practices are owned for the benefit of the shareholders equally and ought to be dealt with in the ordinary course of a winding up.

Background

[7] A legal practice known as "Nathan Lawyers", commenced operation in 2002. Its partners were the first defendant, Robert Stevenson and Matthew Stapleton. The plaintiff commenced employment in that partnership on 4 February 2008, as a salaried partner.

[8] In November 2008, that legal practice became an incorporated legal practice. The first defendant, Stapleton and the plaintiff, were each were directors of the incorporated practice, known as Nathan Lawyers.

[9] Prior to the incorporation of that legal practice, Stapleton had separately leased premises at Ascot. Stapleton predominantly practiced from the Ascot premises. He rarely attended the main office of the incorporated legal practice, which was at South Brisbane.

[10] The Ascot practice subsequently became a matter of concern to the plaintiff. By 2011, that concern had led to discussions between the plaintiff, the first defendant and Stapleton as to the continuation of the incorporated legal practice.

[11] Stapleton severed ties with the incorporated legal practice of Nathan Lawyers, with effect from 31 March 2012. On 1 April 2012, the second defendant commenced operating an incorporated legal practice known as Nathan Lawyers Brisbane.

[12] Between 1 April 2012 and 5 November 2014 that incorporated legal practice oversaw two separate practices, conducted by the plaintiff and the first defendant respectively, under one roof from offices located in South Brisbane. After 5 November 2014, the separate practices were conducted from the premises at Oxley and West End respectively.

[13] The second defendant provided employees and administrative services to each legal practice. The second defendant also held the professional indemnity insurance policy for the practices.

Pleadings

[14] The plaintiff alleges that in or about March 2012, he and the first defendant agreed to conduct the incorporated legal practice through the second defendant, with effect from 1 April 2012. The terms of that agreement were that each would conduct and own their separate legal practices, with each maintaining separate financial records and submitting separate financial reports to the second defendant's accountant to enable preparation of the second defendant's business activity statements and income tax returns.

[15] The plaintiff alleges that following that agreement, the Oxley and West End practices were operated in accordance with the agreement until the liquidation of the second defendant. The plaintiff alleges that as a consequence of those circumstances, the

plaintiff has an equitable interest in the Oxley practice and the second defendant holds that practice on constructive trust for him.

[16] The plaintiff further alleges that on 14 September 2018, the first defendant, without authority, withdrew from the Oxley practice account the sum of $236,880.00, which was paid for the benefit of the first defendant. As such payment was not made in accordance with the agreement of the parties or for the benefit of the plaintiff or second defendant, there was a complete failure of consideration for the payment of those monies. Those monies are also impressed with a trust in favour of the plaintiff.

[17] The first defendant denies there was any agreement that each would own and conduct separate legal practices. The first defendant alleges that from 1 April 2012, he and the plaintiff agreed to practice law together as shareholders of the second defendant. Whilst each agreed to continue to operate legal practices within their areas of expertise, with their own general accounts, the second defendant entered into every client agreement for those practices, employed all staff and provided all legal services for those practices, issued all invoices to clients and met outgoing expenses.

[18] The first defendant admits he withdrew $236,880 from the account of the legal practice operated by the plaintiff, but says those monies belonged to the second defendant and were paid in discharge of liabilities of the second defendant. The first defendant denies he did not have authorisation to withdraw those monies.

[19] The second defendant does not admit the terms of any agreement entered into between the plaintiff and the first defendant for the operation of the legal practices. The second defendant opposes the relief sought by the plaintiff. The agreement alleged by the plaintiff was contrary to the provisions of the *Legal Profession Act 2007* (Qld) (***"the Act"***). Alternatively, the plaintiff does not come to court with clean hands and has delayed unduly in seeking equitable relief.

Evidence

Commencement of incorporated legal practice

[20] In 2011, the plaintiff discovered the Queensland Law Society had provided Stapleton with a report prepared pursuant to s 264 of the Act in 2010. That report pertained to an investigation of Stapleton's practice. A further investigation had been undertaken in 2011. The plaintiff developed concerns regarding his responsibilities as a director of the incorporated practice, Nathan Lawyers.

[21] In the latter half of 2011, the plaintiff sought information from accountants in relation to the separation of the practice accounts. At one point, the plaintiff sought advice on the structure and setting up of accounts if he moved "in the direction of practising as XYZ… trading as Nathan Lawyers".[1]

[22] On 23 November 2011, the first defendant proposed he send an email to Stapleton to the effect that the plaintiff, first defendant and Stapleton would continue to run the practice

[1] Exhibit to Affidavit of D Williams, p 35.

as Nathan Lawyers. By email dated 24 November 2011, the plaintiff advised the first defendant he would not be party to any such arrangements. The plaintiff expressed a wish to practice separately, but under the umbrella of Nathan Lawyers, with his own client base and files and separate office and trust accounts.[2]

[23] On 30 November 2011, the plaintiff sent an email to the incorporated practice's accountant.. The plaintiff advised the accountant, "There are to be separate office and trust accounts for the 3 of us. The advice required is how we facilitate this. This is urgent and needs to be implemented immediately."[3] By email of the same date, the plaintiff advised the first defendant this must be undertaken without any further prevarication.

[24] The accountant had sent an email earlier that day, noting the plaintiff and first defendant had different views as to how to deal with Stapleton. Two options were proposed: either to prepare director's resignation forms and share transfers and put an offer to Stapleton by which the company, Nathan Lawyers Pty Ltd would continue to operate, or to activate a new company, Nathan Lawyers Brisbane Pty Ltd immediately, by opening new bank and trust accounts and deregistering Nathan Lawyers Pty Ltd after finalisation of all matters pertaining to it.

[25] Subsequent to receiving the plaintiff's email of 30 November 2011, the accountant advised of further options. The first option was to operate separate bank accounts for each of the plaintiff, first defendant and Stapleton. A difficulty with this option was how to share expenses. All bank accounts would be under the one company name. Each would still be accountable for the other's actions as a director/shareholder.

[26] The second option was to open a bank account in the new company name of Nathan Lawyers Brisbane Pty Ltd, the trading under that name to consist only of the plaintiff and first defendant's businesses. The difficulty with that option was it did not consider Stapleton's options and would leave the plaintiff and the second defendant with fiduciary duties as directors of Nathan Lawyers Pty Ltd.

[27] The third option was to open new bank and trust accounts in each person's name and trade as sole traders. The accountant expressed uncertainty as to the Queensland Law Society's requirements in that regard.

[28] By email dated 1 December 2011, the plaintiff advised the accountant the third option needed to be implemented as soon as possible, noting that the Queensland Law Society and their reporting duties for their own practices must be paramount.[4] That email was copied to the first defendant.

[29] By email on 9 February 2019, the first defendant advised Stapleton that with immediate effect, they would "continue our respective practices with a separate office and trust account".[5] The first defendant would inform the Queensland Law Society and Lexon of

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[2] Exhibit to Affidavit of D Williams, p 43.
[3] Exhibit to Affidavit of D Williams, p 47.
[4] Exhibit to Affidavit of D Williams, p 49.
[5] Exhibit to Affidavit of D Williams, p 63.

the changes. In response, the plaintiff advised the first defendant and Stapleton he was "proceeding (if necessary) to run my own operation under Nathan Lawyers".[6]

[30] By email dated 19 March 2012, the first defendant advised Stapleton of a change in the trading structure for Nathan Lawyers Pty Ltd. Each would operate separate practices under Nathan Lawyers from 1 April 2012. By email dated 20 March 2012, the plaintiff advised the first defendant that as they would be operating as a separate company with a separate office and trust accounts, the integrity of emails, the server and File Pro must be preserved.

[31] By email dated 29 March 2012, the first defendant advised Stapleton that the first defendant and the plaintiff intended to operate separate practices under Nathan Lawyers Brisbane Pty Ltd, with one trust account. Stapleton was advised their partnership had been dissolved as a consequence of breach of duties by him as a director of Nathan Lawyers Pty Ltd.[7] In response, Stapleton said he disagreed with the first defendant's comments but would "give up" and he had commenced the steps to finalise matters.[8]

Separate practices

[32] The plaintiff gave evidence that consistent with the agreement to operate separate practices, he and the first defendant operated entirely separate practices from 1 April 2012. Those practices operated as separate businesses. The work in progress generated by each practice was kept, billed and received by that practice. The revenue from each practice was deposited into different general accounts. Direct costs and expenses for each practice were paid from its general account, including employment expenses, such as wages and superannuation. Any costs not identified as direct costs of either practice were split, pro rata, based on the head count of each practice or otherwise split 50/50. There was no mixing of funds as consolidated revenue.

[33] The plaintiff said from the commencement of these separate practices, neither he nor the first defendant used or accessed funds from the other's general account until the first defendant made an unauthorised withdrawal of $236,880 out of the general account of the plaintiff's practice on 14 September 2018. Each also operated separate trust accounts. Further, although each separate practice used the same firm of accountants, different accountants were used by each practice from November 2014.

[34] Initially, a consolidated monthly business activity statement was prepared for the second defendant to meet GST and PAYG withholding tax obligations from calculations setting out the GST and PAYG withholding obligations of each respective practice. Each practice paid its share of those obligations, using the payments slip. That process operated until September 2015, when each practice was granted separate branch registration by the Australian Taxation Office (***"ATO"***).

[35] The plaintiff said separate branch registration was undertaken as the plaintiff was receiving notifications from the ATO that certain PAYG withholding tax or GST

[6] Exhibit to Affidavit of D Williams, p 62.
[7] Exhibit to Affidavit of D Williams, p 73.
[8] Exhibit to Affidavit of D Williams, p 7.

obligations had not been paid by the first defendant's practice. Both the first defendant and the plaintiff agreed to the accountant's suggestion that each should apply for individual branch registration.

[36] Once individual branch registration was granted, each practice commenced reporting to the ATO for BAS and PAYG withholding tax as individual branches, with each practice preparing and lodging its own business activity statements. While the second defendant still lodged a consolidated income tax return, each practice paid its respective component of income tax based on its contribution to the profit of the second defendant. Each practice maintained separate accounting records, prepared its own profit and loss statements and balance sheets, and maintained its own files, work in progress and other practice records.

[37] The plaintiff said any profit was dealt with on the instructions of the plaintiff, in the case of the Oxley practice, and the first defendant, in the case of the West End practice. The plaintiff did not draw any profit from his practice. All profits were retained in that practice. The West End practice had no profits. It did have accumulated losses. Neither the plaintiff nor the first defendant attended each other's offices. Neither had an understanding of the other's practice. Each contributed to any remaining joint obligations by reference to a calculation as to their respective contributions.

[38] In cross-examination, the plaintiff accepted he never had occasion to look at any of the first defendant's client files. The plaintiff was vigilant about ensuring clients' money was secure. He knew the first defendant had management systems in place for his practice. The plaintiff did not ever supervise the first defendant's compliance with those systems.

[39] The plaintiff did not accept that running separate practices constituted a breach of his duties as a director of the second defendant. He and the first defendant had agreed they would run their own practices separately. That situation was different to Stapleton running a separate practice at Ascot. When Stapleton, the first defendant and the plaintiff were practicing together, they had agreed to operate as one practice.

[40] The plaintiff said the first defendant and he complied with their statutory obligations as directors. They filed the requisite returns. They complied with the requirements of the Queensland Law Society. It knew they were practicing separately.

[41] The plaintiff accepted that prior to the commencement of these proceedings he had not used the word "trust" in respect of his practice. He had, however, consistently maintained the practices were entirely separate and the Oxley practice "belongs to me".[9]

[42] The first defendant gave evidence that whilst the plaintiff and he conducted separate practices within the second defendant's incorporated legal practice, each owned 50% of those practices. That understanding was based on the shareholding of the second defendant. Each of the plaintiff and the first defendant held 50 of the 100 issued fully paid ordinary shares. The first defendant accepted there was never any specific

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[9] T1-88/15.

agreement as to dividends, profit distribution or splitting of assets or liabilities on a winding up.

[43] The first defendant accepted the agreement to conduct separate practices included that each would conduct their own files and bill without reference to the other, that each would receive income in respect of those billings to their own individual general accounts and that each would use that income to meet the costs of their individual practices. The first defendant also accepted he had never previously claimed an entitlement to monies generated from files conducted in the plaintiff's practice and the plaintiff had never made any claim to an entitlement to the income generated from the first defendant's practice.

[44] In cross examination, the first defendant said his understanding of the purpose of the operation of separate practices by the plaintiff and first defendant was that, in the context of the plaintiff not being happy with Stapleton remaining in the practice, the plaintiff "wanted to run the separate practices so as to, I suppose, control it himself and me - my side of the practice by myself".[10] The agreement was that they would run separate accounts and separate practices. There was no discussion by the parties as to what was actually going to happen with the assets of the second defendant.

[45] The first defendant accepted that since the commencement of the second defendant's incorporated legal practice, he had had nothing to do with how legal services were provided to clients of the plaintiff's practice and the plaintiff had nothing to do with how he provided legal services to clients of the first defendant's practice. He had not done anything to ensure the legal services were being provided competently to the clients of the plaintiff's practice. The plaintiff had not done anything to ensure the first defendant was providing competent advice to the clients of his practice.

[46] The first defendant said that prior to the occupation of separate premises, he and the plaintiff had oversight of the other's practice, including hiring, complaints, disciplinary matters and the payment of taxation obligations and liabilities of the second defendant. There were multiple occasions of written communications between each of them and other staff members. Discussions included finding offices after the second defendant had been informed in early 2014 that the landlord was looking at selling those premises.

[47] Initially, they considered premises suitable to accommodate all staff of the second defendant in the one location. In or about September 2014, the plaintiff raised whether the first defendant would agree to move to the Oxley/Darra area. When the first defendant was not agreeable, the plaintiff queried if he would be agreeable to the personal injuries practice moving to the Oxley/Darra area. The first defendant said the plaintiff wanted "to relocate his part of the practice to be closer to his referral source, which was at Oxley".[11]

[48] The first defendant agreed to the opening of the Oxley practice in November 2014. The first defendant moved the balance of the second defendant's practice to West End. The West End premises were leased by the second defendant, under a lease executed by the

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[10] T2-21/5.

[11] Affidavit of D Williams, para 28.

plaintiff and the first defendant as directors. The lease of the Oxley premises was in the name of a separate entity, of which the plaintiff was the sole director and shareholder.

[49] The first defendant said he met with the plaintiff to discuss arrangements for the ongoing operation of the incorporated legal practice by the second defendant, once they were operating from separate premises. They each agreed the practice would continue to operate as it had for the second defendant. The first defendant said the separate general accounts created for each office were primarily put in place to manage their respective divisions. Each of the plaintiff and the first defendant had full access to these accounts as well as the separate branch trust accounts.

Winding up application

[50] In 2015, the first defendant became concerned the plaintiff considered the separate offices to be separate and distinct businesses. The first defendant engaged solicitors, who formally wrote to the plaintiff on 22 December 2015. A request for a meeting of directors of the second defendant was agreed to by solicitors for the plaintiff, but they asked it be held after plaintiff's return from overseas in February 2016. In their letter of 7 January 2016, the plaintiff's solicitors took issue with a number of factual matters, including that the second defendant "is a successor to Nathan Lawyers Pty Ltd or the partnership".[12]

[51] By letter dated 7 March 2016, the first defendant's solicitors advised the first defendant did not consider a meeting of directors to have any utility, as the plaintiff had made no attempt "to adequately discharge his duties as a director of the company".[13] The first defendant proposed the second defendant's legal practice be valued and indicated he would consider selling his shares or undertake an equitable distribution of the assets "including the current files" following the winding up of the company.[14] Alternatively, a members' voluntary winding up liquidation of the company should occur immediately.

[52] By letter dated 9 March 2016, the plaintiff's solicitors denied any failure by the plaintiff to discharge his duties as a director and queried the need for a valuation if there was agreed "an orderly division of files and assets".[15]

[53] On 30 June 2016, the first defendant sent an email to the plaintiff calling for a meeting of directors of the second defendant on 8 July 2016. By email dated 5 July 2016, the plaintiff advised they were running their own practices and he did not expect to have any discussions with the first defendant about the inner workings of their separate practices.

[54] By letter dated 19 July 2016, the first defendant gave the plaintiff notice of a directors' meeting of the second defendant on 27 July 2016. The proposed agenda included a review of the company's finances, bank statements and files. By email dated 23 July

[12] Exhibit to Affidavit of J Nathan, p 62.
[13] Exhibit to Affidavit of J Nathan, p 63.
[14] Exhibit to Affidavit of J Nathan, p 63.
[15] Exhibit to Affidavit of J Nathan, p 65.

2016, the plaintiff advised he would not be attending the meeting. The plaintiff said "we are separate practices and any attempt to conduct affairs ignoring that fact, is rejected".[16]

[55] Subsequent attempts by the first defendant to convene a directors' meeting were unsuccessful, until 3 March 2017. That meeting was attended by the plaintiff and first defendant and by invitation, each of their accountants. That meeting was unable to resolve the respective differences.

[56] The first defendant said that throughout the operation of those two practices the second defendant reported financially as a single law practice. Each had access to the accounting records of the respective practices.

[57] The first defendant became aware that sums totalling $290,000 were transferred by the plaintiff from the Oxley practice general account in four separate transactions on 23 June 2017, 25 June 2018, 27 June 2018 and 29 June 2018. None of those transfers were with the authority or consent of the first defendant.

[58] The plaintiff said he authorised the payments from the Oxley practice general account. A payment of $54,697.77 on 23 June 2017 was for rent in advance; of $55,545.41 on 25 June 2018 was for rent in advance; of $128,251.85 between 18 June 2018 and 27 June 2018 was for the upgrade of IT systems and hardware, and of $105,600 on 29 June 2018 was a short term loan. The plaintiff paid expenses up front, from the revenue of the practice.

[59] The first defendant relied on the withdrawal by the plaintiff of those amounts in his application for the second defendant to be wound up on the just and equitable ground. At the time he swore his affidavit, he did not know whether those payments were appropriate or inappropriate. Whilst he alleged in his affidavit that those payments were made without authorisation, he agreed in evidence that the plaintiff had no obligation to refer the payments to him under the terms of their arrangements. He did not tell the Court on the winding up application the plaintiff had no obligation to get the first defendant's authority to transfer from his own practice account.

[60] The first defendant accepted that in June 2018 he knew two payments were for service fees to the plaintiff's own company and a third payment was for rent for the next year. The first defendant said the statement in his affidavit on the winding up application that he had only recently discovered the payments made by the plaintiff, related to the payment the plaintiff had made in June 2017. He did know about the payments made by the plaintiff in June 2018. He accepted he was not alleging the payments made by the plaintiff were inappropriate.

Withdrawal of funds

[61] In June 2018, the first defendant was looking at what the plaintiff had invoiced in the Oxley practice. A suggested plan, in his discussions with a consulting firm, TED

[16] Exhibit to Affidavit of J Nathan, p 75.

Enterprises, was for the first defendant to draw down monies from the Oxley general account when the opportunity arose, so the second defendant could meet its creditors.

[62] TED had been advising the first defendant for some years in respect of matters concerning the second defendant. They never rendered an account to him until 11 September 2018. He was not able to say how that account was calculated by TED. There had been no discussion as to how he was to be charged by TED. He engaged their services and they issued the invoice. The invoice was sent by TED after he had made the decision to draw down monies from the plaintiff's general account to pay TED.

[63] The first defendant accepted that in his discussions with TED in late June 2018, he had indicated he was waiting for the "dollars to go up" in the plaintiff's general account.[17] He accepted that reference suggested the amount in the account was important to him. He denied the reason he did not draw down monies from that account at that stage was because the account had significantly less funds. His reference to waiting "for the dollars to go up", was "just a reaction".[18]

[64] The first defendant had also received advice he should obtain discharge authorities in the event funds became available to pay out a Bank of Queensland (***"BOQ"***) loan established when the first defendant was in partnership with Stevenson and Stapleton.[19]

[65] The first defendant denied that part of the plan was to use the funds from the Oxley practice to pay out his own debts. The first defendant took the BOQ debt to be a debt of the second defendant, although there was no formal agreement by the second defendant to take over that debt.

[66] On 14 September 2018 the first defendant withdrew $236,880 from the Oxley practice general account, , leaving only $1,060.82 in that account. As a consequence, there were insufficient funds for the Oxley practice to pay the expenses of the business, including wages, client outlays and other expenses. The plaintiff had to access other sources of funds to meet those expenses.

[67] The first defendant said he withdrew those funds from the Oxley practice general account, to "preserve same and pay company debts".[20] That was the first occasion he had ever drawn any money from that account.

[68] The $236,880 was used by the first defendant to pay $66,000 in consulting fees to TED Enterprises Pty Ltd; $64,000 to the first defendant; $25,000 in legal fees to Mullins Lawyers and $81,880 to meet an outstanding debt to B & KM Parker. Subsequent to the commencement of these proceedings, the first defendant repaid $64,000.

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17 T2-39/35.
18 T2-39/26.
19 T2-24/40.
20 Affidavit of J Nathan.

[69] The first defendant said he had not made a decision in late June 2018 to take the funds. He was considering his options. One possible creditor was BOQ. He never acted on that thought. He always wanted to pay the Parker debt. At that point he did not have any account from TED and he had not engaged Mullins Lawyers.

[70] The plaintiff said he had no knowledge of TED Enterprises Pty Ltd. Investigations had revealed its director was an executive director of a pre-insolvency business with a person named David Cassidy, a long term business associate of the first defendant. Neither the Oxley practice nor the second defendant owed a debt to TED Enterprises or that pre-insolvency business. Similarly, neither the Oxley practice nor the second defendant had a debt to Mullins Lawyers, or to the first defendant. The plaintiff said Bruce Parker had loaned money to the first defendant's family trust in about 2009. Those funds were subsequently on loaned to Nathan Lawyers Pty Ltd. Even allowing for interest paid on that loan, the sum outstanding for that loan would have been less than that paid to B & KM Parker by the first defendant.

[71] The first defendant said the sum of $81,880 related to a loan Parker had initially made to the first defendant in his capacity as personal representative of a deceased client in or about June 2008. That debt was repaid and a new loan was advanced to the first defendant, in his capacity as trustee of a family trust. The first defendant said the plaintiff agreed this loan would be taken as an injection of funds for the practice of Nathan Lawyers. That loan was subsequently treated as a liability in the books of the second defendant, with the interest being paid by the second defendant. The first defendant said it was agreed between them that it was a debt of the second defendant.

[72] The first defendant accepted that that loan first appeared in the books of the second defendant in 2015, notwithstanding the loan dated back to 2009. The first defendant could not explain why the loan did not appear in the accounts of the second defendant upon the commencement of that entity. He thought he raised it with the plaintiff around 2014 or 2015. He could not recall whether it was shown in the accounts of the practice operated by the plaintiff or the practice operated by the first defendant. He also accepted those records showed a debt of about $47,000, that did not vary from 2015, 2016 or 2017.

[73] The first defendant said receipt of a solicitor's letter, dated 14 September 2018, seeking repayment of the loan to the Parkers within seven days or action would be taken, with the second defendant at risk of being wound up, triggered him to withdraw the funds to repay the debt to Parker. He did not bring that letter to the attention of the plaintiff. He had no reasonable explanation for his failure to do so. He accepted he did not want the plaintiff to know in advance of his plan to repay the Parker loan. He was not sure the plaintiff would agree to pay that loan.

[74] The first defendant accepted that prior to the receipt of that solicitor's letter, his own solicitors advised he repay the Parker loan directly from the bank account of the second defendant, rather than from his own account. He denied he had contacted Parker's solicitors and suggested they send a letter so that he had a trigger for payment. Prior to receipt of the letter from the solicitors, there had been telephone calls from Parker seeking repayment of the loan.

[75] The first defendant said there was an interest calculation attached to the solicitor's letter. He accepted that letter did not refer to any attachment. The first defendant denied he provided the calculation of interest to Parker's solicitors. He accepted the document was headed "Loan from Julian Family Trust to Nathan Lawyers Pty Ltd". He had no explanation for that heading.[21] He could not explain how the interest calculation document only calculated interest to May 2018, if it was attached to the letter from Parker's solicitors.

[76] The first defendant said the second defendant was also liable for the debt owed to Bank of Queensland in the sum of approximately $251,318. The second defendant had the benefit of that overdraft, met all interest payments in respect of that overdraft in its accounts and obtained tax deductions for such interest payments. That debt was accessed by the plaintiff for the operation of Nathan Lawyers and, subsequently, the practice operated by the second defendant. The first defendant said the plaintiff had objected to the inclusion of that liability in the second defendant's accounts, on the ground his name was not on the original loan agreement.

[77] The first defendant accepted in cross examination that he did not disclose, when seeking the winding up on just and equitable grounds, that he had transferred over $236,000 from the Oxley practice general account. He also accepted that the sums paid to TED and Mullins Lawyers related to work he had personally requested as part of his application to wind up the second respondent on just and equitable grounds. The first defendant initially considered these payments to be for the benefit of the second defendant, but accepted in hindsight the payments were for his own personal benefit. The first defendant agreed he did not have the money himself to meet those expenses.

Findings
Generally

[78] The plaintiff impressed me as both credible and reliable. His answers were considered and he gave evidence in a manner consistent with a genuine attempt to be candid and forthright in his evidence.

[79] By contrast, the first defendant impressed me as being neither accurate nor reliable. His evidence, together with aspects of his conduct in the winding up proceeding, demonstrated a lack of candour.

[80] The first defendant's failure to disclose, on the making of his application for a winding up order, that the payments the plaintiff had made, were payments that could properly be made by the plaintiff from his own practice's general account, without reference to the first defendant, was one example.

[81] Another was his failure to disclose, in the making of that application, his own unauthorised withdrawal of over $236,000 from the Oxley practice general account. That latter example was particularly significant. Those funds were taken by the first defendant in circumstances where the only conclusion, from a consideration of the

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[21] T2-33/40.

email communications at or around that time, is that the first defendant deliberately lay in wait for a moment when that practice's general account had maximum funds in order to pay what were the first defendant's own personal debts, knowing he did not have funds of his own to meet those debts.

[82] The first defendant's initial attempts in evidence to justify that withdrawal as preserving the funds of the second defendant and meeting its debts, were, at best, disingenuous. I do not accept any of the first defendant's evidence, unless it is supported by independent, contemporaneous documentation.

Separate practices

[83] I accept the plaintiff's evidence that it was agreed between the first defendant and the plaintiff that from the commencement of the operation of the incorporated legal practice by the second defendant, each would conduct their own separate practices. The email communications exchanged between them at the time are consistent with that agreement.

[84] Their conduct in the operation of those separate practices thereafter was also consistent with such an agreement. Each practice had its own areas of specialisation. Each maintained separate general accounts. Each kept separate financial records. Each accounted for its own revenue and expenses. Each kept its own files, including records of work in progress. Neither transacted on the other's practice account. Each accepted responsibility for its share of GST or income tax liabilities.

[85] Further, whilst the second defendant operated the incorporated legal practice, the plaintiff's separate practice traded under the name "Nathan Lawyers Brisbane Pty Ltd", and operated a website "nathanlawyers.com.au", which contained no reference to the first defendant, the first defendant's separate practice, or its staff. Similarly, the first defendant traded under the name "Nathan Lawyers", operating a website "nathanlaw.com.au", which likewise, contained no reference to the plaintiff, the plaintiff's separate practice or staff employed in the plaintiff's separate practice.

[86] In addition to those arrangements, each practice operated on the basis that capital items were funded from the respective practice's general account. Neither required the authority or approval of the other before making capital purchases. Importantly, each decided what amounts would be drawn from their respective accounts by way of wages and actual drawings.

[87] Whilst the incorporated legal practice had obligations to file taxation and other documentation, the practices were carried out entirely separately and independently. Neither the plaintiff nor the first defendant exercised control over the operation of the other's separate practice throughout that time. Neither sought to access funds generated from the other's practice. Neither sought to obtain any benefit from the income derived by the other's separate practice.

[88] I do not accept the first defendant's evidence that the agreement to operate separate practice was on the basis each would own 50% of the other's separate practice. That

contention is not consistent with the email communications exchanged between them prior to and at the commencement of the incorporated legal practice operated by the second defendant. Such a contention is also inconsistent with the conduct of the parties after the commencement of the agreement.

[89] The first defendant's own conduct in surreptitiously seeking, for the first time, to withdraw virtually all available funds from the plaintiff's practice general account was also inconsistent with a conclusion that the first defendant genuinely believed that was the agreement between the parties. If that was his genuine belief, there would be no reason for the first defendant to engage in such conduct. His conduct is consistent with a conclusion that his own practice having been unsuccessful, the first defendant attempted to wrongfully take the assets of what he knew to be the plaintiff's own separate business to meet the first defendant's debts.

[90] The agreement reached between the plaintiff and the first defendant to operate separate practices and their subsequent conduct, support a finding that it was their common intention that each separate practice constitute a separate business which, upon payment of all outstanding obligations of the second defendant, was held by the second defendant on constructive trust for the benefit of the plaintiff, in respect of the Oxley practice and for the benefit of the first defendant, in respect of the West End practice.

[91] A constructive trust arises in circumstances where it would be unconscionable for the holder of the legal title to property to assert that that property was held free of any beneficial interest in the claimant.[22] Equity will intervene to prevent the unconscientious denial of a claimant's legal rights if it is established the parties agreed to that claimant having an interest in the property or that it was their common intention that the claimant have such an interest, and it is further established that that claimant has acted to his or her detriment on the basis of that agreement or common intention.[23]

[92] The requisite intention may be established by agreement between the parties or by expressed statements as to their intention, or may be inferred from their conduct.[24] Here, the common intention that each would have the beneficial interest in their respective practices arose both from their conduct of the practices and the conduct of the second defendant. That latter conduct was evidenced by a separation, in the financial records of the second defendant, of the income and expenses of each separate practice and an apportionment of each separate practice's liability for what were common expenses paid by the second defendant.

[93] The requisite detriment arises if the claimant has acted in a way referrable to the agreement or intention that they have that beneficial interest.[25] A person will have acted on that common intention, if that person has engaged in conduct that could not reasonably have been expected to have occurred unless that person was to have an

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22 *Muschinski v Dodds* (1985) 160 CLR 583, 615-616; *Shepherd v Doolan* [2005] NSWSC 42 at [30].

23 *Shepherd v Doolan* [2005] NSWSC 42 at [31]; *Iman Ali Islamic Centre v Iman Ali Islamic Centre Inc* [2018] VSC 413 at [402], [477].

24 *Shepherd v Doolan* [2005] NSWSC 42 at [37]; *Green v Green* (1989) 17 NSWLR 343 at [355].

25 *Shepherd v Doolan* [2005] NSWSC 42 at [40]; *Iman Ali Islamic Centre v Iman Ali Islamic Centre Inc* [2018] VSC 413 at [402].

interest in the property.[26] The interest will be that agreed upon or intended if it can be established.[27]

[94] The plaintiff has conducted his separate practice and business on the basis of an agreement to conduct separate practices. That conduct was to his detriment, unless the plaintiff was to have the beneficial interest in his separate practice. The plaintiff's conduct could not reasonably have been expected to have occurred without such an interest. In such circumstances, equity should intervene, subject to the protection of others from unjust consequences.

[95] The fact that the plaintiff and the first defendant agreed to operate those separate practices and businesses under an incorporated legal practice conducted by the second defendant does not alter that conclusion. That corporate structure governs the obligations of the second defendant to third parties, such as creditors, during the operation of the incorporated legal practice. Upon the meeting of all of those obligations there is no reason equity ought not to apply to prevent the first defendant from asserting an entitlement to benefit from the plaintiff's separate practice and business, when it would be unconscionable for him to do so.

[96] In decreeing a constructive trust, a Court is not bound by an unyielding formula. The equity of the transaction shapes the measure of relief.[28] A court may therefore take into account the consequences of the imposition of a constructive trust.[29] Such considerations may influence not only the decision to give the remedy of constructive trust, but also the moulding of the requisite relief. As Deane J in *Muschinski v Dodds* said:

> "…. where competing common law of equitable claims are or may be involved, a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order or from some other specified date." [30]

[97] A contrary conclusion is not mandated by the terms of the shareholding of the second defendant. To adapt the observations of Dean J in *Muschinski v Dodds*, "the applicable provisions were not framed to meet the contingency of premature failure of the…relationship", such that "other rules or principles will commonly be called into play". [31]

[98] The lack of any specific agreement between the plaintiff and the first defendant, in the event of a breakdown in the running of the incorporated legal practice by the second defendant, is a consequence of neither the plaintiff nor the first defendant turning their mind to a division of assets upon the breakdown of that relationship. The first defendant accepted the agreement entered into between the parties did not include provision for the distribution of assets in the event of such a breakdown.

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[26] *Grant v Edwards* [1986] 2 All ER 426 at [648].
[27] *Shepherd v Doolan* [2005] NSWSC 42 at [41].
[28] *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380, 386; cited with approval by Mason J in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 108.
[29] *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 379-380.
[30] (1985) 160 CLR 583, 615.
[31] (1985) 160 CLR 583, 618.

[99] The failure to do so does not prevent equity from intervening, provided the second defendant first meets all of its outstanding debts and obligations. In that respect, the present circumstances are distinguishable from those in *Raulfs v Fishybite,* where a constructive trust was found not to arise because the specific provisions of the partnership agreement dealt with the manner of division of the partnership assets upon termination.[32]

Unclean hands / delay

[100] The imposition of a constructive trust is not to be denied upon the basis of any conduct by the plaintiff. Whilst the first defendant raised the need for a winding up of the second respondent in December 2015, the first defendant took no steps in respect of that matter until late 2018. It was not unreasonable, or unconscionable in such circumstances, for the plaintiff to continue to act in accordance with their agreement.

[101] There has also been no undue delay on the part of the plaintiff to take steps to enforce his rights. The plaintiff promptly took such steps upon action being taken by the first defendant to have the second defendant wound up on the just and equitable grounds. That ground is in itself significant. The winding up of the second defendant was not on the basis of concern as to solvency. It was in reliance upon principles of justice and equity. There is no inconsistency in the imposition of a constructive trust in the determination of what would be just and equitable in the winding up of the second defendant, after it has met all of its outstanding obligations.

Legal Profession Act

[102] The liquidator for the second defendant contended that the finding of an agreement that each of the plaintiff and first defendant would conduct separate practices as separate businesses, would constitute an agreement to frustrate the operation of s 117 of the Act as the operation of separate practices meant each did not have oversight of the other's practice, contrary to their obligations as directors of the incorporated legal practice conducted by the second defendant.

[103] Section 117 of the Act provides:

> **"117 Incorporated legal practice must have legal practitioner director**
>
> (1) An incorporated legal practice is required to have at least 1 legal practitioner director.
>
> (2) Each legal practitioner director of an incorporated legal practice is, for the purposes of this Act, responsible for the management of the legal services provided in this jurisdiction by the practice.
>
> (3) Each legal practitioner director of an incorporated legal practice must ensure that appropriate management systems are implemented and kept to enable the provision of legal services by the practice—
>
> (a) under the professional obligations of Australian legal practitioners and other obligations imposed under this Act; and

[32] [2012] NSWCA 135 at [84].

(b) so that the obligations of the Australian legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice.

(4) If it ought reasonably to be apparent to a legal practitioner director of an incorporated legal practice that the provision of legal services by the practice will result in breaches of the professional obligations of an Australian legal practitioner or other obligations imposed under this Act, the director must take all reasonable action available to the director to ensure that—

(a) the breaches do not happen; and

(b) if a breach has happened—appropriate remedial action is taken in relation to the breach.

(5) Nothing in this part derogates from the obligations or liabilities of a director of an incorporated legal practice under another law.

(6) The reference in subsection (1) to a legal practitioner director does not include a reference to a person who is not validly appointed as a director, but this subsection does not affect the meaning of the expression 'legal practitioner director' in other provisions of this Act."

[104] The term "professional obligations" is defined in s 110 of the Act. It includes duties to the Court, to clients and meeting obligations in connection with conflicts of interest and the ethical rules.

[105] A consideration of the terms of s 117 supports a conclusion that the obligations on each legal practitioner director of an incorporated legal practice are to ensure that appropriate management systems are implemented and maintained to enable the provision of legal services in accordance with those professional obligations of Australian legal practitioners and other obligations imposed under the Act and its regulations.[33]

[106] Whilst neither the plaintiff nor the first defendant had oversight of, control over or input into the management of the provision of legal services by each other, the plaintiff gave uncontradicted evidence that the conduct of those separate practices occurred with the knowledge of the relevant professional body, namely, the Queensland Law Society. There is no suggestion that body raised concerns that the structure of the operation of those practices did not comply with their respective obligations under s 117 of the Act.

[107] In any event, a breach of that section would not justify withholding the relief sought by the plaintiff. Such a conclusion would result in a sanction which was not proportionate to the seriousness of the alleged illegality. The imposition of such a form of civil sanction would also not further the purpose of the statute, an important factor where the statute itself imposes no such sanction.[34]

[108] A court should not hold that a form of contract is prohibited by statute unless there is a clear implication or necessary inference that the statute so intended such a finding.[35] No such implication or inference arises from this provision of the Act.

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[33] cf *Council of the Law Society of NSW v Wehbe* [2018] NSWCATOD 14 at [186].

[34] *Nelson & Anor v Nelson & Ors* (1995) 184 CLR 538.

[35] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [118]–[129].

Monies had and received

[109] Once it is accepted that the Oxley practice was held on constructive trust for the benefit of the plaintiff, there was no legal basis upon which the first defendant could withdraw funds from that practice's general account in payment of his own personal expenses.

[110] It was ultimately accepted by the first defendant that the monies paid to TED and Mullins Lawyers were in respect of expenses incurred by the first defendant. Those monies properly are to be returned to the practice account of the Oxley practice.

[111] The first defendant ought also to refund to that practice account, the sum of $81,880 purportedly paid in repayment of monies loaned by the Parkers. The sum repaid was substantially greater than the debt recorded in the accounts of the second defendant.

[112] Further, the first defendant's evidence as to the circumstances in which such a sum was due and payable to the Parkers lacked substance. I do not accept the first defendant's evidence that he had received a demand by solicitor's letter, sent on the same day as the withdrawal of the funds by the first defendant. The repayment of that debt had been the subject of specific legal advice to the first defendant on the preceding day. The letter was also purportedly sent by express post, rendering receipt on the same day highly unlikely.

[113] I also do not accept the first defendant's evidence that he satisfied himself as to the correctness of the calculation of the amount due and owing to the Parkers. The first defendant said the calculation document was annexed to the solicitor's letter. That letter contains no reference to an annexure. Further, the document itself refers to a loan payable by a different entity to the second defendant and only calculates interest to May 2018. Those features render it improbable the calculation document was forwarded to the first defendant by the Parkers' solicitors.

Bank of Queensland debt

[114] I do not accept the first defendant's evidence that the debt owed to the BOQ was a debt the plaintiff had agreed was to be met by the second defendant. That evidence was inconsistent with all relevant contemporaneously made documentation.

[115] First, that debt arose from an agreement entered into in 2005 by the first defendant, Stapleton and Stevenson. Second, the business separation report prepared by accountants in 2008 listed all of the assets and liabilities assumed by Nathan Lawyers Pty Ltd. Those liabilities did not include the BOQ debt. Third, a report prepared by the accountants on 30 June 2014 did not include the BOQ debt in the loan accounts for the second defendant. That report expressly stated the "Partnership bank overdraft no. 20213896" was not taken over by the second defendant.[36] That overdraft related to the Bank of Queensland debt.

Conclusions

[36] Exhibit to Affidavit of D Williams, p 231.

[116] The plaintiff has established an entitlement to a declaration that upon payment of all outstanding obligations of the second defendant, the second defendant holds the remaining assets of the Oxley practice on trust for the plaintiff and the remaining assets of the West End practice on trust for the first defendant.

[117] The plaintiff has also established an entitlement to an order that the second defendant repay to Oxley practice's general account the balance of the $236,880 withdrawn by the first defendant from the Oxley practice's general account.

[118] I shall hear the parties as to the form of orders and costs.