

# SUPREME COURT OF QUEENSLAND

CITATION: *Wise Investments Pty Ltd v Ruddy Tomlins & Baxter, Solicitors & Anor* [2019] QCA 271

PARTIES: **WISE INVESTMENTS PTY LTD**  
ACN 143 656 848  
(appellant)  
v  
**RUDDY TOMLINS & BAXTER, SOLICITORS**  
**(A FIRM)**  
ABN 64 667 544 365  
(first respondent)  
**MICHELLE CHRISTI CULLEN**  
(second respondent)

FILE NO/S: Appeal No 1551 of 2019  
SC No 8216 of 2014

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 221 (Martin J)

DELIVERED ON: 26 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 23 July 2019

JUDGES: Gotterson and Philippides JJA and Bradley J

ORDERS: **1. Appeal dismissed.**  
**2. The appellant is to pay the respondents' costs of the appeal, including any reserved costs, on the standard basis.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – SOLICITOR AND CLIENT – RETAINER - GENERALLY – where the first respondent acted for both the vendor and purchaser, the appellant, in a transaction for the sale of a lot of land that was never completed – where the appellant argued that the first respondent was retained to prepare a contract for the sale of seven lots, but instead only prepared a contract for the sale of a single proposed lot – where the learned primary judge found that neither the appellant nor the vendor told the solicitor of the first respondent of an agreement to purchase seven lots – where the learned primary judge also found that the solicitor of the first respondent was entitled to draw the conclusion from discussions she had with the vendor and the appellant that the sale of the single proposed lot was one being carried out in the interests of the

vendor – whether the learned primary judge erred in finding that the solicitor of the first respondent was entitled to draw the conclusion that the sale of the single proposed lot was carried out in the interests of the vendor – whether the first respondent breached its duty owed to the appellant

CONVEYANCING – VOLUNTARY ALIENATION OR CONVEYANCE TO DEFRAUD CREDITORS – where the second respondent’s husband transferred to her a property at Burleigh Waters – where the transfers were executed after the appellant filed an application for a freezing order over the Burleigh Waters property – where the appellant sought an order that the transfers were void pursuant to s 228 of the *Property Law Act 1974 (Qld)* on the basis that they were made with intent to defraud creditors – where the learned primary judge found that the transfers were alienations of property and that they were done for the purpose of defeating the appellant in recovering what the second respondent’s husband was liable to repay – where the learned primary judge declined to make an order under s 228 because his Honour found that the second respondent had provided valuable consideration and that the conveyance to her was in good faith and without knowledge of any intent to defraud creditors – whether the learned primary judge erred in finding that the transfers were made by the second respondent for valuable consideration and without knowledge of intent to defraud creditors

*Property Law Act 1974 (Qld)*, s 228(1), s 228(3)

*Barton v Official Receiver* (1986) 161 CLR 75; [1986] HCA 44, cited

COUNSEL: T Alexis SC, with P Afshar, for the appellant  
G Beacham QC, with A Nicholas, for the first respondent  
The second respondent appeared on her own behalf

SOLICITORS: Bennett & Philp Lawyers for the appellant  
Hyland Lawyers for the first respondent  
The second respondent appeared on her own behalf

- [1] **GOTTERSON JA:** The appellant in this appeal is Wise Investments Pty Ltd (“Wise”). It is a company of which the sole director and shareholder at all relevant times was Mr Anil Mishra. He is a qualified accountant and practised in a firm, ACM Partners, which provided both accounting and taxation consulting services. In about 2004, Mr Grant Cullen became a client of the firm and, in due course, a good friend of Mr Mishra.
- [2] An entity for which Mr Mishra prepared financial statements and tax returns was the Cullen Unit Trust, the units in which were held initially by Mr Cullen and his first wife, Natasha Cullen. This entity undertook a profitable residential subdivision of land at Bowen known as Gloucester View.

- [3] Grant and Natasha Cullen separated in 2008. Pursuant to consent orders made in the Federal Magistrates Court in October 2009, he was to pay her amounts of \$150,000 and \$400,000. In exchange for the \$150,000, she was to relinquish her interest in the unit trust and in exchange for the \$400,000, she was to relinquish her interest in the former matrimonial home at Burleigh Waters. In due course, the units she held in the unit trust and her interest in the matrimonial home were transferred to Mr Cullen.
- [4] The residential subdivision was carried out in stages. According to Mr Mishra, in late 2009, he and Mr Cullen agreed that the former, by a nominee, would purchase seven lots to be created in Stage 3 of the subdivision for \$115,000 per lot, in total \$805,000. Payment of that amount was to be made as and when required by Mr Cullen as trustee of the unit trust (“Mr Cullen as Trustee”) in order to fund the completion of Stage 3.
- [5] Wise was Mr Mishra’s nominee. It was registered on 14 May 2010. The issued shares in it were recorded as being beneficially owned by Mr Mishra.<sup>1</sup>
- [6] Mr Mishra maintained that he and Mr Cullen retained a firm of solicitors, Ruddy Tomlins & Baxter (“RTB”) to prepare a contract for the sale of the seven lots to Wise and to attend to its completion. His complaint is that they did not do so. Instead, they prepared a contract for the sale of a single proposed Lot 504 by Mr Cullen as Trustee to Wise for \$200,000. The area occupied by the proposed Lot 504 was not identical with that of the proposed seven lots. It included them and also land that was to become the cul-de-sac. This contract was dated 7 September 2010 and was signed by both Mr Cullen as Trustee and Wise.
- [7] A survey plan subdividing Lot 504 into seven lots was registered on 30 September 2013. In October 2013, Mr Cullen as Trustee purported to terminate the contract. In the latter half of 2014, the Commonwealth Bank and another mortgagee together took possession of the seven lots and sold them. Neither they, nor Lot 504, were ever transferred to Wise.
- [8] As to the Burleigh Waters property, Mr Cullen executed a transfer of it from himself to himself and his second wife, Michelle Christi Cullen, on 27 October 2014. Some three days later, they executed a transfer of it to Michelle Cullen. In both instances, the consideration was expressed to be “the natural love and affection borne by the transferor for the transferee”. The transfers were duly registered.
- [9] It was in those circumstances that in 2014, Wise commenced a proceeding in the Supreme Court of Queensland against Mr Cullen as Trustee as First Defendant, RTB as Second Defendant and Michelle Cullen as Fourth Defendant.<sup>2</sup>
- [10] Wise succeeded in its claim against Mr Cullen as Trustee on a restitutionary basis. It proved that it (and Mr Mishra who had assigned the benefit thereof to Wise) had in fact paid \$815,000 (including a \$10,000 overpayment) to bank accounts controlled by Mr Cullen or to Stage 3 contractors at his direction during 2010. In so finding, the learned primary judge rejected contentions by Mr Cullen that the payments, which were undisputed, were in fact repayments to Mr Cullen of monies

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<sup>1</sup> ASIC Company Extract: AB 2 269-270.

<sup>2</sup> For technical reasons which are not called in question in to this appeal, Mr Mishra was sued as Third Defendant. The proceeding was in fact commenced before the transfers were executed but that is of no significance for the appeal.

that he had “funnelled” to Mr Mishra to hold for him in order to hide funds from his first wife and that the shares Mr Mishra held in Wise were held on trust for him. Mr Cullen as Trustee has not appealed against the judgment against him for \$815,000 with interest to be assessed. Nor is he a party to the current appeal.

- [11] However, Wise failed in its claim against RTB. It had sought damages for negligence and breach of contract in an amount of \$1,284,850. There is an appeal against the dismissal of this claim. RBT is the First Respondent to the appeal.
- [12] There is also an appeal against the dismissal of Wise’s claim against Michelle Cullen that the transfers of the Burleigh Waters property to her were void pursuant to s 228 *Property Law Act* 1974 (Qld) (“PLA”) as an alienation of property with an intent to defraud Wise and that, in consequence, she holds that property on trust variously for Mr Cullen, or Mr Cullen as Trustee. Thus Michelle Cullen is the Second Respondent to the appeal.
- [13] Grounds 1 to 8 in Wise’s Notice of Appeal<sup>3</sup> concern the claim against RTB while Grounds 9 to 11 concern the claim against Michelle Cullen. It is convenient to consider the respective claims and the appeals against their dismissals separately.

### **The claim against RTB**

- [14] Critical to Wise’s damages claim against RTB was its pleaded allegation that in early September 2010, Wise retained and employed RTB for reward to take such steps, for and on its behalf as was necessary, and to advise thereon, in attending to the preparation and completion of a contract for the seven lots.<sup>4</sup> The retainer was pleaded to have arisen from two meetings that were attended by Mr Mishra and Mr Cullen with Ms Leah McDonnell, solicitor, of that firm that took place in September 2010 and in which she was told that Mr Mishra and Mr Cullen had agreed that Mr Mishra, or his nominee, would purchase the seven proposed lots for \$805,000 (\$115,000 each).<sup>5</sup>
- [15] The learned primary judge declined to make a finding that Wise retained RTB on that basis. After an examination of the evidence, his Honour concluded:

“[176] Ms McDonnell was entitled to draw the conclusion from the discussions she had with Mr Cullen and, later with Mr Cullen and Mr Mishra, that this venture – the sale of Lot 504 – was one being carried out at the behest of, and in the interests of, Mr Cullen. As she told them on more than one occasion, the transaction made no sense if it was intended to protect Mr Cullen's interest in the land represented by Lot 504. But, this scheme was something from which they would not be diverted. They were of the view, misguided though it was and notwithstanding Ms McDonnell's advice, that it would be of use in protecting Mr Cullen from the claims being made by his ex-wife.”

- [16] Later in his reasons, the learned primary judge made the following further findings:

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<sup>3</sup> AB 1 1-7.

<sup>4</sup> Second Further Amended Statement of Claim paragraph 10: AB 1 63.

<sup>5</sup> Ibid.

“[203] Neither Mr Mishra nor Mr Cullen told Ms McDonnell of an agreement for Mr Mishra to purchase 7 lots. They did not ask her, or RTB, to act for them in the conveyance of anything other than Lot 504. They did not ask her to create or record any document in relation to the 7 lots. What they wanted her to do, and what she did do, was to create a contract for a single parcel of land with the sale price of \$200,000 but with the overriding condition that it was for Mr Cullen to decide whether or not the contract would proceed. They did this in the teeth of advice from Ms McDonnell about the imprudence of the arrangement. But they persisted in it because of a misguided view that this arrangement would assist Mr Cullen to protect his Bowen land from his ex-wife.”

- [17] His Honour went on to hold that in the absence of any instructions to act with respect to the conveyance of the seven lots, there was no duty upon RTB to advise Mr Mishra on the basis set out in the pleading.<sup>6</sup>
- [18] The conclusion and findings which I have set out are central to most of the grounds of appeal concerning the claim against RTB. Before turning to those grounds, I propose to give a factual context to what it was that RTB was engaged to do as revealed by contemporaneous documents.
- [19] **Factual context:** On 30 March 2010, the Whitsunday Regional Council (“the Council”) notified development approval for the reconfiguration of a lot (Lot 505) into 17 lots within Stage 3 of the residential subdivision.<sup>7</sup> The reconfiguration provided for the extension of Ada Place with Lots 21 to 25 on one side of the extension and Lots 33 to 37 on the other side of it. Ada Place terminated in a cul-de-sac around which there were seven other lots, Lots 26 to 32.
- [20] On 11 May 2010, Mr Cullen instructed Ms McDonnell of RTB, the firm that had acted for him in the subdivision, that the seven lots “at the back” were to be sold as one parcel for \$200,000.<sup>8</sup> Mr Cullen requested Ms McDonnell on 8 June 2010 to send to Mr Mishra in his company name, “the contracts for the back seven lots by email for signing”.<sup>9</sup>
- [21] On 29 July 2010, RTB advised the council that their client (Mr Cullen) proposed that the 17 lot subdivision be effected by the registration of two plans, the first being one to create 10 of the lots and the second to create the other seven. The council was told that “due to matters of commerciality (our) client wishes to proceed to register two plans to create the full 17 lot subdivision”.<sup>10</sup>
- [22] On 4 August 2010, the Council replaced the approved reconfiguration with one that was depicted in Drawing No. DP-01. It created 11 lots. The seven back lots were included in a new Lot 504.<sup>11</sup>

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<sup>6</sup> Reasons [204].

<sup>7</sup> AB 2 188-196.

<sup>8</sup> AB 2 197.

<sup>9</sup> AB 2 204.

<sup>10</sup> AB 2 309.

<sup>11</sup> AB 2 316-324. Ms McDonnell had prepared a Disclosure Statement for Lot 504 which nominated Wise as the purchaser and which she emailed to Mr Cullen for his signature on 28 July 2010: AB 2 271-273. Mr Cullen signed the Disclosure Statement on 3 September 2010: AB 2 335-336.

[23] Mr Cullen and Mr Mishra attended at RTB's Bowen office on 7 September 2010 and conferred with Ms McDonnell for about one and a quarter hours. She prepared a file note of the conference. Its contents were accurately summarised by the learned primary judge in the following paragraphs in his reasons:

“[150] Ms McDonnell records that Mr Cullen told her:

- (a) that he was in Bowen to check on progress of the subdivision and that he had had discussions with the contractor and the real estate agent,
- (b) that his ex-wife was chasing him for money and that he still had the Gold Coast firm acting for him in that matter,
- (c) he was concerned about the security of the subdivision given that the solicitors for his ex-wife were looking to his assets to satisfy his obligations under the consent order,
- (d) Stage 3 of the development consisted of 10 lots and he had received drawings for a further 7 lots,
- (e) he wanted to protect the next stage and to sell as many lots as possible for the current stage.

[151] Ms McDonnell told him:

- (a) she could register the survey plan once it was returned from Council,
- (b) to seek advice from his family law solicitors about the transaction he proposed because it could be set aside,
- (c) that he and Mr Mishra would be wasting money on legal fees, stamp duty and tax and that he should pay his wife out as soon as possible.

[152] Mr Cullen told her that he wanted to go under contract on the balance land area for the Stage 4<sup>12</sup> subdivision so that his wife could not take it. He told her that he wanted to have the contract with a company in his accountant's name as he had agreed to help and would hold it for him.

[153] Mr Mishra told her that this company was Wise Investments Pty Ltd and that he was the sole director and shareholder. He told her that the purchase price would be \$200,000 with no deposit and that the transaction might not happen.

[154] Ms McDonnell agreed to draw the contract and the disclosure statement and had a clerk start working on those documents while they were talking. They were prepared, read over and signed. It was left on the basis that Mr Cullen and Mr Mishra would work out whether the transaction was necessary and Mr Cullen would let her know.”

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<sup>12</sup> That is to say a subsequent subdivision of the one lot into 7 lots.

- [24] As I have noted, a contract for the sale of the proposed Lot 504 by Mr Cullen as Trustee to Wise dated 7 September 2010, was duly prepared by Ms McDonnell and signed by the parties to it.<sup>13</sup> RTB was stated to be the solicitor for both Seller and Buyer. A special condition of the contract provided that it was conditional upon registration of a survey plan within 18 months of the contract date creating a separate title for Lot 504. If that condition was not satisfied within that timeframe, then either party might terminate the contract.<sup>14</sup> Settlement was to take place 21 days after notification that the special condition was satisfied.<sup>15</sup>
- [25] The survey plan was registered on 10 March 2011. Mr Cullen and Mr Mishra conferred by telephone with Ms McDonnell on 13 May 2011. Her file note of that conference records that she confirmed that registration of the plan of subdivision had taken place. There was a separate title for Lot 504. There was discussion as to whether the transfer of it to Wise should go ahead. Ms McDonnell advised that as it was not an arm's length transaction, she was not prepared to proceed without a valuation of the lot. She reiterated a concern that a transfer at undervalue might be set aside by the Family Court. The note records she was to let the matter lie until Mr Cullen decided what to do.<sup>16</sup>
- [26] On 29 March 2012, Mr Cullen emailed Ms McDonnell "re contract dated 7 September 2010". He advised her that his former wife had been paid out from another source and that "the asset protection plan and purpose of this contract is no longer required and will not be proceeding anymore". He said that he would contact her in due course when he had decided "to register the remaining 7 Lots for titles".<sup>17</sup> Ms McDonnell then closed the file.
- [27] **Findings as to reliability of oral testimony:** The learned primary judge found that Mr Mishra had a flawed memory.<sup>18</sup> He rejected evidence from Mr Mishra that he and Mr Cullen had met with Ms McDonnell on 24 or 25 May 2010.<sup>19</sup> He considered that Mr Mishra had given an inconsistent story with respect to Lot 504.<sup>20</sup> His Honour also concluded that Mr Cullen's recollection of what occurred at the meeting on 7 September 2010 was "sparse".<sup>21</sup>
- [28] Despite an observation that Ms McDonnell's approach to giving evidence had, on occasion, bordered on truculent,<sup>22</sup> his Honour did not find her to be either untruthful or unreliable in her evidence. It is unsurprising then that his Honour accepted the file note that Ms McDonnell had made of the meeting on that date as being an accurate record of what was said.<sup>23</sup>
- [29] On appeal, Wise has not directly challenged the findings made as to the reliability of the evidence of those three witnesses. Nor did it question the finding as to the accuracy of the file note. The thrust of the challenge on appeal was as to the sufficiency

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<sup>13</sup> AB 2 385-399.

<sup>14</sup> Special Conditions 3.1 and 3.2: AB 2 395.

<sup>15</sup> Special Condition 4: *ibid.*

<sup>16</sup> AB 2 600.

<sup>17</sup> AB 2 668.

<sup>18</sup> Reasons [123].

<sup>19</sup> Reasons [128].

<sup>20</sup> Reasons [138]-[141].

<sup>21</sup> Reasons [145].

<sup>22</sup> Reasons [116].

<sup>23</sup> Reasons [149].

of the instructions there recorded to justify a conclusion by Ms McDonnell that she was to act on Mr Cullen's instructions alone.<sup>24</sup>

- [30] **The grounds of appeal:** The grounds of appeal concerning this claim do not press that the learned primary judge ought to have found, consistently with Mr Mishra's oral evidence, that RTB was engaged to act for Wise in a purchase of seven lots for \$805,000 from Mr Cullen as Trustee. The absence of any reference to a consideration of \$805,000 in the file note for the conference that preceded the contract supports the evidence of Ms McDonnell that she was never told about it or about payments that Mr Mishra had made towards that amount.
- [31] Further, the reference in the file note to preparation of a contract "for the balance land area" does not support Mr Mishra's claim that the instructions were for a contact for the purchase of seven lots only. In any event, the fact that Wise, by Mr Mishra, signed the contract dated 7 September 2010 in the form it was drafted, renders it improbable that Ms McDonnell had been instructed to prepare a contract for the purchase of seven lots for \$805,000.
- [32] The grounds of appeal in question accept that the instructions given by Mr Cullen and Mr Mishra related to a contract for Lot 504. They have as a common theme, a proposition that his Honour erred in finding that Ms McDonnell was entitled to conclude that the transaction was one to be carried out to protect Mr Cullen's interests and that she was to act on his instructions as to whether it was to proceed or not. If that was the tenor of the instructions she had, it would preclude other propositions for which the grounds of appeal contend, namely, that RTB had duties to protect Wise's interests as purchaser of Lot 504 particularly after registration of the survey plan creating it, to obtain instructions from Wise, and to advise it, in relation to completion of the contract.
- [33] I acknowledge at this point that the learned primary judge found that Mr Mishra had directed payments to Mr Cullen or third parties in the sum of \$815,000, that that sum was paid in anticipation of Mr Mishra's acquiring seven lots in the Gloucester View estate, and that there was no documented contract because they trusted each other completely.<sup>25</sup> Having briefly explored relevant restitutionary principles, his Honour concluded that it was on that basis that Wise was, in the circumstances, entitled to recover the \$815,000.<sup>26</sup> As I have said, that reasoning is not challenged in this appeal.
- [34] The learned primary judge evidently appreciated that those findings were not findings that were directly relevant to, let alone determinative of, the nature of the engagement of RTB. That latter issue was to be determined by reference to the instructions that were given by Mr Cullen and Mr Mishra to that firm. Hence, his Honour gave much attention to the evidence concerning the instructions given to Ms McDonnell. Having regard to his findings concerning the reliability of the evidence of Mr Mishra and Mr Cullen, his Honour gave particular credence to the contemporaneous record of instructions given that was prepared by Ms McDonnell and which his Honour found was accurate.

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<sup>24</sup> Appeal Transcript ("AT") 1-19 ll10-14; 1-24 115-7.

<sup>25</sup> Reasons [19], [44].

<sup>26</sup> Reasons [20]-[23].

- [35] The file note of the conference attended by Mr Mishra and Mr Cullen at Ms McDonnell's office in Bowen on 7 September 2010<sup>27</sup> was a focus of submissions of the parties during the hearing of the appeal. This note records that Mr Cullen was in Bowen to check on progress with the subdivision. His wife was chasing him for money. He did not want to put the subdivision in jeopardy with his wife looking to take his assets. Stage 3 occupied 10 lots with a balance land area for Stage 4.
- [36] There is then a notation in the file note: "go under contract on balance land area for Stage 4 subdivision so wife can't take it." And next the notation: "Contract to company in accountant's name as he has agreed to help – held for him", which is followed by these details:
- "Wise Investments Pty Ltd – he is sole director, shareholder  
\$200,000  
No deposit at all – may not happen."
- [37] There is then reference to advice given by Ms McDonnell that the Family Court could set aside the transaction "if not at arm's length for proper consideration" and then: "Grant wants to protect his asset by putting in Acct. Name if necessary until wife sorted out. He won't do last stage until knows he is in the clear."
- [38] A notation follows that Ms McDonnell agreed to draw the contract and disclosure statement and after it: "Once docs typed, read over, signed. They will work out whether transaction necessary. Grant to let me know." The file note concludes with the following:
- "Advised files would go to conveyancing and ltrs sent out to them.  
Nothing further req until instructed by Grant."
- [39] It is, I think, obvious that the instructions then given to Ms McDonnell were for a transaction to protect Mr Cullen's interests. In the course of argument of the appeal, Philippides JA put to senior counsel for Wise that the tenor of the note is precisely consistent with a plan to put aside the proposed subdivision so that the wife's solicitor could not seek any claim over the land for the Stage 4 subdivision (the seven lots and cul-de-sac) and to do so by putting that land in the name of Mr Mishra's company as a temporary manoeuvre to see how things went with the property settlement. Senior counsel for Wise said that his client would have to accept that that was so from Mr Cullen's perspective.<sup>28</sup>
- [40] It is difficult to see how the file note could be seen as having any different tenor from Mr Mishra's perspective. The language of the note forecloses any possibility that Ms McDonnell was instructed that Mr Mishra or Wise, acting independently of Mr Cullen, was to purchase the land for its true value in an arm's length transaction. The suggestion by senior counsel for Wise that the phrase in the file note "held for him" meant "held for Mr Mishra", and not for Mr Cullen, is untenable in context. The notation that "they would work out whether the transaction was necessary" evidently referred to a decision to be made by Mr Mishra and Mr Cullen within an accountant and client relationship, not a vendor and purchaser relationship.

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<sup>27</sup> Exhibit 13: AB 2 380-382.

<sup>28</sup> AT 1-25 1128-36.

- [41] Further, the absence of any reference to Mr Mishra having paid any sums of money at Mr Cullen's direction in relation to subdivision of "the back block" not only supports Ms McDonnell's oral testimony that she was not instructed about that, but also compounds the difficulty for Wise in contending for a duty to act for it as if it was an independent purchaser.
- [42] It is significant, too, that the file note that Ms McDonnell made of her telephone conversation with both Mr Mishra and Mr Cullen on 13 May 2011,<sup>29</sup> to which I have referred, is consistent with the nature of the transaction for which she was to prepare a contract. It records that after she confirmed that the survey plan for Lot 504 had been registered, there was discussion as to whether to go ahead with the transfer of the lot to Wise. She advised that transfer duty would have to be paid on the true value of the lot. The note concluded with the words:  
"won't do it unless done properly; advised waste of duty, costs etc. As Family Court could still set aside the transaction.  
leave until Grant decides what to do."
- [43] There is nothing in the other documentary evidence adduced at trial which significantly undermines the contents of the two file notes as being an accurate reflection of the instructions given to Ms McDonnell. The same may be said of the cross examination of Ms McDonnell, extracts from which were set out by the learned primary judge at paragraphs 174 to 176 of his reasons. Indeed, the evidence then given was confirmatory of what was in the file notes. Further, the written communications in evidence which took place after the May telephone conversation do not provide a basis for a sound inference that at some point thereafter, Wise engaged RTB to act for it as a purchaser at arm's length of Lot 504.
- [44] There was a reference in the letter from RTB's conveyancing division to Wise dated 1 October 2010 forwarding a copy of the signed contract and disclosure statement, to matters on which the firm required "your further instructions". Those matters were set out in an attachment headed "Important Information for Buyers". They were limited to transfer duty and building covenants. Thus, the reference to "further instructions" was not to instructions generally. It is not a basis for attributing to RTB, contrary to the contents of the file note for the conference on 7 September 2010, that it was to act for Wise, as if the latter was an independent purchaser at arm's length. I would add that because the transaction was not of that character, Rule 8.5 of the *Legal Profession (Solicitors) Rule 2007*, on which some reliance was placed by Wise in argument, was not engaged.
- [45] For these reasons, Wise has, in my view, failed to establish the proposition on which the grounds of appeal with respect to this claim are themed. The learned primary judge did not err in concluding that the transaction concerning Lot 504 in which RTB was engaged to act, was one to be carried out to protect Mr Cullen's interests and that the firm was to act on his instructions as to whether it was to proceed or not. Mr Mishra knew that from his participation in the conferences. There was no breach by RTB of duty owed by it to him or to Wise. Accordingly, Grounds 1 to 8 inclusive have not been made out.

### **The claim against Michelle Cullen**

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<sup>29</sup> Exhibit 26: AB 2 600.

- [46] Michelle Cullen participated in both the trial and the appeal. She was not legally represented on either occasion. At the appeal, she relied on written submissions prepared by a solicitor.
- [47] As I have noted, Grant Cullen executed a transfer of the Burleigh Waters property to himself and Michelle Cullen on 27 October 2014.<sup>30</sup> On 30 October 2014, they executed a transfer of the land to Michelle Cullen.<sup>31</sup> Both transfers were duly registered. The consideration in both instances was expressed to be “the natural love and affection borne by the transferor for the transferee”.
- [48] Section 228(1) PLA renders every alienation of property made with intent to defraud creditors voidable at the instance of any person prejudiced thereby. Wise was motivated to have the transfers avoided given that, as was agreed on the pleadings, the property had a then market value of \$1,350,000 and was subject to a mortgage to Westpac for \$950,000.<sup>32</sup>
- [49] The learned primary judge found that the transfers which together resulted in Michelle Cullen replacing Grant Cullen as registered proprietor of the property, were alienations of property within the meaning of the section.<sup>33</sup> His Honour also inferred that Mr Cullen engaged in the transfers for the purpose of defeating or delaying or hindering Wise in recovering from him what he was liable to repay to it.<sup>34</sup> Neither the finding nor the inference are challenged on appeal.
- [50] **The s 228(3) PLA limitation:** Section 228(3) PLA, however, provides that section 228 does not extend to any estate or interest in property conveyed for valuable consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors. The learned primary judge concluded that apart from the consideration expressed in each of the transfers, Michelle Cullen had, in fact, provided valuable consideration for the transfer to her.
- [51] In arriving at that conclusion, his Honour drew upon a chronology which he had prepared and which included the following undisputed events:
- “(a) from 20 July 2012 Mr Cullen was the sole registered proprietor of the Burleigh Waters property,
  - (b) there was one mortgage over the Burleigh Waters property in favour of the National Australia Bank (the NAB mortgage) and another in favour of CEG Capital and Equities Group Direct Securities Pty Ltd (the CEG mortgage),
  - (c) May 2014 – Mr Cullen sought to refinance, among other things, the NAB and CEG mortgages,
  - (d) 4 June 2014 – CEG gave notice under s 84 of the PLA with respect to the Burleigh Waters property,

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<sup>30</sup> AB 2 1159.

<sup>31</sup> AB 2 1156.

<sup>32</sup> Reasons [89].

<sup>33</sup> Reasons [72].

<sup>34</sup> Reasons [91]. The inference was irresistible given that the transfers were executed after Wise filed an application for a freezing order over the Burleigh Waters property which was listed for hearing on 28 October 2014.

- (e) 14 August 2014 – CEG commenced proceedings in this court for recovery of possession,
- (f) 25 August 2014 – Diamond Conway (Mr Cullen's solicitors) registered a mortgage (the first Diamond Conway mortgage) - securing all current and future fees and disbursements - over the Burleigh Waters property,
- (g) 10 September 2014 – Mrs Michelle Cullen was successful in securing refinancing in the sum of \$950,000 from Westpac, ...
- (n) 20 November 2014 – Mrs Cullen executed a guarantee for the payment of Mr Cullen's legal fees and granted a mortgage to Diamond Conway securing that guarantee (the second Diamond Conway guarantee),
- (o) 2 December 2014 – Boddice J made orders freezing Mr Cullen's assets up to the unencumbered value of \$815,000,
- (p) 3 December 2014 –
  - a) Diamond Conway released the first Diamond Conway mortgage,
  - b) Diamond Conway was paid its legal fees of \$39,813,
  - c) The two transfers concerning the Burleigh Waters property were lodged and registered, and
  - d) Mr Cullen paid his wife \$36,793.”<sup>35</sup>

[52] His Honour reasoned in the following way that there was valuable consideration provided by Michelle Cullen for the transfers:

“[96] The consideration from Mrs Cullen was that she paid out Mr Cullen's debts to NAB and CEG. This did not appear on the transfer documents (no doubt to reduce the stamp duty) but it was a part of the arrangement which led to the transfers.

[97] The consideration referred to in s 228(3) must be "valuable" but it need not pass to Mr Cullen.<sup>36</sup> Mrs Cullen paid the debts he owed to NAB and CEG. In order for that to be done she needed to offer security and, so, she needed to become the registered proprietor. The consideration was the payment by Mrs Cullen of Mr Cullen's debts to NAB and CEG as well as the guarantee she gave for his legal fees.”

[53] The learned primary judge next posed this question: “Did Mrs Cullen act in good faith without notice of intent to defraud?” His Honour answered that question in the positive. His reasoning to that answer was as follows:

“[98] Mrs Cullen's evidence was consistent on this point. She wanted to protect her home and she was willing to enter into new securities and commitments to do that. She knew her

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<sup>35</sup> Reasons [77].

<sup>36</sup> *Pico Holdings Inc v Wave Vistas Pty Ltd* [2005] HCA 13; (2005) 214 ALR 392.

husband could not refinance the property and so she was placed in a position from which there was only one exit.

[99] In order to demonstrate that she acted in good faith, she needed to demonstrate that the transactions were regularly executed and that she did not have notice that any fraud was intended. In her cross-examination she denied all knowledge of the claims of Wise against her husband. Her husband had sought to refinance the NAB and CEG loans in May 2014 but failed. She was successful in doing that in September of that year. Mr Cullen was not served with these proceedings until a month after that and Mrs Cullen was not then a party to them.

[100] An application for a freezing order was made by Wise seven days after service of these proceedings. Mrs Cullen was not a respondent to that application.

[101] In its argument, Wise relies on this exchange in cross-examination. Mrs Cullen was asked why she agreed to purchase the property from Mr Cullen. She said:

“The reason was financial hardship, in some way. We - my husband was in a lot of debt, bad credit rating, wasn't working. I went back to work after three months still breastfeeding my child to service a - so I could afford the mortgage.

Would you agree that when the discussion about you purchasing the property from him occurred, the purpose was to reduce the risk to his business activities? ---Reduce risk to his debt and for our house not being taken from us.”

[102] Later in her cross-examination she agreed that she knew that Diamond Conway were a firm of solicitors in Sydney that were acting for her husband. She said that they were acting in relation to the Fiji business but she did not know of their involvement in these proceedings because she had “no idea of these proceedings”. She denied any knowledge of the problems that her husband was having with Mr Mishra and the demands being made to transfer property at Bowen to him. She said that she first became aware of these court proceedings when she received the letter from Westpac in relation to Wise.

[103] Mrs Cullen's evidence on these matters was consistent and was undisturbed by cross examination. There was no documentary evidence which contradicted anything she said. I accept that she was telling the truth when she said she was not aware of these proceedings. This was not the type of case where a spouse is the beneficiary of a voluntary conveyance of property. Mrs Cullen took on the full burden of refinancing the debt owed on the Burleigh Heads property and she did that absent any knowledge of the dispute between her husband and Mr Mishra. She has satisfied the onus of demonstrating that the conveyance to her was, from her perspective, in good faith and without knowledge of any intent to defraud creditors.”

[54] In view of that answer to his question and the conclusion he had reached as to valuable consideration, the learned primary judge held that the order sought by Wise under s 228 PLA could not be made.<sup>37</sup>

[55] **The grounds of appeal:** Wise relies on the following grounds of appeal in relation to this claim:

“9. His Honour erred in finding at [97] that the Second Respondent provided valuable consideration for the transfer of the property located at 200 Acanthus Avenue, Burleigh Waters in the State of Queensland (**property**).

10. His Honour erred in finding at [103] that the Second Respondent did not have notice of the intent to defraud creditors, having found at [91] that Mr Cullen transferred the property to his wife for the purpose of defeating or delaying or hindering the Appellant in recovering what it was owed.

11. His Honour should have found that the property was not conveyed to the Second Respondent for valuable consideration and in good faith or that the Second Respondent had notice of Mr Cullen's intention to defraud creditors.”<sup>38</sup>

[56] Before turning to these individual grounds, I note that, consistently with the decision of the New South Wales Court of Appeal in *Wentworth v Rogers & Anor*,<sup>39</sup> the learned primary judge acted on the basis that in light of the finding that the alienation to Michelle Cullen was to defeat creditors, the onus was on her to establish that the property was conveyed for valuable consideration and that she acted in good faith without notice of the intention to defraud creditors.<sup>40</sup>

[57] **Ground 9:** Wise submitted that there was no evidence that Grant and Michelle Cullen had agreed between themselves that the transfers were to be made other than for the consideration expressed in them. Further, no money passed between them for the transfers. All that happened was a substitution of mortgagees. There was, therefore, no valuable consideration provided by Michelle Cullen.<sup>41</sup>

[58] In considering the avoidance provision in s 120(1) of the *Bankruptcy Act* 1966 (Cth), the High Court in *Barton v Official Receiver*<sup>42</sup> endorsed the ruling of the Full Court below<sup>43</sup> that “a purchaser for valuable consideration” within the meaning of that section was “one who has given consideration for his purchase which has a real and substantial value, and not one which is merely nominal or trivial or colourable.”

[59] It is true that Michelle Cullen did not pay any money to Grant Cullen for the transfers of this property. However, her conduct in securing the refinancing by Westpac in anticipation of the transfers was of real value to Mr Cullen. It enabled the discharge of the NAB mortgage and the CEG mortgage in consequence of which Mr Cullen was released from personal liability to those lenders for the

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<sup>37</sup> Reasons [104].

<sup>38</sup> AB 1 3,4.

<sup>39</sup> [2004] NSWCA 430 per Hodgson JA at [66] – [68] (Santow JA and Hislop J agreeing).

<sup>40</sup> Reasons [92].

<sup>41</sup> AT 1-63 140 – AT 1-64 119.

<sup>42</sup> (1986) 161 CLR 75 per Gibbs CJ, Mason, Wilson and Dawson JJ at 86.

<sup>43</sup> At (1984) 4 FCR 380.

amount secured by their respective mortgages. The benefit of the releases was neither nominal, trivial nor colourable.

- [60] Further, insofar as the property had a value which exceeded the amounts that had been secured by the discharged mortgages, Michelle Cullen executed a guarantee for payment of Diamond Conway's fees and granted a mortgage to that firm to secure her guarantee. That was to Mr Cullen's benefit in ensuring that that firm would continue to act, and was of value to him.
- [61] It was therefore correct, in my view, for the learned primary judge to have found that Michelle Cullen provided valuable consideration for the transfers to her of the property. This ground of appeal has not been made out.
- [62] **Ground 10:** As drafted, this ground of appeal implies that the finding at paragraph 91 of the reasons as to Mr Cullen's purpose in executing the transfers of the property precluded the finding made at paragraph 103 concerning Michelle Cullen. Clearly it did not. It does not follow as a matter of course that because Grant Cullen had that purpose, Michelle Cullen must have known of it. Wise does not point to any evidence in the nature of an admission by her of knowledge of his purpose.
- [63] In oral submissions on appeal, senior counsel for Wise criticised the learned primary judge as having erroneously focused upon Michelle Cullen's knowledge of the dispute between her husband and Mr Mishra. Her evidence about the purpose of the transfer and the other creditors that "must have been in her foresight", it was submitted, was overlooked.<sup>44</sup>
- [64] In order to develop this criticism, senior counsel referred to certain questions and answers in a passage of the cross examination, the full text of which is as follows:

"All right. Could I ask was there a reason why at that time, namely, May 2014 – and I will use your word – you agreed to purchase the property from him?---Yes.

And what was that reason?---The reason was financial hardship, in some way. We – my husband was in a lot of debt, bad credit rating, wasn't working. I went back to work after three months still breastfeeding my child to service a – so I could afford the mortgage.

Would you agree that when the discussion about you purchasing the property from him occurred, the purpose was to reduce the risk to his business activities?---Reduce risk to his debt and for our house not being taken from us.

And when you mentioned, as you just did in your answer, it was to reduce our risk to his business, what did you mean?---I didn't say business.

Well, when you mentioned to his Honour that it was to reduce risk, what did you mean?---Debts.

But what's the risk in relation to debts?---I didn't want my house taken from me and my children.

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<sup>44</sup> AT 1-69 144 – AT 1-70 11.

And you thought that there was a risk of that happening at that point in time because of the debts that your husband owed. Is that right?---Correct.

Thank you. And of course, as you've told us – and, madam, you're not to be criticised for this – you were trying to do your best for your family at the time?---Yes.

All right. Now, can I just ask you some questions about the debts that your husband had at that time. Do you follow?---Yes.

Now, there were debts to the banks, weren't there?---Yes.

National Australia Bank was probably the major creditor at the time; is that right?---Yes.

And you know what I mean by creditors, don't you?---Yes.

People to whom your husband owes money to?---Yes.

All right. So the National Australia Bank – there was a lot of money owing to it. Is that right?---Correct.

And there was also another company called CEG?---Yes.

Remember that one?---Yes.

And your husband owed money to them as well?---Correct.

Can you tell us who else he owed money to at the time, as best you recall?---Diamond Conway.

And just so we're clear, Diamond Conway were a firm of solicitors in Sydney that were acting for your husband at the time?---Correct.

And acting for him, as you understood it, in relation to proceedings that had been brought in this court by Wise Investments against your husband?---No.

Well, what was Diamond Conway acting in relation to in May of 2014?---My awareness was that it was in relation to our Fiji business, because I was also involved in the Fiji business.

I see. And of course I think these proceedings didn't come until a bit later that year.

Is that right?---I had no idea of these proceedings.

We'll come to that. But just coming back to my principal question, apart from the NAB and CEG and Diamond Conway, what other creditors were there at the time you decided to purchase the property from your husband?---I'm unsure of what – I can't really remember, I'm sorry.<sup>45</sup>

- [65] It was submitted that the last answer given by Michelle Cullen was an acceptance on her part that there were other creditors, the identification of which she was unable to recall.<sup>46</sup>
- [66] I am unable to agree that this evidence precluded the finding at paragraph 103 of the reasons. In the course of this cross examination, Michelle Cullen stated that the purpose of the transfers was to prevent their house being taken from them. She was then asked about three creditors of Mr Cullen – the National Australia Bank, CEG and the solicitors, Diamond Conway, each of whom had a mortgage over the property. She was aware of those creditors. However, in view of their registered mortgages, the transfers could not have been undertaken to defraud them as creditors.
- [67] Michelle Cullen denied knowledge at the time of the claim that Wise was making. There was no evidence at the trial identifying any other creditors of Mr Cullen. It was not put to Michelle Cullen that there were such creditors or, importantly, that if there were, she knew that they would have been able to resort to the property by way of execution of a judgment, had it remained in his name.
- [68] For these reasons, this ground of appeal cannot succeed.
- [69] **Ground 11:** In the face of the evidence to which the learned primary judge referred and which I have discussed in the context of Ground 10, the finding urged in this ground of appeal is not one that the learned primary judge should have made, in my view.

### **Disposition**

- [70] None of the grounds of appeal concerning either claim has succeeded. It follows that this appeal must be dismissed. The appellant ought pay the respondents' costs of the appeal on the standard basis.

### **Orders**

- [71] I would propose the following orders:
1. Appeal dismissed.
  2. The appellant is to pay the respondents' costs of the appeal, including any reserved costs, on the standard basis.
- [72] **PHILIPPIDES JA:** For the reasons given by Gotterson JA, I agree with the orders proposed by his Honour.
- [73] **BRADLEY J:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

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<sup>46</sup> AT 1-71 III-3.