

SUPREME COURT OF QUEENSLAND

CITATION: *Grace Bunclie Pty Ltd & Anor v Ralph Lauren 57 Pty Ltd & Ors* [2020] QSC 182

PARTIES: **GRACE BUNCLE PTY LTD AS TRUSTEE OF THE CINDY FLEMING TRUST**
ACN 605 600 959
(plaintiff/first applicant)
MICHAEL PATRICK CONLEY AS ADMINISTRATOR OF THE ESTATE OF CINDY ANN FLEMING
(second applicant)

v

RALPH LAUREN 57 PTY LTD IN ITS OWN CAPACITY AND AS TRUSTEE OF THE JOHN JAMES TRUST, THE BRETT GRAHAM TRUST, THE LISA CLOWES TRUST, THE 171 ROBERTSON STREET UNIT TRUST, THE DOUGLAS AND MISAKO JAMES DISCRETIONARY TRUST, THE LISA CLOWES DISCRETIONARY TRUST, THE SIMON AND LISA CLOWES DISCRETIONARY TRUST, THE CINDY FLEMING CENTRO UNIT TRUST, THE AARON FLEMING CENTRO UNIT TRUST, THE JORDIN FLEMING CENTRO UNIT TRUST, THE KEATON FLEMING CENTRO UNIT TRUST, THE TRISTAN FLEMING CENTRO UNIT TRUST, THE DOUGLAS JAMES CENTRO UNIT TRUST, THE MISAKO JAMES CENTRO UNIT TRUST, THE JOHN JAMES CENTRO UNIT TRUST, THE DAVID JAMES CENTRO UNIT TRUST, THE LISA CLOWES CENTRO UNIT TRUST, THE SIMON CLOWES CENTRO UNIT TRUST, THE BELLA CLOWES CENTRO UNIT TRUST AND THE MAX CLOWES CENTRO UNIT TRUST

ACN 079 745 056

(first respondent)

ROBERT JOHN JAMES

(second respondent)

JAMES MURRAY FORBES AND KYLIE MAREE FORBES AS TRUSTEES OF THE CRU TRUST

(third respondents)

DOMINIC JOHN WING AS TRUSTEE OF THE WING FAMILY TRUST

(fourth respondent)

SIMON LUCAS CLOWES AND LISA MICHELLE CLOWES

(fifth respondents)

RALPH LAUREN PTY LTD IN ITS OWN CAPACITY AND AS TRUSTEE OF THE RALPH LAUREN UNIT TRUST

ACN 010 941 616
 (sixth respondent)
**RALPH LAUREN 33 PTY LTD IN ITS OWN
 CAPACITY AND AS TRUSTEE FOR THE 27
 COMMERCIAL ROAD TRUST**

ACN 089 012 484
 (seventh respondent)
AVENTINE REAL ESTATE LTD

ARBN 086 748 898
 (eighth respondent)
**SPV BRISBANE PTY LTD IN ITS OWN CAPACITY
 AND AS TRUSTEE OF THE ACJD FAMILY TRUST
 AND THE 29 DOGGETT STREET TRUST**

ACN 124 684 564
 (ninth respondent)
NORBERT CALABRO
 (tenth respondent)

FILE NO/S: BS No 4589 of 2016
 BS No 4849 of 2016
 BS No 6557 of 2017

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 14 October 2019

JUDGE: Bradley J

ORDER: **I will hear from the parties as to the form of the orders that should be made.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND CONSOLIDATION OF PROCEEDINGS – CONSOLIDATION OF PROCEEDINGS – where the plaintiff, as trustee of a trust, commenced three separate proceedings involving the first respondent in various of its capacities as a defendant – where the plaintiff alleges a previous trustee of the trust entered into numerous partnerships with, amongst others, the first respondent in various of its capacities – where the plaintiff seeks to consolidate the proceedings to allege the existence of those partnerships, and other partnerships involving additional parties, in a single proceeding – whether the involvement of the plaintiff and first respondent in each existing proceeding, and certain questions of fact common to more than one of

them, enlivens the discretion to consolidate pursuant to the UCPR – whether the proceedings should be consolidated – whether additional parties should be included – whether leave should be granted to proceed – whether a stale claim should be renewed

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 24, r 78, r 389

Fitzgerald v Cooper [2020] NSWSC 451, cited

Hartnett v Hynes [2010] QCA 65, cited

Lilyville Pty Ltd v Colonial Mutual Life Assurance Society Ltd [1999] QSC 372, cited

Pacific Century Production Pty Ltd v Taylors Contracting Services Pty Ltd [2003] QSC 289, cited

Rodgers Family Investments Pty Ltd v Australia and New Zealand Banking Group Ltd [2008] QSC 85, cited

Stacks Managed Investments Limited v Tolteca Pty Ltd [2015] QSC 80, approved

- COUNSEL: A J H Morris QC, with I A Erskine, for the applicants
D A Kelly QC, with S J Williams QC and M A Eade, for the first, second, sixth, seventh and ninth respondents
L F Kelly QC, with D J Pyle, for the third to fifth and eighth respondents
R S Ashton QC for the tenth respondent
- SOLICITORS: Hawthorn Cuppaidge & Badgery for the applicants
Wilson Lawyers for the first, second, sixth, seventh and ninth respondents
Cooper Grace Ward for the third to fifth and eighth respondents
Norton Rose Fulbright for the tenth respondent

- [1] Grace Buncle Pty Ltd (**GB**) is the trustee of the Cindy Fleming Trust (the **CFT**). GB is the applicant in three separate proceedings. GB seeks orders for consolidation of those proceedings into a single proceeding pursuant to r 78.¹
- [2] GB also seeks an order for joinder of 12 new parties to the consolidated proceeding pursuant to r 69, if necessary an order granting GB leave to proceed pursuant to r 389, and directions. In the third of the proceedings, GB seeks an order granting it leave to renew the claim pursuant to r 24, because it was filed on 30 June 2017 and has never been served.
- [3] The defendants, and the proposed new defendants who appeared, opposed the orders sought by GB.

Background

- [4] The common origin of the matters in dispute is the personal relationship between Cindy Ann Fleming and Robert John James that endured from July 2002 to May 2009. According to GB's proposed consolidated pleading, Ms Fleming married

¹ In these reasons, each reference to a rule is to a rule in the *Uniform Civil Procedure Rules 1999 (Qld)* (**UCPR**).

Michael Patrick Conley on 4 September 2010.² From about 2011, Ms Fleming and Mr James were parties to a proceeding in the Family Court of Australia (the **Family Court Proceeding**).

- [5] On 3 September 2014, Ms Fleming died intestate. On 14 October 2014, the court appointed Mr Conley as administrator of her deceased estate, pursuant to a grant of letters of administration.
- [6] From about 2002 until her death, Ms Fleming had been the trustee of the CFT. On 29 October 2014, Mr Conley was appointed trustee of the CFT. On 4 May 2015, Mr Conley retired and GB was appointed trustee of the CFT.
- [7] On 11 August 2015, the Family Court Proceeding was compromised.

The first proceeding

- [8] On 9 May 2016, GB commenced the first proceeding against Ralph Lauren 57 Pty Ltd (**RL57**) as trustee of a discretionary trust, the John James Trust (the **JJT**). In it, GB alleges a partnership (the **CFT/JJT Partnership**) between Ms Fleming, as trustee of the CFT, and RL57 (by Mr James), as trustee of the JJT, made by an oral agreement.
- [9] GB alleges RL57 breached fiduciary obligations and failed to keep accurate partnership records. GB seeks a declaration that the CFT/JJT Partnership was dissolved on the death of Ms Fleming, and orders for the appointment of statutory trustees for sale of the real property of the partnership, receivers of the other property of the partnership and special referees to take an account of the partnership, amongst other relief. GB alleges there are six real properties owned by the partnership: two in Queen Street, one in Fortitude Valley and three at Southport.
- [10] RL57 denies the alleged oral partnership agreement, and denies there was a partnership or, alternatively, denies that the partnership has been dissolved. RL57 alleges an oral agreement about the initial investment by Ms Fleming, through the CFT, in real property acquired by Mr James, through RL57 as trustee of the JJT, and three subsequent oral loan agreements between the two. The investment and each of the loans is alleged to have been for a term of 10 years. RL57 denies any breach of fiduciary obligation. RL57 says a number of matters alleged by GB involve personal entitlements of Ms Fleming in respect of the principal place of residence she shared with Mr James, which RL57 says were compromised in the Family Court Proceeding.

The second proceeding

- [11] On 13 May 2016, four days after the first proceeding was commenced, GB commenced the second proceeding. It named two defendants: RL57, as trustee of 13 unit trusts (the **Centro Unit Trusts**)³ and three discretionary trusts;⁴ and Mr

² GB and Mr Conley seek to include Mr Conley as a second plaintiff in a consolidated proceeding.

³ There are 13 Centro Unit Trusts: the Cindy Fleming Centro Unit Trust, the Aaron Fleming Centro Unit Trust, the Jordin Fleming Centro Unit Trust, the Keaton Fleming Centro Unit Trust, the Tristan Fleming Centro Unit Trust, the Douglas James Centro Unit Trust, the Misako James Centro Unit Trust, the John James Centro Unit Trust, the David James Centro Unit Trust, the Lisa Clowes Centro Unit Trust, the Simon Clowes Centro Unit Trust, the Bella Clowes Centro Unit Trust and the Max Clowes Centro Unit Trust.

James, in his personal capacity. GB alleges Ms Fleming, as trustee of the CFT, and RL57, as trustee of each of the three discretionary trusts, were in another partnership (the **Centro 3 4 6 Partnership**) for the holding or development of real property in James Street, Fortitude Valley.

- [12] GB complains about the redemption of 45 units in each of the Centro Unit Trusts, formerly held by Ms Fleming as trustee of the CFT, pursuant to a fair value determined by Norbert Calabro.⁵ GB alleges breaches of fiduciary duty by RL57 and knowing assistance by Mr James. GB seeks a declaration that the Centro 3 4 6 Partnership was dissolved on the death of Ms Fleming or the date her units in the Centro Unit Trusts were redeemed, and orders for the replacement of RL57 as trustee of each of the Centro Unit Trusts and the vesting of the trust property in the new trustee. GB also seeks more than 20 other orders in respect of the Centro 3 4 6 Partnership.
- [13] The defendants deny the unit holders in the Centro Unit Trusts were partners. They allege the Centro 3 4 6 Partnership was between the Centro Unit Trusts (not the unit holders) and deny that Ms Fleming, as trustee of the CFT, was a partner. They plead terms of oral agreements with Ms Fleming, pursuant to which the CFT loaned money to the Centro 3 4 6 Partnership to acquire and hold real property. They deny that Ms Fleming's death effected a dissolution of any partnership of which she was a member as trustee of the CFT. They say the matters the subject of GB's claim were compromised in the Family Court Proceeding. They deny the allegations of breach of fiduciary duty and knowing assistance.

The third proceeding

- [14] On 30 June 2017, GB commenced the third proceeding. It named nine defendants: RL57, in its own right and as trustee of each of the JJT, the Brett Graham Trust (the **BGT**), and the 171 Robertson Street Unit Trust (the **RSUT**); Aventine Real Estate Ltd (**ARE**); James Forbes and Kylie Forbes as trustees of the Cru Trust (the **CruT**); Dominic Wing as trustee of the Wing Family Trust (the **WFT**); Ralph Lauren 33 Pty Ltd (**RL33**); and Mr James.
- [15] In the third proceeding, GB alleges two further partnerships.
- [16] The first in time is the **K Tower Partnership**, alleged to be between Ms Fleming, as trustee of the CFT, RL57, as trustee of the JJT and as trustee of the RSUT, Mr and Ms Forbes, as trustees of the CruT, Mr Wing, as trustee of the WFT, and ARE. GB alleges breaches of fiduciary duty by RL57 in the alleged application of \$239,433.00 from the alleged CFT/JJT Partnership as capital contributions or a loan to the K Tower Partnership, and the misapplication of partnership funds. Extensive relief (some 26 orders) is sought in respect of the alleged K Tower Partnership.
- [17] The second is the **Hynes Street Partnership**, alleged to be between Ms Fleming, as trustee of the CFT, RL57, as trustee of the JJT and as trustee of the BGT, Mr and

⁴ The Douglas and Misako James Discretionary Trust, the Lisa Clowes Discretionary Trust and the Simon and Lisa Clowes Discretionary Trust. Together, RL57, as trustee of each discretionary trust, and Ms Fleming, as trustee of the CFT, initially held all of the units in each of the Centro Unit Trusts.

⁵ Mr Calabro is one of the proposed new parties.

Ms Forbes, as trustees of the CruT, and Mr Wing, as trustee of the WFT. GB says the partnership acquired real property in Fortitude Valley between February 2008 and June 2011. GB alleges \$501,911.83 from the alleged CFT/JJT Partnership were used to acquire the real property. Extensive relief (some 17 orders) is sought in respect of the alleged Hynes Street Partnership.

- [18] The claim and the statement of claim in the third proceeding have not been served on any of the defendants. The claim expired on 30 June 2018. It has not been renewed. Notwithstanding its stale status, the third proceeding has been listed and managed on the Commercial List, along with the other two proceedings.

The interim compromise

- [19] On 14 February 2017, before the third proceeding was commenced, GB applied for leave to amend the claim and statement of claim in the first and second proceedings to claim relief in the form of an order for the appointment of statutory trustees for sale of certain real property and leave to add ten parties to the first proceeding and Mr Calabro to the second proceeding. The then proposed amendments were extensive. If allowed, GB would have added 90 paragraphs of material facts and 130 paragraphs to the prayer for relief to the statement of claim in the first proceeding.
- [20] The application was to be heard on 9 March 2017. On that date GB, RL57 and Mr James agreed on “Terms of Interim Compromise” (the TIC) and GB’s applications were adjourned by consent with costs reserved.⁶
- [21] The TIC effected a joint appointment of an agent, Mr Sheehy, to sell the real properties GB alleged were assets of the CFT/JJT Partnership and those alleged to be assets of the K Tower Partnership and another alleged partnership, the Knapp Street Partnership. The last partnership was to be alleged in GB’s proposed amendments to the statement of claim in the first proceeding.
- [22] The TIC also effected the joint appointment of a forensic accountant, Mr Lytras, to consider and report on GB’s allegations in the proposed amended pleading and the evidence of two accountants who had opined on the transactions concerning the CFT/JJT Partnership in the first proceeding. Mr Lytras was also appointed to consider and report on Mr Calabro’s determination of the fair value of the units formerly held by Ms Fleming, as trustee of the CFT, in the Centro Unit Trusts.
- [23] After the TIC was agreed, GB and RL57 fell into dispute as to the meaning and effect of the instrument. On 23 June 2017, RL57 filed an application seeking a declaration as to the proper construction of the TIC. On 4 July 2017, GB sought a declaration that the TIC was void as *ultra vires*.
- [24] On 23 February 2018, Bond J rejected GB’s contention that the TIC was void and made a declaration as to the proper construction of the disputed terms.⁷
- [25] On 5 February 2019, Bond J directed the parties to report on the steps taken to give effect to the TIC and on the current position as to the disposition of any issues arising in the three proceedings.

⁶ The proposed additional parties, including Mr Calabro and the Non-James Parties sought to be added as parties to the proposed consolidated proceeding, are not parties to the TIC.

⁷ *Grace Bunclie Pty Ltd v Ralph Lauren No 57 Pty Ltd* [2018] QSC 24.

- [26] On 23 April 2019, the parties filed a joint report. On 29 April 2019, before Douglas J, directions were made for GB to file and serve any application for consolidation, to amend the statement of claim and for the joinder of parties by 17 May 2019.

The present applications

- [27] On 17 May 2019, GB filed the applications that are a subject of these reasons. On 4 June 2019, Douglas J reviewed the applications and directions were made to facilitate a hearing for a day in the civil list on 5 September 2019.
- [28] On 5 September 2019, the court granted GB an adjournment of the applications and made directions for the exchange of material, including the proposed amended application in each proceeding.

14 October 2019 hearing

- [29] On 14 October 2019, the parties (and proposed parties) returned for the hearing of the adjourned applications. GB's amended applications were filed by leave that day. In support of the applications, GB read 12 affidavits and 12 other documents filed in the proceedings.
- [30] The final form of GB's proposed consolidated statement of claim (the **consolidated pleading**) was exhibited to one of the affidavits.⁸ It is 158 pages in length, including 358 paragraphs (many with numerous sub-paragraphs) and 53 tables as well as a prayer for relief with 35 paragraphs. It includes 162 defined terms set out in table 1, which stretches across 15 pages. There are three schedules itemising alleged payments.
- [31] At the hearing, GB and Mr Conley were represented by Mr Morris QC and Mr Erskine of counsel. GB filed two outlines of submissions concerning the applications. Its 16 August 2019 outline was relatively brief: 27 paragraphs over 4 pages. Its 20 September 2019 outline could not be so described. It comprised 126 paragraphs over 40 pages.
- [32] Mr D A Kelly QC, Mr S J Williams QC and Mr Eade of counsel appeared for RL57 in each of its 21 different capacities, RL33 in its own capacity and as a proposed new defendant in its capacity as trustee of the 27 Commercial Road Trust, and Mr James. They also appeared for two other proposed new defendants: Ralph Lauren Pty Ltd (in its own capacity and as trustee of the Ralph Lauren Unit Trust) and SPV Brisbane Pty Ltd (in its own capacity and as trustee of the ACJD Family Trust and the 29 Doggett Street Trust). It is convenient to refer to these parties and proposed parties collectively as the **James Parties**.
- [33] The James Parties filed a written outline of submissions dated 2 September 2019, prepared for the 5 September hearing. The outline proper comprised 115 paragraphs over 42 pages. There were four annexures: a list of 35 "material changes" from the existing pleadings (or those GB had previously sought to file); a list of 30 "matters abandoned" in the consolidated pleading; a list of 102 "new matters" pleaded in the consolidated pleading; and a list and table of material changes to GB's case that would affect the TIC and the matters to be investigated by Mr Lytras pursuant to the TIC. In total, the outline and annexures run to 90 pages. Counsel for the James Parties also filed a nine page outline in reply on 4

⁸ Affidavit of Peter Leslie Challen filed 12 July 2019 in BS No 4589 of 2016.

October 2019. The James Parties read five affidavits and 13 other documents filed in the three proceedings; most of the latter had been read by GB.

- [34] Mr L F Kelly QC and Mr Pyle of counsel appeared for Mr and Ms Forbes, Mr Wing, Mr and Ms Clowes, and ARE. It is convenient to refer to these parties as the **Non-James Parties**. They relied on an eight page outline of submissions dated 3 September 2019 and a four page set of responsive submissions dated 4 October 2019. The Non-James Parties read one affidavit and 12 other filed documents; save for written submissions, these were documents read by GB or the James Parties.
- [35] Mr Ashton QC appeared for Mr Calabro. He relied on a seven page outline dated 30 August 2019, prepared for the originally scheduled hearing, and a nine page set of responsive submissions dated 4 October 2019.
- [36] The principal focus of the written submissions and the hearing was the consolidation orders sought by GB. It is convenient to consider that topic first and then to turn to the other procedural relief GB seeks. Finally, it will be necessary to deal with the costs of the application and of the adjournment on 4 September 2019.

Consolidation

- [37] GB seeks orders for consolidation pursuant to r 78, which is in these terms:
- “The court may order that 2 or more proceedings be consolidated if—
- (a) the same or substantially the same question is involved in all the proceedings; or
- (b) the decision in 1 proceeding will decide or affect the other proceeding or proceedings.”
- [38] Before the *Judicature Act*, only a defendant could apply for consolidation.⁹ In *Martin v Martin & Co*,¹⁰ Lopes LJ remarked:
- “I suppose the reason was that it was thought that the plaintiff was master of the situation so far as bringing a number of actions is concerned, and that the defendant was passive in this matter; so that so far as he is concerned it was reasonable to assist him in the consolidation of actions brought against him.”
- [39] No such limitation applied in the post-*Judicature Act* rules. None appears in r 78. However, the ability of a plaintiff to choose whether to commence separate proceedings remains relevant to a consolidation application. GB’s decision to commence three separate proceedings, each against a different collection of defendants, and each concerned with the alleged misuse of different property, resulted in important distinctions between the three proceedings.
- [40] Generally, consolidation is ordered where, in all the circumstances, it is convenient, to avoid a multiplicity of separate actions and to save time and expense.¹¹ It has

⁹ *Cameron v McBain* [1948] VLR 245 (*Cameron v McBain*) at 246 (Herring CJ).

¹⁰ [1897] 1 QB 429 at 431.

¹¹ *Cameron v McBain* at 247 (Herring CJ).

been said that the Court's discretion to order consolidation, and so to control its own processes, is broad.¹² There is no presumption against consolidation.¹³

- [41] Counsel for GB submitted that the court should consider the consolidated pleading for the purpose of determining whether orders ought to be made under r 78. The consolidated pleading is relevant, and ought to be considered, as it sets out the material facts upon which GB would rely if the court were to order consolidation and the relief it would seek from the court. It indicates that a number of the matters presently alleged in one or other of the three proceedings would not be pursued and others would be pursued on a materially different basis, if the proceedings were to be consolidated. It may be assumed that GB's instructions for this course were informed by a consideration of the evidence available to GB from further investigations, the defences filed in the first and second proceedings, and the evidence adduced by the defendants in the course of interlocutory hearings.
- [42] The consolidated pleading also sets out a number of new matters that GB would add to the facts, matters and circumstances presently alleged and to the relief presently claimed. It also anticipates the inclusion of 11 additional defendants, the subject of separate but related orders sought by GB. GB might seek such relief, even if consolidation is not ordered, and might do so in fresh proceedings or by leave to add each of them to one of the existing proceedings.
- [43] All of these matters are relevant to a decision on consolidation of the three separate proceedings. They bear particularly on any exercise of discretion under r 78.
- [44] However, I respectfully adopt the approach of Bond J regarding similar submissions put in *Stacks Managed Investments Limited v Tolteca Pty Ltd*.¹⁴ The court must first consider the relationship between the existing proceedings to determine whether the circumstances engage the discretion to make a consolidation order under r 78.
- [45] The analysis in the annexure to the outline for the James Parties identified that the following questions are involved in all three proceedings:
- (a) The creation of the CFT, with Ms Fleming as trustee;
 - (b) The death of Ms Fleming;
 - (c) The appointment of Mr Conley as administrator of her deceased estate;
 - (d) Mr Conley's appointment as trustee of the CFT; and
 - (e) Mr Conley's retirement as trustee and the appointment of GB as trustee of the CFT.

¹² *Re Ling; Ex parte Ling v Commonwealth* (1995) 58 FCR 129 at 134 (Hill J).

¹³ *A Goninan & Company Ltd v Atlas Steels (Australia) Pty Ltd* [2003] NSWSC 956 (*A Goninan*) at [22] (Austin J), approved in *Lois Nominees Pty Ltd v QBE Insurance (Australia) Ltd* (2011) 42 WAR 75 at 88 [77] (Beech J).

¹⁴ [2015] QSC 80 (*Stacks v Tolteca*) at [34]-[39]. Austin J described the equivalent requirements in the NSW rule as "limitations on the Court's power to consolidate" in *A Goninan* at [26].

- [46] Each of these matters is admitted by those of the James Parties who are defendants in the first and second proceedings. As the third proceeding has not been served, no defence has been filed. There is no reason to anticipate that any of the James Parties would deny any of these matters in the third proceeding.
- [47] Nor is there any reason to suspect that any of the Non-James Parties would do so. However, it is possible that GB might be put to proof by non-admissions. That is of little concern. One would expect GB could readily establish such matters by admissible documentary evidence. Otherwise, it would not have alleged them.
- [48] In the first and third proceedings, GB alleges the establishment of the CFT/JJT Partnership by an oral agreement between Ms Fleming and Mr James. This is denied by the James Parties in their defence to the first proceeding. This issue is not to be of any continuing importance. The consolidated pleading does not include the allegation. Instead, the CFT/JJT Partnership is alleged to be inferred from a range of other factual matters, none turning on the evidence of Mr James, as the only surviving party to the alleged oral agreement.
- [49] The second proceeding does not involve any allegations about the CFT/JJT Partnership. It alleges that Ms Fleming (as trustee of the CFT) was “in a partnership” with RL57 as trustee of three discretionary trusts, not including the JJT.
- [50] Notwithstanding this, Mr Morris QC submitted it was “critical” that:
- “each of these cases must be heard together because it would be unthinkable that we might reach a result where different findings on that issue of fact [i.e. the existence of the alleged CFT/JJT Partnership] were made in separate proceedings involving technically different legal entities but ... involving, ultimately, the same group of people who will benefit from the outcome.”¹⁵
- [51] The inclusion of RL57 as a party in each proceeding does not give rise to the commonality of questions or the direct relationship for which r 78 was framed. In the first proceeding, it is sued as trustee of the JJT. In the second proceeding, it is sued in the quite different capacities as trustee of each of the Centro Unit Trusts and the three other discretionary trusts. In the third proceeding, it is sued in its own right and as trustee of the JJT, the BGT and the RSUT. The subject matter of the third proceeding is the conduct of the alleged K Tower Partnership and the alleged Hyne Street Partnership. It has nothing of substance in common with the other proceedings. Some of the new causes of action and new relief in the consolidated pleading relate to the alleged application of CFT/JJT Partnership property that is either already alleged in the first or third proceeding or is distinct and not yet the subject of allegations in any of the existing proceedings.
- [52] In the circumstances, it could not fairly be said that “the same or substantially the same question is involved in all the proceedings” as required by r 78(a). Given the manner in which GB now would assert the CFT/JJT Partnership, there is no real

¹⁵ Transcript, 1-6 L23-29.

possibility of inconsistent findings of a kind that would reflect adversely on the administration of justice.¹⁶

[53] The decision in any of the three proceedings would not decide or affect either of the other proceedings in any relevant sense. There is nothing that could be decided in the third proceeding that could decide or affect anything in the other two. At most, it could be said that the outcome in one proceeding might cause the parties to consider terms on which the other proceedings could be resolved without a trial. That is not the subject matter of r 78(b).

[54] The prospect of any inconsistent findings, if it seemed likely to arise, could be managed by directions pursuant to r 79 or r 80.¹⁷ I understood the oral submissions of Mr Morris QC to comprehend as much.

[55] The three proceedings do not involve substantive common issues of fact and law. There is some similarity between the nature of the legal issues and the nature of the relief claimed, but these arise from different facts. The proceedings may involve common witnesses, but GB has not shown they involve common evidence (save for evidence relied on to infer the CFT/JJT Partnership) or that the likely course of evidence in each proceeding is such that they should be heard together.

[56] It follows that the discretionary power to order consolidation under r 78 does not arise.

[57] To a certain extent, this difficulty was acknowledged by Mr Morris QC in his reply to the submissions of counsel for the James Parties and Non-James Parties, *viz* that:

“the orthodox approach would be to, firstly, bring our application to join additional parties in each of the three subsisting proceedings; secondly, seek leave to deliver amended pleadings in [these] proceedings and thirdly, then apply for consolidation of the proceedings.”¹⁸

[58] However, he urged the court to accept a submission that:

“what is described as orthodox no doubt is orthodox, but it’s not efficient, and what we’ve sought to do is to – to use the vernacular – cut to the chase. This is about bringing all the issues in all the proceedings before one court on one occasion.”¹⁹

[59] This elides the difficulty that GB might not be permitted to include additional parties in the existing proceedings and might not be permitted to amend to plead in one or more of the proceedings claims that are already the subject of another. GB did not frame its applications in the “orthodox way” and so the parties’ submissions did not address it. In the circumstances, it is not necessary or appropriate to reach any conclusion as to what might have been.

¹⁶ *Pacific Century Production Pty Ltd v Taylors Contracting Services Pty Ltd* [2003] QSC 289 at [24] (Ambrose J).

¹⁷ *Rodgers Family Investments Pty Ltd v Australia and New Zealand Banking Group Ltd* [2008] QSC 85 (*Rodgers Family Investments*) at [40]-[42] (McMeekin J).

¹⁸ Transcript, 1-65 L41-45.

¹⁹ Transcript, 1-65 L45 – 1-66 L2.

- [60] The broad discretionary considerations that tend in favour of consolidation have been mentioned above. Foremost is the desirability of avoiding a multiplicity of actions. Of course, GB caused three proceedings to come into existence. In a sense, GB might be said to be invoking the court's assistance in an effort to remedy its own wrong. Conventionally, oppressed defendants seek consolidation. Here, the defendants oppose it. Their grounds for doing so relate to other, less favourable, discretionary considerations, considered below.
- [61] According to Mr Morris QC, contentions about the orthodox approach put by the James Parties and the Non-James Parties:

“lose a lot of their force when they are combined with a contention that all of us should be complying with, and that we aren't complying with, the requirements of the UCPR, particularly rules 5 to 7, in terms of acting efficiently and expeditiously to bring the real matters in dispute to trial.”²⁰

- [62] Without doubt, the rules, including those as to consolidation, are to be applied with the objective of avoiding undue delay, expense and technicality and facilitating the just and expeditious resolution of the real issues at a minimum of expense.²¹

The stage of the proceedings

- [63] The three existing proceedings are at different stages of progress.
- [64] Pleadings have been exchanged in the first and second proceedings and an interim compromise has been agreed. So the matters in dispute have been identified and the parties have begun an agreed process that may resolve them.
- [65] In contrast, the claim in the third proceeding has never been served.

Costs, time and efficiency

- [66] The saving of time and expense is another usual consideration for a consolidation order. It is less compelling here, where the separate proceedings have been managed together and, sensibly, the parties have retained the same solicitors and counsel to act for them in each proceeding. It may be assumed they would continue to be managed with a view to avoid duplication of costs. In fact, the defendants point to delay and expense factors, amongst others, as favouring a rejection of GB's application.
- [67] The first and second proceedings progressed with the exchange of separate sets of pleadings, against the background of the supervising judge having raised at the outset whether a single set of pleadings would be preferable. The finalisation of a consolidated statement of claim by GB and the preparation of consolidated defences by the existing defendants to the first and second proceedings would take time and involve additional costs.
- [68] Mr Morris QC rightly submitted that the claims in the consolidated pleading are not legally complex, but they are extremely factually complicated. One might say factually dense.

²⁰ Transcript, 1-65 L35-39.

²¹ UCPR, r 5.

- [69] The size of the consolidated pleading is noted above. In short, GB proposes a transformation of proceedings from three separate, targeted claims – able to be pleaded in seven, nine and ten pages – into a long caravan of allegations and claims over 158 pages. The present and proposed defendants might legitimately question why they should be joined, when their individual interests are confined to a few, or perhaps in some cases none, of the matters in dispute between GB and other parties. A trial in a consolidated proceeding (or a joint hearing) may suit GB’s convenience. That does not warrant imposing on each defendant the materially longer hearing time and consequentially increased costs that would likely follow.
- [70] Consolidation does not seem likely to achieve a saving in overall hearing time.²²
- [71] The number of defendants, in their various capacities, will affect both the speed with which the matter would proceed and the expenses the parties would incur in doing so. The consolidated pleading identifies twelve legal persons as defendants. However, those twelve persons are sued in 34 different legal capacities. One, RL57, is sued in its own capacity and as trustee of each of 20 different trusts.
- [72] The James Parties may have quite distinct defences to those of the Non-James Parties. Each of the Non-James Parties may have defences specific to the allegations raised against them and to their individual positions. Leaving aside the first 49 paragraphs of the proposed consolidated pleading, the other 309 paragraphs address facts, matters and circumstances directed to one or other of the numerous separate allegations about dealings with funds and real property through the 17 alleged partnerships and 25 alleged trusts. The delay and expense likely to be occasioned by consolidation would be undue, to the extent that it would cause each defendant to trawl through matters relating to claims against others. The saving of time and expense usually associated with successful consolidation orders, is not evident.
- [73] The prospect of delay and the increased expense sound against a consolidation order.²³

Just resolution of the real issues

- [74] The greatly increased factual complexity of a consolidated proceeding may cause unfairness to parties with lesser roles, or prejudice their ability to conduct their case, amid the clash of larger forces. There may be merit in keeping the distinct allegations and defences separate, so that they could be addressed and determined with appropriate focus.²⁴
- [75] Certainly, there is no basis to conclude that consolidation would likely be more conducive to a just resolution of the real issues between the parties. It is not said to have any positive effect on the prospects of non-judicial resolution of the dispute through negotiation or mediation.

The compromise

²² *Fitzgerald v Cooper* [2020] NSWSC 451 at [65] (Williams J).

²³ *Stacks v Tolteca* at [38] (Bond J).

²⁴ *Rodgers Family Investments* at [41] (McMeekin J).

- [76] The terms of the compromise agreed by GB, RL57 and Mr James encompass matters GB proposed to add by amendment to the first or second proceeding. They were agreed to include the realisation of identified real property and the provision of the opinion of a single expert on a number of the contentious accounting and valuation matters. The TIC provided that if the trustee for sale were to accept an offer from RL57 to acquire any of the properties, then an agreed percentage of the purchase price would be for GB's interest in the property. On the day the TIC was agreed, GB, by its then counsel, informed the court that the compromise disposed of the then extant applications and constituted a process by which the first and second proceedings would be disposed of in their entirety. Although there have been difficulties in reaching agreement on many minor matters, the parties to the TIC have sold some of the properties the subject of the compromise and put in place arrangements to market the balance.
- [77] For the James Parties, it is said that the consolidated pleading "radically changes" GB's claims and "renders inutile" much of the TIC. As an example, the James Parties point to GB's proposed abandonment of its claim to be entitled to joint ownership of eight properties to which it has sought to appoint statutory trustees for sale. This would be an important change, as the TIC contains detailed terms about the realisation of those properties by the jointly appointed Mr Sheehy. The James Parties also identify that the consolidated pleading does not include some transactions GB agreed were to be investigated and reported on by Mr Lytras and alters the alleged purpose, source and amount of other such transactions. The consolidated pleading would introduce many new transactions, which appear to be of a nature that Mr Lytras might conveniently investigate, in the same manner as the transactions previously agreed.
- [78] The James Parties submit that GB is estopped from departing from the conventional basis upon which the TIC were agreed. They contend that the conventional basis adopted was the allegations contained in the then proposed amended statements of claim in the first and second proceedings. The James Parties have acted in reliance on that basis. Indeed, they have sought declarations as to the proper construction of the TIC and opposed GB's assertion that it is void.
- [79] At its simplest, leaving aside the adverbs and adjectives, the James Parties' position might be formulated in this way. GB asserted certain rights in the first and second proceedings, including in the proposed amendments to its pleadings. By the TIC, GB agreed to compromise those rights in certain respects. GB cannot now assert rights that are inconsistent with the rights previously asserted and made the subject of the compromise. This is because GB has bound itself by the TIC and cannot loosen those voluntarily adopted constraints by the device of asserting inconsistent rights.
- [80] GB submitted that "the question or issue of estoppel" should be pleaded in any defence to the consolidated pleading and, if ultimately necessary, resolved by the court.
- [81] Against this background, GB's application appears as a vehicle driven with the TIC in its blind spot. Fresh eyes have been drawn to the dispute, and with them have come changes of emphasis. For such changes to be accommodated, without undue delay or expense, it is necessary to understand their effect. Here, it appears no

attention has been paid to the impact of the refreshed approach on the relationship between the parties established by the TIC.

- [82] While the just resolution of disputes requires parties to have a sufficient opportunity to identify the issues they seek to agitate, the choices a party makes about the claims it makes and how they are framed have consequences.²⁵ When a party has entered into binding agreements about means to narrow or resolve matters in dispute, it is not as free to revise its claims as it might be, absent such an agreement. The need for there to be an end to disputation and the desirability of parties being held to their bargains are strong public policy reasons precluding a party from raising an alternative or inconsistent claim after a compromise.
- [83] The disputes about the scope for GB to amend its case and the effect of the TIC upon its case would be made more complicated by the consolidation of the three proceedings. The existence of the TIC is a practical matter that tends to make it inexpedient to consolidate the proceedings.
- [84] Other complications were raised by the James Parties in written submissions. These included: that some new causes of action found in the consolidated pleading are statute barred; and that the use GB proposes to make of documents produced or disclosed in the Family Court Proceeding is improper.²⁶ They also raised the alleged need for some further particulars of the consolidated pleading. GB joined issue with the James Parties on each of these matters. In view of the conclusion I have reached on the topic of consolidation, it is not necessary to deal with them at this time.

Conclusion on consolidation

- [85] Taking all matters into account, I am not satisfied that it is appropriate to order consolidation. The application is not plainly within the scope of the power conferred by r 78. I am not satisfied that consolidation of the proceedings would save time or expense for the parties. The distinct claims and parties do not signal any saving in the time taken to try all of GB's claims. Appropriate orders are available to take advantage of any available time savings. There are valid concerns about the fairness of a consolidated proceeding for the less significant proposed parties. It follows that the exercise of a more general power to consolidate is not justified.
- [86] With the prospect of consolidation vanquished, the parties ought to be able to progress the TIC and proceed to a resolution of their disputes, whether by trial or other process, without undue delay. If GB no longer wishes to pursue some of its existing claims, that will also shorten the existing proceedings. If GB wishes to pursue new claims – subject to the effect of its earlier compromise and any relevant time limitation – it should do so promptly, in the manner it may be advised.
- [87] The orders for consolidation should be refused.

Joinder of new parties

²⁵ *UBS AG v Tyne* (2018) 265 CLR 77 at 94 [38] (Kiefel CJ, Bell and Keane JJ).

²⁶ Given the inclusion of so many other defendants – each foreign to the proceeding in the Family Court – the James Parties say GB may need leave of the Family Court, which it does not appear to have sought or obtained.

- [88] As the consolidation order is not to be made, there is no reason to order the inclusion of additional parties as defendants to a consolidated proceeding.
- [89] On 14 February 2017, GB filed an application to include ten new parties in the first proceeding. These included the Non-James Parties. That day, GB also filed an application to include Mr Calabro as a party to the second proceeding. On 10 March 2017, both these applications were adjourned to a date to be fixed with costs reserved.
- [90] In its proposed form of orders, GB proposed that these applications be “otherwise dismissed”. That is not opposed by the Non-James Parties or Mr Calabro.
- [91] GB and Mr Conley pressed his inclusion, in order to take advantage of statutory rights conferred on him in his capacity as administrator of the Estate of the late Ms Fleming. He could be included as a second plaintiff in existing proceedings on that basis.

Leave to proceed

- [92] In written submissions filed and served for the 5 September 2019 hearing, the James Parties contended that no step had been taken in the first or second proceeding since 9 March 2017, so that leave to proceed was required pursuant to r 389(2).
- [93] GB contests that it requires leave to proceed. GB contends that the judgment of Bond J on 23 February 2018 and his Honour’s orders of 2 March 2018 were steps in the first and second proceedings. It appears GB also contends that the orders made on 13 April 2019 were a step in each of the three proceedings.
- [94] At the 14 October 2019 hearing, by the amended applications, GB sought leave to proceed. The defendants did not seek an order dismissing any of the proceedings for want of prosecution.
- [95] It is well-recognised that unnecessary delay has a tendency to bring the legal system into disrepute and adversely affect the prospect of a fair and just resolution of proceedings.²⁷ The explanation for the delay and whether the defendants will suffer particular prejudice are relevant factors in any grant of leave.²⁸
- [96] The events in issue in the first proceeding are alleged to have occurred between September 2002 and 2006. GB asserts rights in respect of the CFT/JJT Partnership, said to have been dissolved on the death of Ms Fleming in September 2014. The second proceeding concerns events in 2003. The Centro 3 4 6 Partnership is also said to have been dissolved on Ms Fleming’s death. The proceedings were commenced in 2016. By then the underlying matters were already many years in the past, resulting in the usual prejudice to a defendant of the loss of or deterioration in the quality of evidence and the difficulties of verifying matters.²⁹ It may be assumed that Ms Fleming did not seek to vindicate the asserted rights while in a relationship with Mr James. No explanation was offered for the delay between 2009 and 2016. These circumstances place a particular burden on GB to proceed with expedition so as to avoid any further prejudice.

²⁷ *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 at [3] (Atkinson J).

²⁸ *Lilyville Pty Ltd v Colonial Mutual Life Assurance Society Ltd* [1999] QSC 372 at [2] (Chesterman J).

²⁹ *Hartnett v Hynes* [2010] QCA 65 at [40] (Muir JA).

- [97] The absence of a step, if that is what has occurred in this instance, between March 2017 and the present is simply explained. The TIC provided for a number of things to occur – directed to enabling the parties to resolve GB’s then asserted claims. The TIC required the parties to do various things. The parties reported to the court on 23 April 2019 that, “No steps have been taken in the [first and second] proceedings by agreement, pending compliance by the parties with the [TIC]”.
- [98] The court has now dealt with the consolidation proposal. GB, RL57 and Mr James may now be able to better focus on carrying out the balance of the TIC process. The spirit of compromise might take hold once again, so that the parties could resolve more, or even all, of the elements of their disputes.³⁰
- [99] Notwithstanding the other factors that might tend against granting leave, the parties should have leave to proceed in the first and second proceedings. This will remove any doubt about the status of the proceedings. It will also reactivate the implied undertakings under the rules.

Renewal of the claim in the third proceeding

- [100] To renew a claim that has not been served, a plaintiff must satisfy the court that reasonable efforts have been made to serve the defendant or that there is another good reason to renew the claim.³¹ GB adduced no evidence of any effort to serve any of the James Parties or the Non-James Parties named as defendants to the third proceeding. It follows that GB must establish a good reason for renewal of the claim.
- [101] As the High Court observed:
- “Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for.”³²
- [102] The third proceeding was commenced after the TIC were reached. So, the TIC cannot be the reason the claim was not served.
- [103] The solicitor for GB, Mr Challen, deposed that the third proceeding was commenced “solely to preserve certain limitation periods”. Confusingly, he also deposed that “it was necessary for proceedings to be commenced no later than 30 June 2017” to avoid the lapsing of caveats lodged by GB over certain land titles. As best it might be understood, Mr Challen’s explanation seems to be: that the alleged Hynes Street Partnership was said to be wound up on 30 June 2011, so that a limitation period might have expired on 30 June 2017; and that caveats lodged over titles related to the alleged K Tower Partnership would have lapsed about 30 June 2017 if a proceeding claiming an estate or interest in the land had not been commenced.
- [104] According to Mr Challen, the caveats were withdrawn in March 2018 and Mr Sheehy has been instructed to sell the subject real properties. Mr Challen deposes that, if the proceedings are not consolidated, GB “does not intend claiming in respect of the K Tower partnership in two separate sets of proceedings”. The relief

³⁰ All of the defendants to the first and second proceedings are among the James Parties. Considerations that might apply to the Non-James Parties or to Mr Calabro are not relevant to this question of leave to proceed.

³¹ UCPR, r 24(2).

³² *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 215 [103] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

claimed in the proposed consolidated pleading does not include any item specifically about the Hynes Street Partnership or the K Tower Partnership; in particular, relief by way of the appointment of statutory trustees for sale is no longer sought in respect of the real properties allegedly owned by the K Tower Partnership. However, matters are set out in paragraphs 94 to 115 concerning the K Tower Partnership. At best, it might be said that the future of the claims in the third proceeding is uncertain.

[105] On 15 August 2017, the James Parties named as defendants in the third proceeding applied to stay the proceeding or to have the statement of claim struck out. On 22 August 2017, by consent the third proceeding was placed on the Commercial List and the James Parties' application was adjourned to be heard by Bond J on a date to be fixed with costs reserved.

[106] Mr Challen does not say why the third proceeding has never been served. I infer that, by commencing the third proceeding, GB sought the benefit of preserving possible rights, likely for use in negotiations with the James Parties, but did not intend to progress the claims and so wished to avoid exposing itself to an adverse costs order by serving it. I am satisfied GB decided not to serve the claim. From this and the proposed consolidated pleading, I infer GB does not intend to progress the third proceeding.

[107] In the circumstances, GB has shown no good reason to renew the claim.

Costs

[108] In substance, the respondents have succeeded in opposing the relief sought by GB, save for leave to proceed in the first and second proceedings. That was an indulgence that GB had to seek in any event and did not add, to any practical extent, to the length of the hearing or the submissions.

[109] GB filed short written submissions by Mr Erskine seeking an order that GB should have its costs thrown away by the adjournment on 5 September 2019. Those submissions rely on the service of written outlines by the James Parties four days after the date fixed by the directions of Douglas J.

[110] As noted above, those submissions were quite substantial. However, they raised matters of substance that ought to have been addressed by GB in the preparation of its case for consolidation.

[111] I am not persuaded that any differential costs order should be made. Indeed, I am concerned that any undue delay and expense be avoided with respect to costs. If costs are not agreed between the relevant parties, the costs of the relevant groupings of respondents should be assessed in a single process, without requiring separate assessments in each of the three proceedings. If directions or orders are required to facilitate that process, the parties may approach the court for that purpose.

[112] GB should pay the respondents' costs of the applications and amended applications.

[113] GB should also pay the costs of the Non-James Parties and Mr Calabro of the applications filed on 14 February 2017, which are now also to be dismissed.

Orders

[114] I will hear from the parties as to the form of the orders that should be made.