

SUPREME COURT OF QUEENSLAND

CITATION: *Onza Industries Pty Ltd v Tingalpa Tyre & Mechanical Pty Ltd* [2020] QSC 244

PARTIES: **ONZA INDUSTRIES PTY LTD**
(Plaintiff/Applicant)
v
TINGALPA TYRE & MECHANICAL PTY LTD
(Defendant/Respondent)

FILE NO/S: BS No 10492 of 2016

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 11 August 2020

DELIVERED AT: Brisbane

HEARING DATE: 27 July 2020

JUDGE: Bowskill J

ORDERS: **The application is dismissed, with no order as to costs**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND CONSOLIDATION OF PROCEEDINGS – SEPARATE DECISION OR DETERMINATION – GENERALLY – whether it is just and convenient to make an order for the determination of questions as to the capacity in which the defendant purchased the property the subject of the dispute, whether as trustee of a trust or otherwise, and as to whether the plaintiff validly and effectively replaced the defendant as trustee of the trust, separately and before determination of any other issues in the proceeding

Uniform Civil Procedure Rules 1999 (Qld), r 483

Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 217 ALR 495

COUNSEL: D Lane, *sol*, for the plaintiff/applicant
I Plath, director, appeared with leave for the defendant/respondent

SOLICITORS: Lewis & McNamara for the plaintiff/applicant

[1] The plaintiff (Onza Industries Pty Ltd) commenced proceedings in this court against the defendant (Tingalpa Tyre & Mechanical Pty Ltd) in 2016 seeking an order under s 82 of the *Trusts Act 1975* (Qld) that certain property located at Lot 2 Abercainey Terrace, Aberdeen in New South Wales (the **property**) be vested in the plaintiff as

trustee of The Plath Family Discretionary Trust, consequential orders to enable that to occur and compensation for the rental money earned from the property. By amended claim filed in August 2017, the claim was varied to include a claim for equitable damages, including damages for failure to rent the property, together with an account of any rental money received by the defendant. The dispute is essentially one between two brothers, Mr Ondra Plath, who is the director of the plaintiff, and Mr Ira Plath, who is the director of the defendant, relating to the property which was purchased in 2006.

- [2] An amended statement of claim was filed in September 2017, and an amended defence was filed in November 2017. No reply has been filed.
- [3] The proceeding was placed on the case flow management list in about August 2019. Reviews in August and November 2019 were adjourned, without objection by the plaintiff, on the basis that Ira Plath, the sole director of the defendant, was awaiting a judgment in relation to another, unrelated, proceeding, and essentially it was difficult for him to deal with both court matters at the same time. Following a review in December 2019 orders were made in relation to particulars and disclosure, as well as an order for the parties to attend a conference with the Resolution Registrar, which it was hoped might be of assistance in finding a way to resolve the proceeding. Unfortunately, that did not succeed.
- [4] Early in 2020, the matter was placed on the supervised case list for matters involving self-represented litigants, as the defendant company does not have legal representation and has to date appeared, with leave, by its director, Ira Plath.
- [5] In June 2020 the plaintiff filed an application seeking an order under rule 483 of the *Uniform Civil Procedure Rules* 1999 for the separate determination of certain questions. An amended application was filed on 8 June 2020, which is the application before me. The application does not articulate the separate questions – rather, it states as propositions the matters the plaintiff proposes be found in answer to separately determined issues. However, as clarified in the course of the hearing, the questions the plaintiff seeks to have separately determined are:
 - (1) Whether the defendant purchased the property in August 2006 in its capacity as trustee of The Plath Family Discretionary Trust?
 - (2) (If so) whether the appointor of the Trust (Ondra Plath) validly and effectively replaced the defendant as the trustee of the Trust, with the plaintiff as the trustee of the Trust, on 4 December 2014?
 - (3) (If so) whether a vesting order should be made, pursuant to s 71 of the *Trustee Act* 1925 (NSW), vesting the property in the plaintiff as trustee of the Trust?
- [6] The plaintiff not only sought an order for the separate determination of these questions, but by its application sought that the questions actually be (summarily) determined at the same time as the application under r 483.
- [7] If those questions were separately determined, and depending on the answers to the questions, that would leave the plaintiff's claim against the defendant for equitable damages to be determined, as well as the defendant's (essentially) counterclaim, on the

basis of what it says is its obligation to repay to Ira Plath money he contributed to the purchase and improvement of the property, and the defendant's own contribution to the purchase of the property. The plaintiff submitted that, if the questions above were separately determined, the remainder of the dispute could appropriately be transferred to the District Court.

- [8] The amended application also seeks an order that, upon the property being vested in the plaintiff (the questions having been answered in the manner the plaintiff contends), there be a declaration that the defendant is entitled to a lien over the property to the monetary value of any expenses incurred and services provided in relation to the property, as pleaded in the amended defence, and recording that the plaintiff undertakes not to sell, transfer or encumber the property without the written agreement of the defendant, or an order of the Court. The solicitor for the plaintiff emphasises that this would protect the defendant's position, notwithstanding a vesting order being made.
- [9] In order to determine the application under r 483 it is necessary to set out a brief summary of the dispute, as it appears from the pleadings of both parties and the affidavit material before the court.
- [10] The Plath Family Discretionary Trust (the **Trust**) was established in or about July 2006. At the date of establishment of the Trust, the defendant, Tingalpa Tyre & Mechanical Pty Ltd, was the trustee and the appointor of the Trust was Ondra Plath.¹ Ondra Plath is the brother of Ira Plath. The Plath Family the subject of the Trust is Ondra Plath, his wife and children.²
- [11] The ASIC current and historical extract of the defendant company shows that it has been registered since 21 February 2000. Relevantly, Ira Plath was a director from 21 February 2000 to 8 March 2001, and then again from 31 August 2010 to the present. Ira Plath has been the company's secretary since June 2000. Ondra Plath was a director from 21 February 2000 to 31 August 2010 and then again from 21 April 2012 to 27 August 2015. Since 27 August 2015, Ira Plath has been the sole director of the defendant. Ira Plath holds 99 of the 100 shares; Ondra Plath holds the remaining 1 share. The shareholding appears to have been the same throughout.³
- [12] In about July or August 2006, the defendant entered into a contract to purchase the property at Aberdeen. The purchase price was \$180,000. A deposit of \$18,000 had been paid, leaving a balance of \$162,000.⁴
- [13] There is a dispute between the plaintiff and the defendant (and their respective directors, Ondra Plath and Ira Plath) as to the capacity in which the defendant purchased the property.
- [14] The plaintiff contends the defendant purchased the property in its capacity as trustee of the Trust. In proof of that contention, the plaintiff relies on the following:

¹ Admitted in [1] of the amended defence.

² Affidavit of Ondra Plath (CFI 21), at pp 63 and 64.

³ Affidavit of Ondra Plath, at pp 16-20.

⁴ Affidavit of Ondra Plath, at p 1; amended statement of claim at [6]; amended defence at [4].

- (a) that the contract for the sale of the land names the purchaser as “Tingalpa Tyre & Mechanical Pty Ltd atf The Plath Family Discretionary Trust”;⁵
- (b) that the loan documentation with the bank which loaned the purchase money records the borrower as “Tingalpa Tyre & Mechanical Pty Ltd ... as Trustee for the Plath Family Discretionary Trust”;⁶
- (c) a letter from the solicitor who acted for Ira Plath and Ondra Plath at the time of the purchase, dated 31 August 2006, which records their instructions that the defendant was to purchase the property as trustee of the Trust;⁷
- (d) copies of leases of the property recording the lessor as “The Plath Family Discretionary Trust” (apparently signed by both Ira Plath and Ondra Plath);⁸ and
- (e) evidence of Ondra Plath (at [21] of his affidavit) that rental income for the property was paid into an account in the name of the defendant as trustee for the Trust from which loan repayments were made. Ondra Plath says that bank statements exhibited to his affidavit at pp 46-48 demonstrate this. But that does not appear to be the case. At p 46 there is a bank statement from September 2006 for an account number ending in 505 in the name “The Plath Family Discretionary Trust” (with no reference to the defendant company). At pp 47-48 there is a bank statement from September 2006 to March 2007 for an account number ending in 640 in the name “Tingalpa Tyre & Mechanical Pty Ltd” (with no reference to the Trust). It seems the latter account is the loan account into which the funds to purchase the property were deposited, and from which loan repayments were made.

[15] The defendant denies the property was purchased in its capacity as trustee of the Trust. In the amended defence it is pleaded that Ira Plath had intended to purchase the property for himself (which does not appear to be disputed by the plaintiff) and to use the shed on the property as storage for digging equipment he was using as part of a building business he had established. Ira Plath says he had paid the deposit (of \$18,000), but was then unable to obtain finance to complete the purchase. Ira says he did not want to lose his deposit, so he contacted his brother, Ondra, and asked him to inquire with the defendant’s bank, Suncorp-Metway Ltd, whether the defendant could obtain finance to purchase the property. Ira further contends that it was a requirement of the bank that Ondra provide additional security for the loan, in the form of a mortgage over his family home; although says the loan was advanced on the basis that the defendant company’s trading figures showed it was able to service the loan.

[16] The terms of the agreement which Ira Plath contends was entered into between him and his brother, Ondra, at this time are set out in [4] of the amended defence.⁹ The effect of the pleaded agreement (referred to as the “proposal”) is that the defendant would purchase the property with funds loaned from Suncorp, secured as described above; Ira would fund the deposit, legal costs and stamp duty associated with the purchase; Ira would undertake works and renovations on the property; the property would be leased

⁵ Affidavit of Ondra Plath, at p 1.

⁶ Affidavit of Ondra Plath, at p 2.

⁷ Affidavit of Ondra Plath, at pp 35 (paragraph 1) and 37 (paragraph B).

⁸ Affidavit of Ondra Plath, at pp 40-45.

⁹ See also the affidavit of Ira Plath (CFI 24) at [8]-[16].

to third party/ies; rent received for the property would be applied to pay outgoings and repay the loan; once the loan was paid out, the property would be sold; from the sale proceeds the defendant would repay Ira the money he had contributed, including for the purchase costs and building work, plus 5%; and any balance would then be split 50/50 between Ira and Ondra.

- [17] In the circumstances, the defendant pleads that the defendant holds the property on a constructive trust for Ira Plath and Ondra Plath, in accordance with this “proposal” (amended defence at [5]).
- [18] Ira Plath contends that the stipulation in the purchase contract – that the defendant purchased as trustee of the Trust – was simply on the basis of (Ondra’s) accountant’s advice and did not reflect the reality of the situation.¹⁰
- [19] The loan documentation records that the loan was secured by mortgage given by Ondra Plath and his wife Anita over a property at Alexandra Hills; a mortgage given by the defendant over the property at Aberdeen and a guarantee and indemnity given by Ondra Plath and his wife Anita.¹¹
- [20] Ira Plath says that prior to the establishment of the Trust, the defendant carried on a business known as Tingalpa Tyre and Mechanical, which was owned by Ira Plath, who was the director and 99% shareholder of the business. Ondra Plath held one share. The ASIC historical search of the defendant confirms the shareholding; but shows that prior to 2006, Ira and Ondra Plath were both directors for the first year of the company’s life, and then Ondra Plath was the sole director up until 2010. Ira Plath contends the defendant continued to conduct the business, in its own right (not as trustee of the Trust) following the establishment of the Trust.
- [21] The plaintiff alleges that on 4 December 2014 the appointor of the Trust, Ondra Plath, removed the defendant as the trustee of the Trust, and appointed the plaintiff as trustee of the Trust in its place. It is apparent that Ondra Plath, as appointor of the Trust, had the power to do this.¹²
- [22] There is in evidence a document described as “minutes of Tingalpa Tyre & Mechanical P/L ATF The Plath Discretionary Trust”, signed by Ondra Plath, which states:
- “I, Ondra Plath, as the Appointor of the Plath Discretionary Trust, I remove Tingalpa Tyre & Mechanical P/L as Trustee of the Plath Discretionary Trust as of this date 4/12/2014 and appoint ONZA INDUSTRIES PTY LTD As the new Trustee of the Plath Discretionary Trust.”¹³
- [23] As at 4 December 2014, the plaintiff company, Onza Industries Pty Ltd, did not exist. It came into being upon registration on 5 December 2014.¹⁴ The defendant challenges the validity or effectiveness of the purported change of trustee on the bases, firstly, that the plaintiff did not come into existence until 5 December 2014; and, secondly, because

¹⁰ Affidavit of Ira Plath at [17]-[24].

¹¹ Affidavit of Ondra Plath, at p 5.

¹² Affidavit of Ondra Plath, at pp 49, 56 (clause 8) and 63 (schedule 1).

¹³ Affidavit of Ondra Plath, at p 75 (the underlined parts are in handwriting; the rest is typed).

¹⁴ Affidavit of Ondra Plath, at p 76.

of the alleged agreement (proposal) between Ira and Ondra Plath, contending that it was unconscionable for Ondra Plath to purport to remove the defendant as trustee of the Trust, having regard to that agreement and/or that he is estopped from doing so.

- [24] The plaintiff pleads that “it was implicit with the Variation [the act of removing the defendant as trustee and purporting to appoint the plaintiff as trustee, on 4 December 2014] that it would be perfected upon the registration of the Plaintiff, being the following day, 5 December 2014” (amended statement of claim at [9A]). A question of law arises as to whether it is valid or effective to replace a trustee with an entity which does not exist at the time of the purported appointment. This was not addressed at the hearing before me, in a manner which would enable any determination of the issue.
- [25] Allegations of breach of trust are made against the defendant, following the alleged Variation, on the basis that the defendant did not deliver the Certificate of Title to the plaintiff, to enable the property to be vested in the plaintiff; changed the locks; and took other actions inconsistent with the plaintiff having any ownership or control of the property. It is also alleged that Ira Plath has been receiving rental moneys for the property directly into his own account.¹⁵ At the hearing of the application, Ira Plath effectively conceded this, saying that the rental money currently being received for the property, of about \$1,500 per month, is “the only income I’ve got”.
- [26] The relief sought by the plaintiff includes an order pursuant to s 71 of the *Trustee Act* 1925 (NSW) (relying upon the cross-vesting legislation) that the property at Aberdeen be vested in the plaintiff as the trustee of the Trust; consequential orders to enable that to occur; and/or equitable damages either on the basis that the defendant has failed to rent out the property and/or on the basis of an account for rental moneys received.¹⁶
- [27] In addition to defending the plaintiff’s claim, by denying the defendant purchased the property in its capacity as trustee of the Trust, the amended defence also pleads that the defendant is indebted to (has an obligation to pay) Ira Plath for about \$193,000 (for the initial deposit and other costs of the purchase said to have been paid by Ira, the value of building works and improvements undertaken by Ira on the property, and the amount Ira says he paid in about July 2011 to discharge the mortgage) and is owed a further approximately \$20,000 that the defendant paid to discharge the mortgage. This is essentially an alternative pleading – if the defendant is found to have purchased the land as trustee of the Trust, the defendant contends it has incurred liabilities in its role as trustee (of about \$213,000) and claims a lien over any property of the Trust to secure that amount. Although not formally set out as such, in substance this is a counterclaim by the defendant. Ira Plath is not a party to the proceeding in his personal capacity.

Jurisdiction

- [28] An initial matter I have considered is whether this proceeding ought properly to have been brought in the District Court, having regard to the value of the land and the amount the defendant’s claimed indemnity (both of which are well within the District Court’s monetary jurisdiction) and should therefore be transferred to the District Court.

¹⁵ Affidavit of Ondra Plath, at p 82 and following.

¹⁶ Amended Claim filed 29 August 2017 (CFI 9).

- [29] For the plaintiff, it was submitted the proceeding had to be brought in the Supreme Court, because of s 82 of the *Trusts Act 1973* (Qld), which empowers “the court” to make a vesting order (that is, an order vesting the property in the plaintiff as the new trustee). The “court” is defined in s 5 of the *Trusts Act* (Qld) to mean the Supreme Court or a judge thereof. Although, if the court considered the matter could be within the District Court’s jurisdiction, the solicitor for the plaintiff said it would not object to the proceeding being transferred.
- [30] Under s 68 of the *District Court of Queensland Act 1967* (Qld), the District Court has jurisdiction to hear and determine, among other things, any equitable claim or demand for recovery of money or damages within the monetary limit of the District Court (\$750,000) (s 68(1)(a)(i)) and a proceeding¹⁷ for a declaration that a trust subsists, where the estate or fund subject or alleged to be subject to the trust does not exceed the monetary limit (s 68(1)(b)(viii)). Under s 69 of that Act, the District Court has, for the purpose of exercising the jurisdiction conferred on it by s 68, all the powers and authorities of the Supreme Court, including the powers and authorities conferred on the Supreme Court by an Act.
- [31] On that basis, there seems no reason why, if the relief sought was a vesting order under s 82 of the *Trusts Act 1973* (Qld), and/or equitable damages, the plaintiff’s claims in this proceeding would not properly be within the jurisdiction of the District Court, with the District Court having power to make the orders sought by the plaintiff, if satisfied a basis for doing so was established.
- [32] However, there is a further complication. Although the amended application refers to s 82 of the *Trusts Act 1973*, having regard to the amended claim the legislative provision the plaintiff in fact relies upon, for the making of a vesting order, is s 71 of the *Trustee Act 1925* (NSW) (the equivalent of s 82 of the Queensland *Trusts Act*), no doubt because the property is situated in New South Wales. The proceeding has been instituted in this Court in reliance upon s 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) and s 9 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld) – both of which expressly contemplate the conferral of jurisdiction on, and the exercise of such conferred jurisdiction by, the Supreme Court. The District Court is not part of the cross-vesting scheme.
- [33] In those circumstances, it would appear appropriate, notwithstanding the value of the land and the amount of any money claim are well within the monetary limit of the District Court’s jurisdiction, for the proceeding to remain in this Court.
- [34] Turning then to the application before the court.

Separate questions

- [35] Rule 483(1) of the *Uniform Civil Procedure Rules* confers a discretion on the Court to make an order for the decision by the Court of a question separately from another question, before the trial of the proceeding. It is a wide discretion, in an overarching sense to be exercised having regard to what is just and convenient.¹⁸ The relevant

¹⁷ See s 93 of the *Supreme Court of Queensland Act 1991* (Qld) (references to action or matter, as appears in s 68, are taken to be a reference to “proceeding”).

¹⁸ See *Prider v Bond University Ltd* [2019] QSC 197 at [17], and the authorities there referred to.

principles were summarised in *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 at [8], a decision which has been applied by this Court in relation to rule 483. Although the discretion is a wide one, courts have sounded notes of caution in invoking this procedure, including Kirby and Callinan JJ in *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at [168] to [170] who said that “[s]ingle-issue trials should ... only be embarked upon when their utility, economy, and fairness to the parties are beyond question”.

[36] In *Reading* at [8] Branson J referred to the following as factors which tell against the making of an order under a provision such as r 483:

“... that the separate determination of the question may:

- (i) give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial (*GMB Research & Development Pty Ltd v Commonwealth* [1997] FCA 934);
- (ii) result in significant overlap between the evidence adduced on the hearing of the separate question and at trial – possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding: *GMB Research & Development Pty Ltd v Commonwealth*; *Arnold v Attorney-General (Vic)* (unreported, Fed C of A, Sundberg J, Nos VG629–37 of 1995, 8 September 1995, BC9502745). This factor will be of particular significance if the court may be required to form a view as to the credibility of witnesses who may give evidence at both stages of the hearing of the proceeding; or
- (iii) prolong rather than shorten the litigation (*GMB Research & Development Pty Ltd v Commonwealth*).”

[37] The solicitor for the plaintiff submitted that there are two “separate and distinct matters” involved in the dispute the subject of this proceeding – the plaintiff’s claim for a vesting order, on the one hand, and the defendant’s monetary claim, on the other. He submitted that it is clear on the material that the defendant purchased the property as trustee of the Trust, and that there is “very clear evidence” that there was a change of trustee. The plaintiff submits that the facts relevant to the determination of the proposed separate questions “are not (sensibly) in dispute” and are “ripe” for determination. The plaintiff also submits that, if the proposed separate questions are determined first, the matters in issue will be significantly reduced, saving both parties time, effort and cost; the prospects of settlement will be enhanced; and, as already noted above, the remaining issues can be dealt with in the District Court.

[38] The essence of the plaintiff’s argument is that its case for the making of a vesting order is a straightforward one, which can easily and quickly be determined, leaving the defendant to pursue its money claim for an indemnity.

[39] On behalf of the defendant, Ira Plath opposes the separate determination of the questions set out above, and submits that the whole of the dispute between the parties should be heard and determined at the same time.

- [40] The dispute the subject of this proceeding is complex and messy. The lack of legal representation for one of the parties does not assist in that regard. It is apparent that there are significant factual disputes in this matter – including about the circumstances in which the property was purchased and on whose behalf it is beneficially held; then about how and by whom the loan was repaid; who is entitled to, and has had the benefit of the rental moneys which have been received in respect of the property; how the outgoings associated with the property were paid (although that appears to have been covered by the rent); and whether Ira Plath made improvements to the property, for which the defendant has an obligation to reimburse him.
- [41] The plaintiff contends that the questions it proposes for separate determination are capable of a straightforward answer, on the basis of the matters referred to at [14] above. I am not persuaded that is the case. Given the matters pleaded by the defendant, and deposed to by Ira Plath, the court will need to hear evidence about how the transaction came about, in order to determine the question as to the capacity in which the defendant became the registered owner of the property. It would not be appropriate to determine those questions summarily, on the basis of the affidavit material presently before the court. There would need to be a hearing in relation to the issues. The main evidence of those circumstances will come from Ira Plath and Ondra Plath (although there may possibly be other relevant witnesses). Those same witnesses will be central to determination of the other issues in the proceeding. The credit of those witnesses is likely to be a relevant factor. The factual issues to be determined in relation to the proposed questions, and the issues pressed by the defendant, are interlinked. Factual findings in relation to the overall conduct of the parties in relation to the property may have a bearing on the determination of the disputed issue as to the capacity in which the defendant purchased the property. It is very likely that there will be duplication of evidence, in the event there was both a hearing of the separate questions and a later trial of the remainder of the dispute.
- [42] For those reasons, in my view, this is a prime example of a case of the kind described by Branson J in the passage set out at paragraph [36] above. I am not persuaded that it would be just or convenient to order the separate determination of the questions as proposed by the plaintiff. This matter should proceed to a trial, of the overall dispute, as efficiently as possible.
- [43] For many reasons, a mediated resolution of this dispute would be far preferable to a trial. I am informed the parties have previously attempted to resolve the dispute without the need for a trial but that they are, according to the plaintiff's solicitor, "very far apart". Although Ira Plath says he is not opposed to participating in a mediation with his brother, he says he cannot afford to pay the costs associated with a mediation. The costs associated with a mediation would be a fraction of the costs involved in a trial (generally, involving the mediator's fees and perhaps the costs of a venue). But this is a matter for the parties.
- [44] It would also be preferable for the defendant to obtain legal advice and representation, including in relation to the pleadings and whether any amendments are required (for example, to more clearly plead a counterclaim against the plaintiff) or applications for joinder of any other party, such as Ira Plath. Having said that, although the solicitor for the plaintiff contended that Ira Plath is in a position of conflict with the defendant, given his claim for reimbursement from the defendant, it is not clear to me that is the case. On the defendant's case, the property is held by it, on constructive trust for Ira

and Ondra Plath, in accordance with the “proposal”; or alternatively, if held on trust for the Trust, that it has a right of indemnity from the Trust property in order to reimburse Ira Plath for the money he has contributed to the property. The position of the defendant and Ira Plath are not in conflict, but are aligned. Ira Plath does not appear to articulate a claim against the plaintiff directly.

[45] Depending on the length of the trial, the Court may be able to accommodate a trial in the week of 30 November 2020. I will hear from the parties about whether this might be convenient to them both, so that this long-running dispute can be brought to an end, and also as to any directions which would facilitate the matter being heard as soon as possible.

[46] I will otherwise dismiss the plaintiff’s application, with no order as to costs.