

# SUPREME COURT OF QUEENSLAND

CITATION: *Hatrun Pty Ltd v Mehmet* [2003] QSC 117

PARTIES: **HATRUN PTY LTD (ACN 010 924 642) AS TRUSTEE  
FOR THE BARRON DEVELOPMENT TRUST**  
(Plaintiff)  
v  
**HYSEN MEHMET**  
(Defendant)

FILE NO/S: 420 of 2002

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 8 May 2003

DELIVERED AT: Cairns

HEARING DATE: 30 January 2009

JUDGE: Jones J

ORDER: **1. That the defendant holds the land situated at Kennedy Highway Atherton and presently described as Lot 4 on RP 706912, County Nares, Parish Barron on trust for the Barron Development Trust.**

**2. That 30 days be allowed for submissions to be made as to the terms of an appropriate vesting order.**

CATCHWORDS: EQUITY – TRUSTEES AND TRUSTEES –  
DECLARATION OF TRUST – where defendant had become the registered owner of development land – whether the defendant purchased the land on trust for the Trust – whether, pursuant to r 292(2) of the *Uniform Civil Procedure Rules*, the defendant had any prospect of succeeding in his claim to beneficial ownership.

*Trust Act 1973 (Qld)*  
*Supreme Court Act 1995 (Qld) s 8*

COUNSEL: D Morzone for the plaintiff/applicant  
C Ryall for the defendant/respondent

SOLICITORS: Williams Graham & Carman for the plaintiff/applicant  
Gadens Lawyers for the defendant/respondent

- [1] The plaintiff is a company appointed by a Trust Deed dated 30 April 1991 as trustee for the Barron Development Trust. Three primary beneficiaries of the Trust, (Messrs. Kimet Mehmet, Pasquale Quadrio and Grant McAuliffe) were, at the time of the creation of the trust, shareholders in the plaintiff company.
- [2] The defendant is the son of Mr Kimet Mehmet and is and was at all material times a secondary beneficiary of the Trust. Between 30 April 1991 - 1 July 2002 he was also a Director of the plaintiff company representing his father's family interests.
- [3] On or about 9 May 1991 the Defendant entered into a contract to purchase land situated on the Kennedy Highway Atherton and described as Lot 4 on RP 706912 County Nares, Parish Barron (hereinafter "the land"). The defendant subsequently became the registered owner of the land, the contract being completed on 14 June 1991.
- [4] The plaintiff claims that, when the land was purchased, the common intention of persons involved was that the land would become trust property pursuant to the Trust Deed referred to above. The intent of the trust was the creation of a trust fund from – "other moneys and all other property which the settlor and/or other persons...may transfer or assign to the Trustee... and all other property acquired by the Trustee under the powers and provisions contained in this Deed".<sup>1</sup> Included in the Trust Deed is a provision permitting the trustee to cause any asset of the trust to be registered in the name of a nominee (clause 15(a)(b)). The plaintiff contends that when the purchase was completed the defendant took the land on trust for the Barron Development Trust.
- [5] The land was to be purchased by instalments with an initial payment of \$100,000 and annual instalments thereafter of \$20,000 each for the next twenty years. The initial instalment was provided by the plaintiff from funds which came to it by way of loans from Messrs McAuliffe and Quadrio in the sum of \$70,000 each. The defendant himself made no monetary contribution to the initial instalment.
- [6] By his defence the defendant contends that the purchase of the land was effected by him in his own right and that the monies for the first instalment were advanced to him by way of loan. He alleges that "it was expressly or impliedly agreed" that the land would be registered in his name, that he would maintain the beneficial ownership of it and that, as trustee of the Barron Development Trust, he would develop and market lots to be subdivided from the land.<sup>2</sup> The defendant relies on the terms of a document executed by the plaintiff, by Messrs McAuliffe and Quadrio and by the defendant on 30 April 1991 ("the development agreement") as creating his right to beneficial ownership.<sup>3</sup> Later reference will be made to these terms.
- [7] The plaintiff now seeks judgment pursuant to r 292(2) of the *Uniform Civil Procedure Rules* To succeed in this application the plaintiff must show –
- (i) that the defendant has no real prospect of succeeding on all or part of its defence; and
  - (ii) there is no need for a trial of the claim or part of the claim.

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<sup>1</sup> See ex "X-1" to affidavit of McAuliffe sworn 20 December 2002, p 9 para [c]

<sup>2</sup> Defence paragraph 4

<sup>3</sup> See ex "X-5" to affidavit of McAuliffe sworn 20 December 2002

- [8] The resolution of the issues raised on the pleadings depends primarily upon the construction of the above documents in the circumstances of their execution. There is virtually no conflict about these circumstances.
- [9] There are, however, a number of other documents relied upon by the plaintiff to establish that the beneficial ownership of the land rests with the plaintiff. Firstly, there is an Acknowledgment signed by the defendant on a date unknown in 1991<sup>4</sup>. There are also financial returns of the plaintiff, some of which were signed by the defendant as the plaintiff's public officer. These financial returns show that the land has consistently been recorded as part of the assets of the plaintiff company.
- [10] The terms of the Acknowledgment may be set out in full. They are as follows:-  
 "I, HYSEN MEHMET (also known as SAM MEHMET) of Irvine Street, Kairi in the state of Queensland being the purchaser of certain land described as Lot 4 on Registered Plan No. 706912 in the County of Nares, Parish of Barron from STANLEY MITCHELL and being the same Mehmet referred to in Deed entered into with REGINALD GRANT McAULIFFE and PASQUALE QUADRIO HEREBY ACKNOWLEDGE AND DECLARE that I have entered into a contract to purchase the said land in my capacity as trustee of the Barron Development Trust and not otherwise."<sup>5</sup>
- [11] As to that document the defendant asserts that it was not signed by him until after the land had been transferred to him. He similarly asserts that the Trust Deed bearing the date 31 April 1991 was not executed until after the contract of sale had been signed. He draws attention to the letter from McCullough & Robertson Solicitors dated 4 June 1991<sup>6</sup> which refers to "an amended Deed of Trust" yet to be executed. The defendant suggests that it was open to conclude that the trust by which the plaintiff was appointed may not, by that date, have come into existence. If so, the defendant's purchase of the land could not have been undertaken "in his capacity as trustee of the trust" as alleged in para 5 of the Statement of Claim.
- [12] These allegations have to be considered against the background of other evidence. The primary flaw in this argument is the fact that the document relied upon by the plaintiff is not described as an amended Deed of Trust but a document identified simply as a Deed of Trust. It does not show any sign of having been amended. It bears the date of execution as 30 April 1991 which I should act upon in the absence of evidence to the contrary and there is no such evidence. Moreover both the Acknowledgement and the Development Agreement<sup>7</sup> make reference to the land purchase, the latter identifying how the first instalment was to be made. There is a high likelihood the documents were prepared and executed at about the same time.
- [13] On behalf of the defendant, my attention was drawn to the Development Agreement and to a passage in para 14 of the affidavit of Mr Gillman sworn 19 December 2002. That passage is some hearsay evidence of an agreement upon which the trust was founded – viz "if the defendant could introduce the land to the trust" the three families would split the profits in certain proportions. That statement coupled with the terms of recital H of the development agreement that Hatrun will act "for the

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<sup>4</sup> Ex "X-3" affidavit of McAuliffe sworn 20 December 2002

<sup>5</sup> Ibid

<sup>6</sup> Ex HMO4 to the affidavit of Hysen Mehmet sworn 29 January 2003

<sup>7</sup> Ex "X-5" affidavit of McAuliffe sworn 20 December 2002

purpose of developing and marketing the land” are relied upon as showing an intention that the land would not form part of the trust.

- [14] The Development Agreement plainly reads that the funds for the initial purchase instalment were monies advanced by way of loan to the plaintiff (paras 1 and 3(a) of the agreement<sup>8</sup>). The funds for the initial purchase instalment were not advanced to the defendant. The other terms of the agreement provide for the utilisation of the balance of the loan funds, the proposal for Stage 1 development of the land, the allocation of net proceeds of sale and the payment of future purchase instalments. Nowhere in the terms of the development agreement is there any express reference to the beneficial ownership of the land reposing in the defendant nor do the terms carry any such implication.
- [15] The defendants argue that the subdivision operation was a joint venture with contractual obligations expressed through the trust. Having read the terms of the Trust Deed providing, as it does, for the trust to exercise its discretion as to accumulation of income and capital, and its distribution among various classes of beneficiaries, it seems to me to have the hallmarks of a genuine trust with the trustees having powers beyond those commonly associated with parties to a commercial joint venture. See particularly the terms of paras 16(c) and (c) of the Trust Deed as to the plaintiff’s discretion.
- [16] The establishment of the trust was, in part, undertaken so as to avoid disclosing to the vendor the true purchasers of the land, but that deception is of no moment in the issue which I have to decide, since each of the parties was clearly complicit in that deception.
- [17] Mr Ryall of counsel for the defendant, in argument, contended that if the defendant was not a beneficial owner, then this application should be refused on the ground that the terms of the trust required the legal ownership of the land to remain with the defendant and that the vesting of the land in the plaintiff should not be granted. The defendant relies, in particular, on the terms of the contract of sale which imposed a personal obligation to pay instalments of purchase price over the 20 year period which now has only approximately 10 years to run. It would appear that, from the financial returns to date, the instalments have been met from the resources of the trust. The defendant, under the contract of sale, also warranted to the vendor that he would enjoy a personal right to occupy a dwelling on the land for an indefinite period subject to the vendor paying electricity and telephone accounts.
- [18] The plaintiff argues that such obligations on the defendant apply in whatever capacity the defendant holds an interest in the land such that if he holds the land as trustee, the trust would accordingly be bound. Moreover the plaintiff argues that this matter of personal obligation is not a point which was pleaded in the defence and it is not something to which regard should be had on this application.
- [19] The defendant submits that the plaintiff has not made out its cause of action and has not, on the evidence, established a common intention of the parties that the land would form trust property. Whilst none of the witnesses has directly attested to the existence of such an intention, it is to be inferred readily from the terms of the documents and from the inclusion of the land as a trust asset in the financial returns exhibited to the affidavits of Mr. Gilman. In addition part of the land has been

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<sup>8</sup> Ex X-5 affidavit of McAuliffe sworn 20 December 2002

subdivided, the allotments have been sold and the net proceeds have been paid to the trust. This history clearly manifests the intention for which the plaintiff contends.

- [20] In all the circumstances I am satisfied that the Barron Development Trust was established when the defendant purchased the land and that he did so in his capacity as trustee of that Trust. This is consistent with the terms of the Acknowledgment signed by him and consistent with the financial returns illustrating the understanding at all times by both accountants and directors, including the defendant, that the plaintiff was the beneficial owner of the land.
- [21] The defendant has not adduced any evidence which challenges those findings but rather relies on the construction of the terms of the documents to suggest a relationship between the plaintiff and the defendant of a kind other than the defendant holding the land as trustee for the plaintiff. Such a construction is, in my view, untenable for the reasons I have advanced. I am satisfied, in accordance with the terms of r 292(2) of the *UCPR* that the defendant has no real prospect of succeeding in the action. As I have reached this view, basically relying upon the terms of various documents and the unchallenged contents of other documents, it is unlikely that any different conclusion would be reached if the matter went to trial. Relying on the principles enunciated in *Bernstrom v National Bank of Australia*<sup>9</sup> I propose therefore to make the declaration sought in the Statement of Claim.
- [22] The defendant has asked, in the event of my coming to this conclusion, that I do not proceed to make an order vesting that legal title in the land in the plaintiff. The background to this is the evidence of ill-will that has arisen between the present directors of the plaintiff on the one hand and the Mehmet family on the other. The minutes of the General Meeting of the plaintiff on 1 July 1991 illustrates the extent of that conflict. The Mehmet family have a 50% stake in the trust assets. The family interests are different to the personal interests of the defendant, though he claims to represent the family. I am satisfied that the defendant should not continue to have the legal title to the subject land, against the wishes of the beneficial owner in circumstances where there is demonstrated conflict between them, but there remains a question whether it is appropriate for that legal title to pass now to the plaintiff.
- [23] There is ample power under s8 of the *Trust Act* to appoint a different trustee of the land where it is expedient to do so. However that relief was not sought by the defendant in his pleading as an alternative to the plaintiff's claim to have the land vest in it. That does not, in my view, preclude consideration of the issue on this application. The court has an inherent jurisdiction, as well as that pursuant to s 8 of the *Supreme Court Act*, to supervise arrangements made by way of trusts. That jurisdiction should be exercised if, in so doing, there will be a reduction in the conflict between the beneficiaries under the trust.
- [24] I propose, therefore, to allow 30 days for submissions to be made as to the terms of an appropriate vesting order.
- [25] My orders are as follows:-

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<sup>9</sup> (2002) QCA 231

1. That the defendant holds the land situated at Kennedy Highway Atherton and presently described as Lot 4 on RP 706912 County Nares, Parish Barron on trust for the Barron Development Trust.
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