

# SUPREME COURT OF QUEENSLAND

CITATION: *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380

PARTIES: **THE PUBLIC TRUSTEE OF QUEENSLAND (AS LITIGATION GUARDIAN FOR ADF)**  
(Plaintiff)

v

**HAJNAL DAHLIA BAN**  
(First Defendant)

and

**SEAN BLACK**  
(Second Defendant)

FILE NO/S: BS 13246 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 7 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 18 November 2011, 25 November 2011

JUDGE: Boddice J

ORDER: [1] The plaintiff's application for summary judgment in respect of that part of the plaintiff's claim concerning the proceeds of the sale of the property which were paid into the joint account on 30 October 2009 is granted.

[2] The plaintiff's application for summary judgment on the first defendant's counterclaim is refused.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – Where the plaintiff applies for summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 in respect of its claim for a declaration that the first defendant holds moneys, deposited in a joint account on trust for the plaintiff – Whether the defendants have no real prospect of succeeding in their defence – Whether there is no need for trial of that part of the claim

EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – LIABILITY FOR BREACH OF TRUST – RELIEF FROM LIABILITY – GENERALLY – Where the first defendant was attorney for financial and personal matters – Where the first defendant paid the proceeds of sale of property into a joint account – Whether payment constitutes a conflict transaction pursuant to s 73 of the *Powers of Attorney Act 1998*

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – Where the first defendant counterclaims for a declaration and other relief in respect of real property – Where the plaintiff also applies for summary judgment on the first defendant’s counterclaim pursuant to r 293 of the *Uniform Civil Procedure Rules 1999* – Whether the steps taken to transfer the property were insufficient to complete the gift of that interest to the first defendant

*Powers of Attorney Act 1998 (Qld)*

*Uniform Civil Procedure Rules 1999 (Qld)*

*Agar v Hyde* (2000) 201 CLR 552

*Corin v Patton* (1990) 169 CLR 540

*Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232

*Gibbons v Wright* (1954) 91 CLR 423

*Imperial Bank of Canada v Begley* [1936] 2 All ER 367

*Rich v CGU Insurance Ltd* (2005) 75 ALJR 856

*Robertson v Vlahos* [2010] QSC 424

*Smith v Glegg* [2005] 1 Qd R 561

COUNSEL: Jackson, QC with Collins, AJ for the plaintiff

No representation for the first and second defendants

SOLICITORS: Official Solicitor to the Public Trustee for the plaintiff

No representation for the first and second defendants

- [1] On 8 December 2010, the plaintiff commenced proceedings claiming declarations and other relief against the defendants in relation to moneys allegedly held on trust for the adult (“ADF”). The defendants deny the moneys are trust funds. The first defendant also counterclaims for a declaration and other relief in respect of real property held in ADF’s name.

- [2] The plaintiff applies for summary judgment in respect of part of its claim against the defendants. The plaintiff submits it is entitled to summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules 1999* in respect of its claim for a declaration that the first defendant holds moneys, deposited in a joint account in the names of ADF and the first defendant on or about 30 October 2009, on trust. The plaintiff also applies for summary judgment on the first defendant's counterclaim pursuant to r 293 UCPR.

### **Background**

- [3] ADF was born on 28 July 1944. He was formerly a barrister at law. In recent times he has been diagnosed with dementia. He is now a resident receiving full time care at an aged care facility.
- [4] The first defendant is a close friend of ADF. They have known each other for at least 10 years. ADF mentored her in her legal studies, and assisted her in her political career. The second defendant is married to the first defendant.
- [5] On 28 April 2009, ADF executed an enduring power of attorney ("EPA") appointing the first defendant as his attorney for financial and personal matters, including health matters. That power of attorney took effect immediately.
- [6] On 2 July 2010, the plaintiff was appointed as administrator for ADF for all financial matters and the Adult Guardian was appointed guardian for ADF for all personal matters. On the same day, the first defendant was given leave to resign as attorney for ADF under the EPA dated 28 April 2009.

### **The claim**

- [7] Relevant to that part of the claim the subject of the summary judgment application, the plaintiff alleges:
- (a) Until 3 November 2009, ADF was the registered proprietor of land located at 541 Chambers Flat Road, Park Ridge in the State of Queensland ("the Park Ridge property").
  - (b) On 21 July 2009, the first defendant attended with ADF at the Logan Hospital. ADF was in a confused and disorientated state, having difficulty communicating with other persons. He was admitted to that hospital.
  - (c) On 28 July 2009, the first defendant transported ADF from the hospital to Garden City Shopping Centre where ADF executed a draft contract of sale provided by the first defendant to sell the Park Ridge property for a consideration of \$2,250,000. The first defendant and Gregory Sowden ("Sowden") then took ADF to a branch of the National Australia Bank at Garden City where ADF signed a typewritten authority and a draft account authority card provided by the first defendant to open a joint bank account in their names. As a consequence of those authorities, a joint account was opened in the names of ADF and the first defendant ("the joint account"). ADF was then returned to the hospital by the first defendant.
  - (d) On or about 28 July 2009, Sowden requested Walker Lawyers act for ADF in the conveyance of the Park Ridge property.

- (e) On 28 October 2009, the first defendant, as ADF's attorney, executed a transfer of the Park Ridge property to the purchaser on behalf of ADF because of "her belief or concern that ADF lacked the capacity to do so".<sup>1</sup>
  - (f) On 29 October 2009, the first defendant, as ADF's attorney, instructed Walker Lawyers to hand the cheque for the proceeds of the sale of the Park Ridge property to the second defendant.
  - (g) On 29 or 30 October 2009, the first defendant, as ADF's attorney, authorised the second defendant to collect the cheque from the sale of the Park Ridge property and to pay it into the joint account.
  - (h) On 30 October 2009, the second defendant collected a cheque for the balance of the proceeds from the sale of the Park Ridge property in the sum of \$2,154,404.24, payable to ADF, and deposited it into the joint account. In August and September 2009, deposit moneys of \$55,000 had also been paid into the joint account.
  - (i) At least from 28 October 2009, the first defendant "actually knew or wilfully closed her eyes to the fact that ADF did not have capacity to undertake any significant transaction or disposition of his property, including making any gift to her of the balance of proceeds or balance proceeds cheque".<sup>2</sup>
  - (j) As attorney for ADF, the first defendant was obliged to avoid entering into conflict transactions as defined in the *Powers of Attorney Act 1998 (Qld)* without the authority of ADF.
  - (k) Between November 2009 and May 2010, the first defendant withdrew, or caused to be withdrawn, moneys from the joint account in excess of \$1.37 million which payments were not made for the benefit of ADF but for her own personal benefit.
- [8] In their defence, the defendants:
- (a) admit ADF presented to hospital on 21 July 2009 but say he was alert and orientated and answered a mini mental state examination correctly;
  - (b) admit the first defendant transported ADF to the Garden City Shopping Centre on 28 July 2009 and whilst there ADF executed a draft contract provided by the first defendant to sell the Park Ridge property for \$2,250,000;
  - (c) say ADF asked the first defendant to arrange for the contract for the sale of the Park Ridge property to be provided to him outside of the hospital so that he could have some privacy to read it. Prior to executing the contract, ADF read through it page by page with Sowden. During this discussion, ADF discussed with Sowden where he would live after settlement resulting in a special condition being inserted to allow ADF to rent back the property for a period of six months;

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<sup>1</sup> Statement of claim, par 14

<sup>2</sup> Statement of claim, par 19

- (d) say the commercial terms of the contract, including the rental back clause, had been negotiated earlier by ADF personally with the buyer's agent, and the contract was prepared by solicitors for the purchaser;
- (e) say that during this conversation ADF discussed arranging for the settlement proceeds to be placed into a joint account with the first defendant so as to ensure that when he died the proceeds of sale would not form part of his estate and thereby be susceptible to a claim for further provision by any family member. ADF advised Sowden that he wished to open a joint bank account with the first defendant that day;
- (f) say prior to ADF going with Sowden and the first defendant to the National Australia Bank at Garden City, Sowden provided ADF with a typewritten authority to the bank directing that the bank account be held as joint tenants, and ADF and the first defendant executed the bank account authorities necessary to open the account;
- (g) admit Walker Lawyers acted for ADF in respect of completion of the contract for the sale of the Park Ridge property, and say that ADF provided instructions to Walker Lawyers directly, including directing Walker Lawyers to pay the proceeds of the sale of the Park Ridge property into the joint account;
- (h) admit that on and from at least as at 28 October 2009, the defendant actually knew that ADF did not have legal capacity;<sup>3</sup>
- (i) say that up to 1 October 2009 ADF appeared to fully comprehend the nature and effect of all his transactions, and his decision to gift the moneys to the first defendant was made at the latest on 28 July 2009 when he directed his solicitor where the proceeds of sale from the Park Ridge property were to be banked;
- (j) deny the gift of the balance of the proceeds of the sale of the Park Ridge property was grossly improvident as the gift was intended to ensure that the first defendant would have all available funds to look after ADF for the remainder of his life;
- (k) deny the first defendant took any unfair advantage of her position to obtain the benefit of the balance of the proceeds of sale of the Park Ridge property as the gift was complete and enforceable when ADF directed his solicitor to pay the sale proceeds into the joint account;
- (l) deny that the transaction constituted a conflict transaction as ADF authorized the transaction, and once the money was deposited into the joint account as authorized by ADF it was jointly held and involved dealing with money that was not a conflict transaction.

### **Counterclaim**

- [9] The first defendant claims that ADF, as the registered owner of land situated at 468 Tully Road, Greenbank ("the Greenbank land"), executed a transfer in favour of the first defendant and himself as joint tenants of that land on 28 August 2009, and that such a transfer was made by way of gift with nothing further to be done in respect

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<sup>3</sup> Defence and counterclaim, par 11(a) and (c)

thereof other than for the first defendant to lodge the transfer for registration. The first defendant claims a declaration that she is the beneficial owner of the fee simple as joint tenants of the Greenbank land together with associated relief.

- [10] By way of answer, the plaintiff denies that the first defendant is the beneficial owner of the land, or entitled to any interest in it.

### **Submissions**

- [11] The application for summary judgment in respect of moneys in the joint account is made on the basis that as the first defendant admits she knew, on and from at least 28 October 2009, that ADF did not have the capacity to enter into any significant transaction or disposition of his property, ADF did not have capacity to make any gift to the first defendant of the balance of the proceeds of the sale of the Park Ridge property received at settlement on 30 October 2009.
- [12] The plaintiff contends that whilst ADF may have directed his lawyers, on 2 August 2009, to deposit the sale proceeds from the Park Ridge property into the joint bank account, ADF did not then have possession or control of the sale proceeds. Those proceeds only became his property when the cheque was provided at settlement on 30 October 2009. By that date, any authority given by ADF to his lawyers was revoked, ADF having lost capacity prior to 30 October 2009. As he no longer had capacity as at 30 October 2009, the balance of the proceeds of cheque, which were ADF's property, was property he had no power to give to another, or to authorise its deposit into an account as a gift. Instead, the first defendant authorised the collection of the cheque and its deposit into the joint bank account. The only legal authority the first defendant could have for that transaction was the power as ADF's attorney. The first defendant admits she did so, exercising that power. Upon its use, there was a conflict in her duty as attorney and her personal interest as joint account holder, that gave rise to a conflict transaction within the meaning of s 73(2) of the *Powers of Attorney Act 1998*. The transaction was a contravention of that Act which could not be authorised by ADF, and was ineffective to perfect a gift of the balance of the proceeds to herself as joint account holder.
- [13] The defendants contend that notwithstanding their admission that the first defendant knew ADF lacked capacity on and from at least 28 October 2009, there remains in dispute, whether ADF lacked legal capacity as at 30 October 2009. Further, there is a genuine dispute as to whether the proceeds of sale of the Park Ridge property was properly to be characterised as joint property having regard to ADF's written authority to his solicitors on 2 August 2009 to deposit those proceeds into the joint account, and as to whether there was any conflict transaction of the proceed which was properly characterised as joint property. The first defendant submits there is a need for a trial of these issues, and it is inappropriate for summary judgment to be given in respect of this aspect of the plaintiff's claim.
- [14] In respect of the first defendant's counterclaim, the plaintiff contends that whilst ADF may have executed an instrument of transfer of his interest in the land to himself and the first defendant jointly on or about 28 August 2009, any such gift was incomplete and not sufficiently perfected before ADF lost capacity. In support of this contention, the plaintiff relies on affidavits from ADF's lawyer who deposes that whilst he held a duly executed transfer, it was never stamped and at no time did he receive instructions to lodge the executed transfer in the Titles Registry.

- [15] The plaintiff contends that as the duly executed transfer was not stamped, and ADF did not ever give authority to his lawyers to deliver the transfer to the first defendant for registration, and the certificate of title was not given or delivered to the first defendant or lodged for registration, there can be no gift completed in equity so as to be binding upon ADF.
- [16] The first defendant contends that upon the due execution of the transfer by ADF, all necessary steps had been taken to complete the gift. She contends that there are genuine issues to be determined, and there is a need for a trial.

### **Summary judgment**

- [17] Rules 292 and 293, UCPR provide:

#### **“292 Summary judgment for plaintiff**

- (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
- (2) If the court is satisfied that-
  - (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff’s claim; and
  - (b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff’s claim and may make any other order the court considers appropriate.

#### **293 Summary judgment for defendant**

- (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
- (2) If the court is satisfied-
  - (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff’s claim; and
  - (b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff’s claim and may make any other order the court considers appropriate.”

- [18] These rules are to be construed by applying their words, not any test under earlier rules.<sup>4</sup> Both rules use the criterion of “no real prospect” of success. A real prospect may be contrasted with one that is only fanciful.<sup>5</sup> In *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd*,<sup>6</sup> Muir JA (with whom Holmes JA agreed) said in respect of r 292:

“In *Rich v CGU Insurance Ltd*<sup>7</sup> Gleeson CJ, McHugh and Gummow JJ cited with approval the following passage from the reasons of Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde*:<sup>8</sup>

‘Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulæ which have been used or intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.’

In this case, whilst the primary judge dealt with the matter carefully and skilfully, if I may respectfully say so, the range and complexity of the issues before him and the existence of factual disputes rendered the granting of summary judgment overly bold.”

Having regard to the similar criterion in rr 292 and 293, these observations are equally applicable to an application under r 293.<sup>9</sup>

## Discussion

### *Claim*

- [19] The plaintiff’s application for summary judgment on part of the claim rests on an acceptance of the contention that the defendants have no real prospect of succeeding in their defence in respect of the claim for a declaration in relation to the moneys in the joint account, and that there is no need for a trial of that part of the claim.
- [20] Whilst at first blush this contention may be considered to be overly bold having regard to the numerous factual contentions made as part of the plaintiff’s claim, a consideration of the defendants’ defence reveals that the relevant factual contentions have been the subject of direct admission.
- [21] Those admissions extend to the central allegation namely, ADF’s capacity as at 30 October 2009, the date the proceeds of sale of the property were provided at settlement by the purchaser’s solicitors to ADF’s solicitors.
- [22] The statement of claim alleged:

“13. On 28 October 2009, the first defendant:

<sup>4</sup> *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 236.

<sup>5</sup> *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 234-235.

<sup>6</sup> [2010] QCA 119 at [81]-[82].

<sup>7</sup> (2005) 75 ALJR 856 at 859.

<sup>8</sup> (2000) 201 CLR 552 at 575-576.

<sup>9</sup> *Robertson v Vlahos* [2010] QSC 424 at [5].

- (a) executed a transfer of the property ("the transfer") to the purchaser on behalf of ADF;
  - (b) in doing so, was exercising the power.
- 14. The first defendant executed the transfer on 28 October 2009 because of her belief or concern that ADF lacked the capacity to do so.
- 15. On 29 October 2009:
  - (a) the first defendant instructed John Walker of Walker Lawyers by email to hand the cheque from the sale of the property to the second defendant;
  - (b) in doing so, was exercising the power.
- 16. On 29 or 30 October 2009:
  - (a) the first defendant authorised the second defendant to collect the cheque from the sale of the property and to pay it into the joint account;
  - (b) in doing so, was exercising the power.
- 17. On 30 October 2009:
  - (a) the land contract was completed;
  - (b) part of the purchase price of the land contract in the sum of \$2,154,404.24 ('the balance proceeds') was provided at settlement by the purchaser's solicitors handing to Walker Lawyers a Westpac Banking Corporation bank cheque no 686103 dated 30 October 2009 payable to 'ADF' for that amount ('the balance proceeds cheque');
  - (c) the balance proceeds cheque was the property of ADF in law and in equity.
- 18. On 30 October 2009:
  - (a) at approximately 3:50pm the second defendant, on behalf of the first defendant, attended at the offices of Walker Lawyers at West End, Brisbane in the State of Queensland and collected the balance proceeds cheque;
  - (b) shortly thereafter, the second defendant, on behalf of the first defendant, deposited the balance proceeds cheque to the joint account at the National Australia Bank, West End Branch.
- 19. On and from at least 28th October 2009 the first defendant actually knew or willfully closed her eyes to the fact that ADF did not have the capacity to undertake any significant transaction or disposition of his property, including making

any gift to her of the balance proceeds or balance proceeds cheque.

#### PARTICULARS

- (a) ADF had been taken to the Logan City Hospital ('the hospital') on 21 July 2009 by the first defendant in a confused and disorientated state and then had difficulty communicating with persons;
- (b) The first defendant had frequent contact with ADF both immediately before his admission to the hospital and whilst in hospital. The contact included personal attendances or telephone communications several times a day;
- (c) On 29 July 2009 Dr Boyle, the neurologist who treated ADF whilst in the hospital, undertook an examination of ADF and informed the first defendant that ADF was suffering from cognitive decline;
- (d) To the knowledge of the first defendant ADF's condition did not improve and deteriorated after his discharge from the hospital on 8 August 2009 and he was readmitted to the hospital on 14 October 2009;

#### PARTICULARS

- (i) on 8 August 2009 ADF was discharged from the hospital, after consultation between the hospital staff and the first defendant as to the condition of ADF as to the ability of ADF to be able to care for his own interests given his cognitive deficiencies and physical condition;
- (ii) ADF returned to his residence at the property and was attended upon by the first defendant on a daily basis who was able to observe that ADF was confused, disorientated, and had difficulty comprehending matters and communicating;
- (iii) on 27 August 2009 the first defendant knew that ADF attended upon Dr Allan Sutch, his general practitioner, for the purposes of obtaining a medical opinion as to ADF's capacity to execute legal documentation which was intended to confer a benefit on the first defendant;
- (iv) on 29 August 2009 Walker Lawyers, at the instruction of the first defendant or with her knowledge, wrote to Dr Allan Sutch,

advising that ADF was about to sign some quite significant legal documents and they wished to establish as to whether he was competent to give instructions and understood the consequences of executing the documentation;

- (v) on 4 September 2009, Walker Lawyers wrote to ADF care of the first defendant advising that the firm was still waiting for a Certificate of Competency from Dr Sutch;
- (vi) on 1 October 2009 the first respondent attended with ADF for an appointment at the neuro psychological unit at the hospital with a consultant neurologist, Dr Oram, who examined and tested ADF. Dr Oram formed the opinion that ADF had severe cognitive impairment which had implications for his day to day functioning and informed the first defendant that ADF had performed poorly in the examination and may have some mental incapacity;
- (vii) on 6 October 2009 the first defendant received correspondence from the Office of the Adult Guardian which raised concerns of the Adult Guardian in respect of ADF ('the Adult Guardian letter');
- (viii) on or about 8 October 2009, the first defendant sought advice from Walkers Lawyers as to the approach that should be taken to the Adult Guardian letter. On the first defendant's instructions Walker Lawyers sought the advice of Ms C Muir of counsel;
- (ix) on 13 October 2009 the first defendant contacted a social worker at the hospital, advised she was concerned at ADF's deteriorating dementia, and requested an assessment from the hospital's Aged Care Assessment Team for services and respite;
- (x) on 13 October 2009, the first defendant contacted the Aged Care Assessment Team for an assessment of ADF to be undertaken;
- (xi) on 13 October 2009, the first defendant made an appointment for ADF to consult a geriatrician;
- (xii) before 14 October 2009, to the first defendant's knowledge, ADF had

commenced to wander around (without any purpose for doing so) and was becoming increasingly aggressive. His condition was of such severity that on the evening of the 14 October 2009 the first defendant transported ADF back to the hospital and he was re-admitted;

- (xiii) on 14 October 2009, ADF was diagnosed with having primary senile dementia uncomplicated as the first defendant knew;
  - (e) on 15 October 2009, Walkers Lawyers, with the knowledge of the first defendant, wrote to Dr Sutch seeking his advice as to whether Dr Sutch was to provide a Certificate of Competency as to the capacity of ADF;
  - (f) the first defendant knew that no Certificate of Competency from Dr Sutch had been forthcoming;
  - (g) prior to 21 October 2009 the second defendant on behalf of the first defendant provided the power to Walker Lawyers so that the transfer could be registered;
  - (h) on or about 27 October 2009, the first defendant received a copy of the assessment of ADF by the Aged Care Assessment Team;
  - (i) on 28 October 2009, Walkers Lawyers wrote to the purchaser's solicitors, on instructions from the first defendant, that there were concerns as to ADF's capacity and that the transfer would be signed by ADF's attorney (being the first defendant);
  - (j) the reason that the first defendant executed the transfer on 28 October 2009 was because of her belief or concern that ADF lacked the capacity to do so.
20. The first defendant has alleged that ADF informed her that his intention was that she would have complete access to funds to be placed into the joint account.
21. However:
- (a) at no time did ADF have possession or control of the balance proceeds of sale or the balance proceeds cheque;
  - (b) the first defendant, exercising the power, authorised Walker Lawyers to hand the balance proceeds cheque to the second defendant;

- (c) the second defendant, on behalf of the first defendant, exercising the power, caused the balance proceeds cheque to be deposited to the joint account.”

In response, the defendants pleaded in the defence:

- “8. The defendants admit the allegations of fact in paragraphs 11, 12, 13, 14, 15, 16, 17(a) and 17(b) of the statement of claim.
9. With respect to paragraph 17(c) of the statement of claim, the defendants are not required to plead in response to this paragraph as it contains no allegation of fact.
10. With respect to paragraph 18 of the statement of claim, the defendants:
- (a) admit the allegations of fact in sub-paragraphs (a) and (b);
- (b) say that the second defendant was also acting on behalf of Mr ADF when he collected and deposited the cheque.
11. As to paragraph 19 of the statement of claim, the defendants:
- (a) admit the allegations of fact in that paragraph save for the allegation that the first defendant ‘wilfully closed her eyes to the fact’;
- (b) are not required to and therefore do not plead in response to the particulars;
- (c) deny that the first defendant wilfully closed her eyes to any fact, as alleged by the plaintiff or at all. The basis for the defendants’ belief that the allegation to that extent is untrue is that on and from at least 28 October 2009 the first defendant actually knew that Mr ADF did not have the capacity there alleged.
12. The defendants admit the allegations of fact in paragraph 20 of the statement of claim.
13. With respect to paragraph 21 of the statement of claim, the defendants admit the allegations of fact in sub-paragraphs (a), (b) and (c).”

[23] Whilst the defendants contend there remains in dispute whether ADF had legal capacity as at 30 October 2009, the admission made by the defendants in respect of this issue is clear and unequivocal. It specifically drew a distinction between the first defendant’s actual knowledge and an allegation of wilfully turning a blind eye. It categorically admitted that the first defendant “actually knew” ADF lacked capacity to undertake any significant transaction “on and from at least 28 October

2009”. There is no reason why that clear admission should not be acted upon. The pleading was filed whilst the defendants were represented by solicitors. The pleading was settled by counsel. That admission renders no longer in dispute any issue as to ADF’s capacity as and from at least 28 October 2009. There is no need for a trial on that issue.

- [24] The proceeds from the sale of the property were not received by ADF until settlement on 30 October 2009. Settlement was only effected because the first defendant, exercising her power as attorney, executed the memorandum of transfer on behalf of ADF. That the first defendant executed the transfer using her power as ADF’s attorney is consistent with her admission that at that date she actually knew ADF did not have capacity.
- [25] The first defendant also gave instructions to ADF’s solicitors to pay the proceeds of the sale into the joint account. That this instruction was given in exercise of her power as attorney is also consistent with the first defendant’s admission that she actually knew ADF no longer had capacity. It is also consistent with an acceptance that ADF’s earlier direction to his solicitors was no longer effective. Such an instruction would have been unnecessary if ADF’s earlier instruction to his solicitors, given in writing on 2 August 2009, to pay the proceeds of sale into the joint account, was still valid and operative. As ADF had by this stage lost capacity, that instruction could no longer be operative. It was revoked on ADF losing capacity.<sup>10</sup>
- [26] Once that conclusion is reached, the first defendant’s instructions to pay the proceeds of the sale of the Park Ridge property into the joint account constitutes a conflict transaction. Section 73 of the *Powers of Attorney Act 1998* provides:

**“73 Avoid conflict transaction**

- (1) An attorney for a financial matter may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that type or conflict transactions generally.
- (2) A conflict transaction is a transaction in which there may be conflict, or which results in conflict, between-
  - (a) the duty of an attorney towards the principal; and
  - (b) either-
    - (i) the interests of the attorney, or a relation, business associate or close friend of the attorney; or
    - (ii) another duty of the attorney.
- (3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney’s own right and on behalf of the principal-

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<sup>10</sup> See, generally, *Gibbons v Wright* (1954) 91 CLR 423 at 444-445.

- (a) deals with an interest in property jointly held;  
or
- (b) acquires a joint interest in property; or
- (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

(4) In this section-

*joint interest* includes an interest as a joint tenant or tenant in common.”

[27] Contrary to the first defendant’s submissions, there is no issue as to when a transaction becomes a conflict transaction. The transaction having been undertaken, the relevant question is whether, at the time of authorising this transaction, using her power as ADF’s attorney, there was conflict between the first defendant’s duty as attorney, and her interests.

[28] To use her power as attorney to direct ADF’s solicitors to give the cheque for the proceeds of the sale of the Park Ridge property to the second defendant, and to direct the second defendant to pay that cheque into the joint account, gave rise to a conflict between the first defendant’s duty as ADF’s attorney and her interest as joint account holder. In this respect, the observations of McMurdo J in *Smith v Glegg*<sup>11</sup> are apposite. In considering a circumstance where a defendant owed a plaintiff fiduciary duties, McMurdo J wrote:

“The plaintiff was totally dependent upon her assistance, and specifically upon her exercise in good faith of her very extensive powers under the power of attorney. That required the defendant to avoid any dealing or transaction by which her own interests could conflict with her duty to the plaintiff. A critical part of her responsibilities as an attorney was her management of the plaintiff’s money and property. If the defendant was to be free to accept a gift of the plaintiff’s only substantial asset, then her interest in maximising the value of what she would receive would conflict with her duty to manage and apply the plaintiff’s property only for the support, health and comfort of the plaintiff, even if that involved some substantial expenditure. ...”

[29] The first defendant contended the transaction could not constitute a conflict transaction as she was simply doing what ADF wanted her to do. Whatever her intentions, the transaction was a conflict transaction. If the first defendant thought the transaction was in accord with ADF’s wishes, and for his benefit, approval could have been sought to enter into the transaction.<sup>12</sup> The first defendant did not obtain any approval for it.<sup>13</sup> There is no reasonable basis for the defendants to contend approval could now be given retrospectively. The power is framed in prospective terms. Further, there is no basis for a conclusion that the transaction

<sup>11</sup> [2005] 1 Qd R 561 at 574 [61].

<sup>12</sup> *Powers of Attorney Act* 1998, s 118

<sup>13</sup> *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232.

was in ADF's best interest, a prerequisite for any approval under s 118 of the *Powers of Attorney Act*.

- [30] The cheque for the balance of the proceeds of the sale of the Park Ridge property was ADF's property. When it came into his possession or control, ADF no longer had capacity. He therefore no longer had power to give that property to another or to authorise anyone else to give that property to another, including authorising its deposit into a joint account as a gift to the other joint account holder. The only legal authority the first defendant had to direct the payment of that cheque into the joint account was under the power of attorney. As the use of that power constituted a conflict transaction, the first defendant's direction to pay the proceeds of the cheque into the joint bank account was ineffective to perfect any gift to her. The first defendant holds those proceeds on constructive trust.<sup>14</sup>
- [31] The admissions made by the defendants as to the first defendant's knowledge of ADF's incapacity as and from at least 28 October 2009, mean there is no issue still in dispute in respect to ADF's capacity as at 30 October 2009. There is no need for a trial in respect of this issue. Similarly, her admissions that she directed payment of the proceeds of sale into the joint account, pursuant to her power as attorney, render the transaction authorised by the first defendant a conflict transaction. There is no need for a trial in respect of this issue.
- [32] The plaintiff has established that the defendant has no real prospect of succeeding in her defence of this aspect of the claim. There is no need for a trial of that part of the claim. The plaintiff is entitled to summary judgment on that part of the claim.
- [33] The plaintiff acknowledges that most of the funds in question have now been transferred from the joint account. However, there is utility in making the declaration sought by the plaintiff. It will allow for ancillary orders to be made, including in respect of tracing those funds, and an account of the proceeds.

#### *Counterclaim*

- [34] The claim for summary judgment in respect of the counterclaim depends on acceptance of the plaintiff's contention that the steps taken by ADF to transfer his interest in the Greenbank land to himself and the first defendant jointly were insufficient to complete the gift of that interest to the first defendant, or to perfect it before ADF lost capacity.
- [35] Central to the plaintiff's assertions in this respect is an acceptance of the contents of ADF's solicitor's affidavit. ADF's solicitor asserts that although ADF executed the transfer on 27 August 2009, the duly executed transfer was never stamped and the solicitors never received the paper title for the land and did not receive instructions to lodge the executed transfer at the Titles Registry.<sup>15</sup>
- [36] The principles for establishing that a gift is complete in equity so as to be binding upon the donor of the property were distilled in *Corin v Patton*.<sup>16</sup> Mason CJ and McHugh J said, at 559:

“Accordingly, we concluded it is desirable to state that the principle is that, if an intending donor of property has done everything which

<sup>14</sup> See *Imperial Bank of Canada v Begley* [1936] 2 All ER 367 at 371.

<sup>15</sup> Affidavit of John Campbell Walker, par 32 – 34

<sup>16</sup> (1990) 169 CLR 540.

it is necessary for him to have done to effect a transfer of legal title, then equity will recognise the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity. ‘Necessary’ used in this sense means necessary to effect a transfer. From the viewpoint of the intending donor, the question is whether what he has done is sufficient to enable the legal transfer to be effected without further action on his part.”

- [37] In *Corin*, Deane J said of the test for determining whether the stage had been reached when a gift of real property and land under an unregistered memorandum of transfer is complete and effective in equity:

“That test is a twofold one. It is whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall or intervention of the donor. Once that stage is reached and the gift is complete and effective in equity, the equitable interest in the land vests in the donee and, that being so, the donor is bound in conscience to hold the property as trustee for the donee pending the vesting of the legal title.”<sup>17</sup>

- [38] Whilst on the contents of the solicitor’s affidavit, it is open to the plaintiff to contend that the gift of the land to the first defendant had not been perfected in equity as ADF had not authorised the delivery of the instrument of transfer to the first defendant nor authorised the delivery of the certificate of title to her, the factual contentions relied upon by the plaintiff are not the subject of admission by the first defendant. Those facts are central to a determination of whether any gift of the land was complete in equity. Not being the subject of admissions, they remain in dispute. Whilst they remain contentious, there is a need for a trial.
- [39] I decline, in the exercise of my discretion, to grant summary judgment in favour of the plaintiff in respect of the defendant’s counterclaim.

### **Orders**

- [40] The plaintiff’s application for summary judgment in respect of that part of the plaintiff’s claim concerning the proceeds of the sale of the Park Ridge property, which were paid into the joint account on 30 October 2009, is granted. The plaintiff’s application for summary judgment on the first defendant’s counterclaim is refused.
- [41] I shall hear the parties as to the form of orders, and costs.

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<sup>17</sup> (1990) 169 CLR 540 at 582