

SUPREME COURT OF QUEENSLAND

CITATION: *Whynot Assets Pty Ltd v Trinity Green Developments Pty Ltd*
[2012] QSC 205

PARTIES: **WHYNOT ASSETS PTY LTD (ACN 133 800 834)**
as trustee of the Castro Assets Trust
(First Applicant)

LEYBOURNE ASSETS PTY LTD (ACN 133 800 861)
as trustee of the Truce Assets Trust
(Second Applicant)

**MAURIZIO VERNA as trustee of the M & P Verna
Family Trust**
(Third Applicant)

**MARK URQUHART as trustee of the Urquhart Family
Trust**
(Fourth Applicant)

**GRAHAME SHELLEY as trustee of the Shelly Family
Trust**
(Fifth Applicant)

**MARK THOMSON as trustee of the Thomson Family
Trust**
(Sixth Applicant)

**TRINITY GREEN DEVELOPMENTS PTY LTD
(ACN 142 927 277) as trustee of the Trinity Green
Developments Trust**
(First Respondent)

**ARSHAD DEVELOPMENTS PTY LTD
(ACN 098 863 097)**
(Second Respondent and First Plaintiff by Counterclaim)

TRINITY GREEN PTY LTD (ACN 098 785 196)
(Third Respondent and First Defendant by Counterclaim)

and

L&W GOODWILL PTY LTD (ACN 104 233 589)
(Second Plaintiff by Counterclaim)

MITCHELL NEVILLE LOUIS NIELSEN
(Second Defendant by Counterclaim)

LAWRENCE FREDERICK TRUCE
(Third Defendant by Counterclaim)

**INDIGO (ANN STREET) DEVELOPER PTY LTD
(ACN 117 593 978)**
(Fourth Defendant by Counterclaim)

FILE NO/S: BS 2183 of 2012

DIVISION: Trial Division

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 6 August 2012

DELIVERED AT: Brisbane

HEARING DATE: 1 August 2012

JUDGE: Philip McMurdo J

ORDER:

1. **The application under s 237 of the *Corporations Act 2001* (Cth) is dismissed.**
2. **The second defendant is given leave to join L & W Goodwill Pty Ltd as a second plaintiff by counterclaim and Mr Nielsen, Mr Truce and Indigo (Ann Street) Developer Pty Ltd as defendants to the counterclaim.**
3. **Leave is given to file an amended counterclaim, consistently with these reasons, to be filed and served by 9 August 2012.**

CATCHWORDS: CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS’ REMEDIES AND INTERNAL DISPUTES – PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER – STATUTORY DERIVATIVE ACTION – where the second respondent applies for leave to add both plaintiffs and defendants to its counterclaim – where the application requires the bringing of a derivative action on behalf of one of the proposed plaintiffs - where the same counsel seeks to represent what would effectively be both the plaintiff and the defendant within the same proceedings – where there are already substantial matters raised upon the pleadings to be determined by the trial judge - whether the derivative proceedings should be permitted to be brought within the present proceedings – whether the second respondent should be allowed to add parties to its counterclaim

Bankruptcy Act 1966 (Cth), s 82

Corporations Act 2001 (Cth), s 237

COUNSEL: A Morris QC with V Brennan counsel for the applicants

B O’Donnell QC and S Webster counsel for the second respondent

SOLICITORS: McMahan Clarke for the applicants

Cooper Grace Ward for the second respondent

- [1] These proceedings come from a substantial and complex dispute between the two sides of several joint ventures for the development of land. I will refer to them, as did counsel, as the Indigo parties (the applicants in the proceedings) and the Hatia side, which at present is limited to the second respondent (“Arshad”).
- [2] The case is set down for trial for five days commencing 20 August 2012. Arshad has applied for leave to add both plaintiffs and defendants to Arshad’s counterclaim. One of those plaintiffs would be the present third respondent in the proceedings (“Trinity Green”). It is a company in which each side has a one half interest. Arshad applies for leave to bring derivative proceedings on behalf of Trinity Green pursuant to s 237 of the *Corporations Act 2001* (Cth).
- [3] The proposed counterclaim was delivered on 19 June 2012 ahead of the filing of this application on 26 June 2012. Ultimately the application came on for hearing in the Civil List, and the argument occupied most of the day. In the same hearing, there was a contested application by Arshad to withdraw certain admissions from its defence, which I then determined in Arshad’s favour.
- [4] The substantial contest now is whether Arshad should be given leave to conduct proceedings on behalf of Trinity Green. I have concluded that leave should not be granted, at least within the context of the present proceeding. To explain that conclusion, it is necessary to say something about the facts.
- [5] The first respondent (“Developments”) is a company through which the parties have conducted a joint venture for the development of land since 2010. It has sold some of the land, resulting in about \$5.4 million being held by it as the net proceeds of sale. It is a trustee company under a unit trust. The Indigo parties together hold 50 per cent of the units. Arshad holds the other 50 per cent.
- [6] The applicants claim that these proceeds comprise or include profits from which Developments is able to and should make a distribution to the unitholders. Arshad resists that claim, alleging that Developments has substantial debts, which it owes to Trinity Green, and that after they are brought into account there is no surplus to be distributed.
- [7] Trinity Green was a company formerly used by the parties as their joint venture vehicle. It appears that it is not a trustee. Each side of the case holds one half of its shares.
- [8] The current joint venture project, which is a development near Browns Plains, was pursued by Trinity Green from 2002 until 2010 when the joint venturers agreed that the project should be transferred to Developments. The project was then sold by Trinity Green to Developments, under a written contract of sale, for a price of \$5.5 million. It is common ground that not all of that price has been paid. But there is a substantial dispute between the joint venturers as to how much remains unpaid. The Indigo parties say that Developments owes Trinity Green \$2,363,061.17. Arshad says that the debt is \$4,204,461.83. That controversy turns upon the effect or otherwise of what Arshad’s case describes as the “round robin” transactions.
- [9] The principals of the first and second applicants are Mr Nielsen and Mr Truce. They and Arshad’s principal, Mr Hatia, pursued another joint venture from 2006 in

relation to a project known as “LoganLink”. Part of their agreement for that project was that Trinity Green should repay money which it had borrowed from Arshad. A sum of \$3 million was then paid to Arshad by Trinity Green. However, the parties are in dispute as to how Trinity Green obtained the funds which it so applied. The Hatia side says that Trinity Green borrowed this money from Mr Hatia’s company, L & W Goodwill Pty Ltd (“L & W”). Therefore, they claim, L & W is a substantial creditor of Trinity Green. However, the Indigo parties say that Trinity Green borrowed the moneys not from L & W but from a company from their side, called Indigo Projects (Management) Pty Ltd (“IPM”), which in turn had borrowed the funds from L & W.

- [10] Trinity Green later paid amounts totalling \$3 million to IPM. IPM has since been wound up and deregistered. The Hatia side says that this \$3 million should have been paid to L & W, because it was Trinity Green’s lender. Clearly, L & W will not be able to recover from what used to be IPM. They say that these payments were made by Trinity Green to IPM through the actions of Mr Nielsen and Mr Truce, who are liable to compensate Trinity Green upon several legal bases, all through alleged breaches of their duties as directors of that company. Mr Nielsen and Mr Truce have now entered into arrangements under the *Bankruptcy Act 1966* (Cth) and the Indigo parties say that the proposed claims against these two individuals, to be made by Trinity Green through derivative proceedings, cannot be brought because the claims are for provable debts under s 82 of that Act.
- [11] The proposed derivative proceedings would have Trinity Green make these claims. First it would claim from Developments what the Hatia side says is the balance owing under the contract of sale, ie the amount of approximately \$4.2 million. Secondly Trinity Green would claim against Developments an indemnity for such amount as it must pay to L & W. The suggested basis for that indemnity is an alleged implied term of the contract of sale. Alternatively it is said that there was such an obligation as part of a collateral contract, the term there being agreed by conduct. The alleged term is that “... Developments would meet any obligation or debt of Trinity Green arising from, or incurred by Trinity Green in connection with the Project when such obligation fell due for payment ...”. Thirdly it is proposed to have Trinity Green make those claims against Mr Nielsen and Mr Truce.
- [12] Associated with the first claim, that is to say for the balance of the purchase price, is a claim proposed to be made by Trinity Green against Indigo (Ann Street) Developer Pty Ltd, which is said to have been a participant in the “round robin” series of transactions. In other words, this claim would involve effectively the same issues as the claim to be made against Developments for the balance purchase price.
- [13] Arshad wishes to add L & W as another plaintiff to its counterclaim, in order to have L & W claim what the Hatia side says is the amount outstanding to L & W by Trinity Green.
- [14] Arshad’s most recently filed defence and counterclaim is that filed on 31 May 2012. It purported to join L & W as the second plaintiff by counterclaim and the counterclaim was made against Trinity Green, Mr Nielsen, Mr Truce and Indigo (Ann Street) Developer Pty Ltd. The proposed defence and counterclaim would go further in several respects, in order to make the claims on behalf of Trinity Green to which I have referred. But it is relevant to note that the Indigo parties pleaded in response to that pleading filed on 31 May. Therefore, many of the issues sought to

be agitated, within at least two of the proposed claims to be made by Trinity Green, are issues which have been joined on the existing proceedings.

- [15] Thus the question of the amount of the outstanding purchase price has been raised in the proceedings as they are presently constituted. The parties interested in that question, namely Trinity Green and Developments, are already parties. If that issue is one which must be determined in order to arrive at the ultimate outcome in these proceedings, those companies will be bound by the determination of that issue. Should that be in favour of Trinity Green, it could bring proceedings against Developments for the outstanding debt, for which Developments would then have no defence. Under the proposed derivative proceedings, the ultimate outcome, if the Hatia side is successful, would be a judgment for Trinity Green against Developments. In that way, the derivative claim can be seen to have some utility. However, it is very limited, because if the question of the indebtedness is decided in the proceedings as presently constituted, any further proceedings, if required, would be a formality.
- [16] However, there could be some doubt as to the operation of an issue of estoppel, because depending on the outcome, a finding in favour of the Hatia side on the amount of the outstanding purchase price might not be essential to that outcome. But as was conceded for the Indigo parties at this hearing, a binding result on this question could be achieved by Arshad seeking a declaration as to the amount of the outstanding purchase price. That declaration could be sought against, amongst others, Developments and Trinity Green. Arshad would have standing to seek that declaration, because its interests as a unitholder in the due administration of the trust, of which Developments is the trustee, would give it an interest in the outcome on this question, affecting as it does the respective positions of the trustee and the unitholders.
- [17] Similarly, the claim that Developments is obliged to indemnify Trinity Green for whatever it must pay to L & W is one which can be made within the proceedings as they are presently constituted and, indeed, involves an issue which has been joined upon the present pleadings. Again Arshad could claim a declaration, not on behalf of Trinity Green but in its own interest, as to the existence of that indemnity because again, that question affects the liabilities of the trustee (Developments) and in turn the rights of the unitholders to distributions.
- [18] The existing pleadings also raise the issue of whether L & W is owed \$3 million by Trinity Green. To have utility in the determination of that issue, these proceedings should bind L & W. To the extent that it has not been duly joined thus far, it could be added as a co-plaintiff to Arshad's counterclaim. Arshad would claim a declaration that Trinity Green must pay L & W (a matter of at least potential relevance to the financial position of Developments). L & W could counterclaim for its debt against Trinity Green. The addition of that counterclaim would not add to the scope of the factual inquiry at the forthcoming trial.
- [19] The Hatia side would also wish to have Mr Nielsen and Mr Truce bound by the determination of that question between L & W and Trinity Green. But counsel for the Indigo parties volunteered that they would consent to be joined to a counterclaim by L & W for that declaration.

- [20] Under the proceedings, to be reconstituted as I have described so far, there would remain for determination in another case the question of the liability of Mr Nielsen and Mr Truce to Trinity Green. The Hatia side seeks to make a claim on behalf of Trinity Green against them in these proceedings, so that all controversies between the two sides can be resolved.
- [21] Under s 237(2) of the *Corporations Act*, the Court must grant an application for leave to bring proceedings on behalf of a company if satisfied of the matters there set out. One of those matters is that it is in the best interests of the company that the applicant be granted leave.¹ I am not persuaded that this criterion is satisfied.
- [22] There is a potential for the interests of Trinity Green to be disadvantaged in the way in which the proceedings would be constituted if the Hatia side is allowed to represent Trinity Green. Essential to each of the claims by Trinity Green against Developments is the premise that Trinity Green is itself liable to L & W. Trinity Green has an interest in defending L & W's claim against it (if the merits are with Trinity Green). It would therefore have to advance inconsistent arguments. Counsel for Arshad submitted that this is not an unusual predicament, because it is found commonly with defendants who bring third party proceedings against the prospect of being held liable to the plaintiff. In the present matters however, there is the fact that, to use the analogy of third party proceedings, the plaintiff (L & W) and the defendant (Trinity Green) would have the same legal representation at the trial.
- [23] In response, it was submitted for Arshad that the interests of Trinity Green would not be compromised, because counsel could appear for Trinity Green only as a claimant against Developments, Mr Nielsen and Mr Truce and not as a defendant to L & W's claim. The contradiction of L & W's claim would be provided by counsel for the Indigo parties (as it would be under the proceedings as presently constituted). I am not persuaded, however, that this would preclude any potential risk to Trinity Green. Presumably, the trial judge will see fit to admit the evidence in a claim or counterclaim for all other components of these proceedings. In that circumstance, the notion that counsel appearing for L & W would prosecute their case against another party, for whom they also appear at the same trial, seems to be at least potentially problematic.
- [24] In contrast, under the proceedings as presently constituted, the question between L & W and Trinity Green would be decided without the representation of Trinity Green, but with the respective arguments being advanced by the Indigo parties and the Hatia side.
- [25] Another relevant consideration comes from the fact that the trial of the proceedings as presently constituted is imminent and that the questions already raised upon the pleadings are likely to well occupy the time which has been allocated. The addition of the substantial claims to be made by Trinity Green against its former directors, at this very late stage, seems to be unrealistic. In other words, for practical reasons concerned with the forthcoming trial, and the need to dispose of the present issues within the time allocated if possible, the proposed derivative claims against the former directors should not be added to the present proceedings. That matter might not of itself mean that the application under s 237 should be refused. But it does go

¹ s 237(2)(c).

to whether the derivative proceedings should be permitted to be brought within the present proceedings, as this application seeks.

- [26] There remains the proposed claim on behalf of Trinity Green for the balance purchase price. For this claim, there is not the same degree of difficulty as exists with the other claims, because the claim against Trinity Green by L & W does not affect the cause of action to be pursued by Trinity Green. However, in a trial where the evidence would be expected to be admitted for all claims and counterclaims, there is still some risk of the interests of Trinity Green being disadvantaged by its being represented by those who would prosecute the case against it for L & W. Presently, that risk cannot be more particularly described. But in my view, it would be unrealistic to assume that this particular claim by Trinity Green could be effectively quarantined by those conducting its case from the other evidence and in the way in which examination and cross-examination of witnesses, who would be relevant to more than this claim alone, would be conducted. Against that risk, there is the utility of permitting Trinity Green to sue for what the Hatia side will argue is the amount of its debt. But as I have discussed, the utility in that respect is slight, because absent a derivative proceeding, the amount of that indebtedness would be determined between all relevant parties. Given the potential risk to the proper conduct of Trinity Green's claim, I am not persuaded that overall it is in the best interests of the company that the Hatia side be permitted to claim on behalf of Trinity Green what it says is the unpaid purchase price, within or as part of the proceedings presently set down for trial.
- [27] It follows that the application or applications under s 237 of the *Corporations Act* should be dismissed. However, it also follows from these reasons that Arshad should succeed on its application, insofar as it seeks to join (or to regularise the joinder of) L & W as a second plaintiff by counterclaim and that of Mr Nielsen, Mr Truce and Indigo (Ann Street) Developer Pty Ltd as defendants to the counterclaim. There will be leave to file an amended counterclaim, consistently with these reasons. I will direct that pleading be filed and served by 9 August 2012. I will hear counsel for the defendants to that counterclaim as to the time by which they should plead to it.