

SUPREME COURT OF QUEENSLAND

CITATION: *Moore v Devanjul Pty Ltd & Ors (No 5)* [2013] QSC 323

PARTIES: **STANLEY GORDON WILLIAM MOORE as TRUSTEE OF THE MOORE INVESTMENT TRUST**
(Plaintiff)

v

DEVANJUL PTY LTD
(A.C.N. 117 644 087) AS TRUSTEE OF THE JADVEK BERTHELSEN FAMILY TRUST
(First Defendant)

AND

VANESSA RUTH BERTHELSEN
(Second Defendant)

AND

DEREK BURNETT BERTHELSEN
(Third Defendant)

AND

DAVID EDGAR WILSON
(Fourth Defendant)

AND

KAILEN DEREK BERTHELSEN as TRUSTEE of the JADVEK BERTHELSEN FAMILY TRUST
(Fifth Defendant)

FILE NO/S: 21/2009; 239/12

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court Bundaberg

DELIVERED ON: 22 November 2013

DELIVERED AT: Rockhampton

HEARING DATE: 30 September 2013

JUDGE: McMeekin J

ORDERS:

- 1. The second defendant pay to the plaintiff the sum of \$297,561 including interest in the sum of \$62,561 to this day;**
- 2. The second defendant pay the plaintiff's costs of and incidental to the proceedings (including**

reserved costs) to be assessed.

3. It is declared that:

i) Devanjul Pty Ltd in its capacity as trustee of the Jadvek Berthelsen Family Trust properly and reasonably incurred a liability to the plaintiff in the sum of \$297,561 including interest in the sum of \$62,561 to this day together with the plaintiff's costs of and incidental to these proceedings (including reserved costs) assessed on the standard basis;

ii) the assets both present and future, real and personal, of the Jadvek Berthelsen Family Trust do stand charged with the payment to Stanley Gordon William Moore as trustee of the Moore Investment Trust of the sum of \$297,561 together with the plaintiff's costs of and incidental to these proceedings (including reserved costs) assessed on the standard basis;

4. That Kailen Derek Berthelsen, as trustee of the Jadvek Berthelsen Family Trust, or such other person who may be trustee of the Jadvek Berthelsen Family Trust, be authorised to sell such of the assets of the Jadvek Berthelsen Family Trust as is necessary to discharge the said charge of the plaintiff and to apply such proceeds to discharge the said charge.

CATCHWORDS: TORTS – TRESPASS – TRESPASS TO LAND AND RIGHTS TO REAL PROPERTY – LIABILITY OF PARTICULAR PERSONS – where plaintiff alleges the first and second defendant committed trespass – where the second defendant was a director of the first defendant – where plaintiff had a right as lessee to property owned by first defendant as trustee – where second defendant effected entry to the property as an agent of the first defendant probably under the apprehension that she was entitled to enter by reason of valid notices – where notices were found to be invalid – whether second defendant is personally liable for trespass – whether the first defendant is liable for the trespass of second defendant

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – BREACH OF CONTRACT – where plaintiff had a contract of lease with the first defendant – where contract included a clause for quiet enjoyment and a clause that the lessor would be under the same liability to the lessee as provided for in s 43 *Retail Shop Leases Act 1994* – where first defendant changed locks, destroyed paved areas, removed a water slide and dug up the main pool – where plaintiff subsequently repudiated the lease - whether the first

defendant breached the contract

DAMAGES – MEASURE OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT AND TORT – where breach of tort and contract found – whether the amount claimed is an appropriate measure of damages – whether the damages should be claimed for the action in tort or for breach of contract

EQUITY – TRUSTS AND TRUSTEES – EQUITABLE REMEDIES – where first defendant was trustee of the Jadvek Berthelsen Family Trust (JBFT) at the material time – where fifth defendant is now trustee of the JBFT – whether the plaintiff can obtain any remedy against the assets of the JBFT

Civil Proceedings Act 2011 (Qld), s 58

Corporations Act 2001 (Cth), s 1274B

Land Title Act 1994 (Qld), s 62, s 37

Property Law Act 1974 (Qld), s 117, s 118

Retail Shop Leases Act 1994 (Qld), s 43

Trusts Act 1973 (Qld), s 65

Uniform Civil Procedure Rules 1999 (Qld), r 165(2), r 476

Amberley Aerospace Park Pty Ltd v Hartwood Architectural Timber & Joinery Pty Ltd [2009] QSC 44, cited

Basely v Clarkson (1681) 3 Lev 37; 83 ER 565

Belar Pty Ltd (in liq.) v Mahaffey [2000] 1 Qd R 447, cited.

Bernard Elsey Pty Ltd v Federal Commissioner of Taxation (1969) 121 CLR 119, cited

Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co [1903] AC 426, cited

C Czarnikow Ltd v Koufos [1969] 1 AC 350, cited

C Evans & Sons Ltd v Spritebrand Ltd [1985] 2 All ER 415, cited

Chief Commissioner of Stamp Duties v Buckle (1998) 192 CLR 226, followed

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, cited

Deancrest Nominees Pty Ltd v Nixon [2007] WASC 304, cited

Deatons Pty Ltd v Flew (1949) 79 CLR 370, cited

Dunn v Large (1783) 3 Doug. 335, cited

Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1, cited

Georgeski v Owners Corp SP49833 [2004] NSWSC 1096, cited

Goldsworthy Mining Ltd v Federal Commissioner of Taxation (1973) 128 CLR 199, cited

Hadley v Baxendale (1854) 9 Ex 341, cited

Hawkesbury Nominees Pty Ltd v Battik Pty Ltd [2000] FCA 185, cited

HTW Valuers (Central QLD) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640, cited

Inverugie Investments Ltd v Hackett [1995] 1 WLR 713, cited

Isis Projects Pty Ltd v Clarence Street Pty Ltd [2006] NSWSC 190 at [98], cited

Johnson v Perez (1988) 166 CLR 351, cited

Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd [1990] 1 Qd R 231, cited

Kemtron Industries Pty Ltd v Commissioner Of Stamp Duties [1984] 1 Qd R 576, cited

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638, cited

Marginson v Ian Potter & Co (1976) 136 CLR 161, cited

Mira v Aylmer Square Investments Ltd [1990] 1 EGLR 45, cited

Moore v Devanjul Pty Ltd & Ors (No 4) [2013] QSC 291, cited

Moore v Devanjul Pty Ltd & Ors (No 3) [2012] QSC 355, cited

Moore v Devanjul Pty Ltd [2010] QSC 250, cited

Moore v Devanjul Pty Ltd [2007] QDC 366, cited

Moore v Devanjul Pty Ltd (Unreported - District Court of Queensland per Dodds DCJ - 23 June 2006), cited

Nolan v Collie (2003) 7 VR 287, cited

Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360, cited

Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388, cited

Radaich v Smith (1959) 101 CLR 209, cited

Re Caveats by Nymboida Pty Ltd (in liq) (unreported 30 - September 1988 - 830/1988), cited

Re Moore; Ex parte Devanjul Pty Ltd [2012] QSC 249, cited

Re Raybauld; Raybauld v Turner [1900] 1 Ch 199, cited

Rentokil Pty Limited v Channon (1990) 90 NSWLR 417, cited

Robinson v Harman (1848) 1 Ex 850, cited

Ron Kingham Real Estate Pty Ltd v Edgar [1999] 2 Qd R 439, cited

Schumann v Abbott [1961] SASR 149, cited

Sellars v Adelaide Petroleum NL (1992-1994) 179 CLR 332, cited

Sibley v Grosvenor (1916) 21 CLR 469, cited
Swiss Bank Corporation v Lloyds Bank Ltd [1982] AC 584,
 cited
TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333,
 cited
*Telex (Australasia) Pty Ltd v Thomas Cook & Son
 (Australasia) Pty Ltd* [1970] 2 NSW 257, cited
Tesco Supermarkets Ltd v Natrass [1971] 2 All ER 127,
 followed
The Progressive Mailing House Pty Ltd v Tabali Pty Ltd
 (1985) 157 CLR 17, cited
Trevor Ivory Ltd v Anderson [1992] 2 NZLR 517, cited
Wah Tat Bank Ltd v Chan Cheng Kum [1975] AC 507,
 followed

COUNSEL: SJ Deaves for the Plaintiff
 No appearance for the Second or Fifth Defendant
 SOLICITORS: Carswell & Company for the Plaintiff
 No appearance for the Second or Fifth Defendant

- [1] **McMeekin J:** The plaintiff is Stanley Gordon William Moore. He sues in his capacity as trustee of the Moore Investment Trust. The second, third and fourth defendants were at material times the directors of a company, Devanjul Pty Ltd (“Devanjul”). They were respectively Mrs Vanessa Berthelsen, her husband Mr Derek Berthelsen, and Mr David Wilson.
- [2] Devanjul was originally sued in these proceedings as the lessor of certain land¹ in which Mr Moore claimed an interest as lessee. At the material time Devanjul was acting as the trustee of the Jadvek Berthelsen Family Trust. The identity of the trustee of the Jadvek Berthelsen Family Trust has changed over the course of the litigation. Mrs Berthelsen, the second defendant, replaced Devanjul as trustee. At the time of trial the current trustee was Kailen Derek Berthelsen, the son of the second and third defendants. He was joined as the fifth defendant in his capacity as trustee of the Jadvek Berthelsen Family Trust.
- [3] The second and third defendants, with others, were and are the beneficiaries of that family trust.
- [4] By the time of trial Devanjul had become deregistered;² the third defendant had become a bankrupt; and the fourth defendant had settled with the plaintiff.

¹ Part of the land and improvements described as Lot 2 on RP 186069 in the County of Cook, Parish of Kalkie contained in title reference 16475047

² I have previously declined to reinstate the company: *Re Moore; Ex parte Devanjul Pty Ltd* [2012] QSC 249

- [5] The only defendants then having any interest in the matter by the time it was called on for hearing were the second defendant, Mrs Berthelsen, and her son, the fifth defendant as trustee. Mrs Berthelsen did not appear when the trial was called³ and the fifth defendant had not filed a defence and did not appear. Mr Moore elected to proceed pursuant to rule 476 *Uniform Civil Procedure Rules 1999* ("UCPR").⁴

The Claims

- [6] By his pleadings Mr Moore alleges:
- (a) At the material time Devanjul was the registered proprietor of certain land on which was conducted a water slide business;
 - (b) He was the lessee under a registered lease over that land and so was entitled to quiet possession of that land at all material times;
 - (b) He conducted a water slide business on the demised land;
 - (c) in June 2007 the second, third and fourth defendants entered onto the land without the consent of Mr Moore and changed the locks on the main gate and equipment shed thereby denying Mr Moore access to the premises;
 - (d) in July/August 2007 the second, third and fourth defendants again unlawfully entered onto that property and without Mr Moore's consent removed the main swimming pool located on the premises, removed a section of water slide, dismantled a smaller water slide set adjacent to a children's pool and removed or damaged various other improvements; and
 - (e) by these actions the second, third and fourth defendants effectively destroyed the business that the plaintiff was conducting and made it impossible for him to continue.
- [7] Mr Moore claims damages in the sum of \$261,672 against the second, third and fourth defendants for trespass. He alleges that Devanjul was vicariously liable for their trespass and in breach of his contractual right to have quiet enjoyment of the premises.
- [8] By his pleadings Mr Moore also seeks certain declarations and consequential orders. As previously mentioned at the time of the alleged trespass Devanjul was the trustee of the Jadvek Berthelsen Family Trust and acting in that capacity when lessor and purporting to exercise the rights of the lessor. Mr Moore seeks to have recourse to the assets of the family trust. The declarations sought and the consequential orders are designed to give effect to that wish.

The Material Findings

³ Two days after the trial Mrs Berthelsen contacted the Registry and subsequently sought leave to reopen proceedings which I refused: see *Moore v Devanjul Pty Ltd & Ors (No 4)* [2013] QSC 291.

⁴ Rule 476 provides, so far as is relevant: (1) If a defendant does not appear when the trial starts, the plaintiff may call evidence to establish an entitlement to judgment against the defendant, in the way the court directs.

- [9] The plaintiff called evidence. Given the lack of any appearance by the defendants there was, of course, no cross-examination. Indeed Mrs Berthelsen's defence did not allege a positive case against the plaintiff.⁵
- [10] Given the lack of any contest I need state only that the evidence given satisfied me that:
- (1) Mr Moore, in his capacity as trustee of the Moore Investment Trust, was a lessee under a registered lease of the subject premises;⁶
 - (2) that under the terms of the lease there were available two three year options exercisable by the lessee, one of which had been exercised;⁷
 - (3) that Mrs Berthelsen or her agents entered onto the demised premises without the consent of Mr Moore at the times alleged;
 - (4) that Mrs Berthelsen or her agents so damaged or caused to be damaged the improvements on the demised land that Mr Moore's business was no longer viable; and
 - (5) that as a consequence Mr Moore was entitled to and did terminate the lease on 30 November 2007;
 - (6) that but for the actions of the defendants Mr Moore would have exercised his option and extended the term to 28 February 2011.

The Issues

- [11] I perceive the relevant issues to be:
- (1) Whether Mrs Berthelsen has committed a trespass and whether there are any defences available to her;
 - (2) If there was a trespass, whether Devanjul is liable for Mrs Berthelsen's trespass? And, if so, whether the action is in contract or tort?
 - (3) Whether Devanjul's liability to Mr Moore entitles Mr Moore to relief against the assets of the Jadvek Berthelsen Family Trust?
 - (4) If so, what orders should be made against the present trustee of the Jadvek Berthelsen Family Trust, which, at the time of trial, was the fifth defendant?

The Claim against Mrs Berthelsen

- [12] Mr Moore had no contractual rights against Mrs Berthelsen. The claim against her personally can only be in trespass.
- [13] That Ms Berthelsen effected entry is plain. She swore an affidavit to that effect in March 2012. In that affidavit she refers to contacting Archie's Pools, that the

⁵ In fact the current defence was filed 2 February 2010 and responded to an earlier version of the Statement of Claim. Mr Moore sought and obtained leave to amend the Statement of Claim in November 2012 and Mrs Berthelsen was given leave to amend her defence but did not do so. She had previously filed a defence purporting to act on behalf of, not as, the trustee of the Jadvek Berthelsen Family Trust, a position that she did not then hold. That pleading was struck out: *Moore v Devanjul Pty Ltd & Ors (No 3)* [2012] QSC 355

⁶ See Ex 5 - the registered lease 20 705933917 between Coral Isles Holdings Proprietary Limited as lessor and Charmaine Lynette Harrison as lessee and the subsequent dealings by which Mr Moore and his wife became the lessees (Ex 7) and Devanjul became the lessor (Ex 8).

⁷ Ex 6

representatives of the firm inspected the pool on the demised land, presumably gaining access on her authority. As well Mrs Berthelsen refers to a number of contractors attending at the site including “Dynamite Diggers” who were there to remove the pool.⁸ The obvious inference is that these contractors were engaged by her.

- [14] I have considered the question of whether the entry could be construed as a lawful one and whether Mrs Berthelsen should, for some reason, be held not personally liable for any trespass.
- [15] It is probable that the entry onto the land was effected under the apprehension that those who did so were entitled to enter by reason of certain notices allegedly given under the provisions of the *Property Law Act* 1974. That was the implication of Mrs Berthelsen’s claim to have served the notices in the affidavit I have mentioned.⁹ The question of the validity of the notices was litigated between the parties and decided in Mr Moore’s favour: see *Moore v Devanjul Pty Ltd* - Unreported - Deardon DCJ - 36/06 – 23/10/06; *Moore v Devanjul Pty Ltd* [2007] QDC 366 per Dodds DCJ.¹⁰ The latter decision is the relevant one for present purposes.
- [16] A mistaken view of one’s right to enter onto another’s property does not excuse the entry or provide a valid defence to a trespass: *Basely v Clarkson* (1681) 3 Lev 37; 83 ER 565.
- [17] If Mrs Berthelsen be considered to be acting as an agent for Devanjul then the fact that she was acting as agent is no defence – an agent remains personally liable for a tort committed by her: *Schumann v Abbott* [1961] SASR 149 (trespass); *Sibley v Grosvenor* (1916) 21 CLR 469; [1916] VLR 307; (1916) 22 ALR 113 (fraud); *Bowstead on Agency* (17th ed, 2001) at p 530.
- [18] It might be said, and it probably was the case, that Mrs Berthelsen was at all times acting as a director of Devanjul. It might be argued that she should therefore not be held to be personally liable for torts committed by the company. The concern expressed in the cases is not to go behind the limited liability of a company and the principle is that the personal liability of a director depends on the precise facts: *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507, 514-515, where Lord Salmon said in delivering the judgment of the Privy Council:

“No doubt the fact that the respondent is chairman and managing director of HSC does not of itself make him personally liable in respect of that company's tortious acts. A tort may be committed through an officer or servant of a company without the chairman or managing director being in any way implicated. There are many such cases reported in the books. If, however, the chairman or managing director procures or directs the commission of the tort he may be personally liable for the tort and the damage flowing from it: *Performing Right Society Ltd v Ciry Theatre Ltd*

⁸ See Ex 14 - affidavit of Mrs Berthelsen at para 32

⁹ See Ex 14 - para 32(f) and (g)

¹⁰ The lessor twice claimed a right of re-entry and forfeiture and on each occasion the District Court relieved against forfeiture. Phillip McMurdo J pointed out that a more apt order would have been a declaration that there had in fact been no forfeiture given the findings that the purported notice was fatally flawed: *Moore v Devanjul Pty Ltd* [2010] QSC 250

Syndicate Ltd [1924] 1 KB 1, 14, 15, per Atkin LJ. Each case depends upon its own particular facts.”

- [19] Here the director, Mrs Berthelsen, was personally implicated. Mrs Berthelsen, it seems, committed or procured the unauthorised entry onto the demised land complained of. The limited liability of the company has no bearing on the issues or indeed the justice of the case.¹¹ Her position as director gives her no protection.
- [20] And, if it be a different question, even if Mrs Berthelsen be considered merely to be, for this purpose, the alter ego of Devanjul, that does not assist her. Devanjul had no right to enter at will. It is well accepted that a tenant under a valid lease has the immediate right to possession which the law protects against interference from strangers and, for this purpose, the landlord is tantamount to a stranger. It is the legal right of exclusive possession in the tenant which the law protects by various remedies, *inter alia*, by an action for trespass (as to which, see, eg, *Radaich v Smith* (1959) 101 CLR 209, 222; *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713; *Georgeski v Owners Corp SP49833* [2004] NSWSC 1096 at [106]–[107]) even against the landlord. I will examine Devanjul’s position more closely below.
- [21] Mrs Berthelsen’s affidavit refers to various claimed defects in the property. She might argue that the presence of the defects justified the entry under the terms of the lease. There are two difficulties. One is that Mr Moore denied the presence of the alleged defects. There was no evidence to put against his. The second point is that, as I have mentioned, Mrs Berthelsen did not plead any positive case against Mr Moore – that is, she did not plead that she had any justification for the entry. In the event that Mrs Berthelsen had appeared she still could not have led any evidence contesting the point given the state of the pleadings: see r 165(2) *Uniform Civil Procedure Rules* 1999.
- [22] Hence Mrs Berthelsen is personally liable in damages for the trespass. The measure of those damages is the amount necessary to place Mr Moore in the same position in which he would have been had the tort not been committed. I will examine the issue of damages later.

Devanjul’s Position

- [23] The first issue is whether Devanjul is liable for the actions of Mrs Berthelsen and those who entered with her or at her request – the converse of the question considered above.
- [24] Mr Deaves, counsel for the plaintiff, cited *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 as supporting the proposition that a company is vicariously liable for the actions of a director. That case was concerned with the personal liability of a director, not the liability of the company, but it does contain a useful discussion of the related principles.
- [25] While it might be a moot point, at least so far as the claim in trespass is concerned, I do not think it right to say that the company is liable vicariously for Mrs Berthelsen’s tort. Rather I think that the company is directly liable. Lord Reid put

¹¹ *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* [1990] 1 Qd R 231 per Thomas J

the basic principles in this way in *Tesco Supermarkets Ltd v Natrass* [1971] 2 All ER 127 at 131:

“I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.”

- [26] The question there under consideration was whether a company should be fixed with liability for an offence. It was held, albeit in *obiter*, that the failure of a director or senior manager in actual control of a limited company's operations who could be identified with the controlling mind and will of the company was sufficient to fix that company with liability: *Tesco Supermarkets Ltd v Natrass* (supra) at 146.
- [27] In some circumstances no doubt it would be open to find that the tortious actions of an agent should not result in the principal being liable. *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 provides an example in the employment situation. But the employer avoided liability there because the employee acted outside the scope of the employment and so beyond authority. There is no suggestion of that here.
- [28] At the time of entry Mrs Berthelsen was a director of Devanjul. She was one of the three only directors and so one of the guiding minds of the company. She and her husband were the only shareholders.¹² The third director, Mr David Wilson, swore an affidavit that was tendered in which he asserted that he left everything up to Mrs Berthelsen.¹³ The obvious inference from Mrs Berthelsen's affidavit that I have referred to, as well as from these facts, is that she was at that time the guiding mind of the corporate trustee.¹⁴
- [29] Where, as here, it is evident that the actions of the directors and shareholders are the actions of the company then there can be no complaint that liability for those actions is sheeted home to the company.
- [30] The second issue is whether the entry by Devanjul was in breach of contract as well as a trespass.

¹² See Ex 12 – the extract from the ASIC register and s 1274B *Corporations Act* 2001

¹³ See Ex 24 para 15

¹⁴ Cf. *Bernard Elsey Pty Ltd v Federal Commissioner of Taxation* (1969) 121 CLR 119 at 121 per Windeyer J

- [31] Although a lease creates an interest in land and covenants in the lease run with the land, a lease is a contract (cf *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 27-9). In the event of a breach of the lease the party not in breach is entitled to damages for the breach. The measure of damages will be that applicable to contract, not that applicable in tort, assuming some difference.
- [32] I turn then to consider Mr Moore's contractual rights.
- [33] Clause 11.1 of the lease provided: "Quiet Enjoyment – You may occupy the Premises for the term without us interrupting you except if the lease authorises us to do so." Devanjul was obliged to perform those obligations: s 117 and 118 *Property Law Act* 1974; s 62 *Land Title Act* 1994.
- [34] Clause 14.1 of the lease provided that despite the premises not being a retail shop the lessor would be under the same liability to the lessee as provided for in s 43 of the *Retail Shop Leases Act* 1994. That section provides that the lessor would be liable to pay compensation "for loss or damage suffered by the lessee because the lessor, or a person acting under the lessor's authority" substantially restricts the lessee's access to the leased shop, takes action that substantially restricts access by customers to the leased shop, or causes significant disruption to the lessee's trading.
- [35] The premises were leased as a water slide business. Given the acts complained of here – amongst other things, changing the locks, destroying paved areas, removing a water slide and digging up the main pool – it is probably not necessary to examine at any length the question of whether there was a breach of the covenant of quiet enjoyment. That is self evident. The changing of the locks effectively deprived Mr Moore of possession of the demised premises. The destruction of the slide, paved areas and pool made it impossible for him to conduct his business, even if he could gain access.
- [36] It is of the essence of a covenant for quiet enjoyment that the tenant be permitted to "peaceably hold and enjoy the demised premises without interruption by the lessor or persons claiming through or under him": *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 214 per Mason J. The acts here went well beyond mere interruption with the physical occupation of the land but included acts which rendered the demised premises unfit for the purpose for which the leased premises were intended to be used: cf *Telex (Australasia) Pty Ltd v Thomas Cook & Son (Australasia) Pty Ltd* [1970] 2 NSW 257.
- [37] Thus there was plainly a breach of the covenant for quiet enjoyment and further each of the acts complained of constituted a breach of the covenants set out in s 43 of the *Retail Shop Leases Act* to which I have referred. Reasonable compensation then is owed.
- [38] The next issue concerns the appropriate measure of damages.

Damages

- [39] Mr Moore determined to treat these various interferences with his title and lease contract as a repudiation by the lessor of the lease. He accepted that repudiation¹⁵

¹⁵ See his solicitor's letter of 30 November 2007 – Ex 20

and has sued for damages. What he seeks are damages for the lost chance of earning an income from the demised premises.¹⁶

- [40] Mr Moore called an accountant to establish the loss he sustained as a result. The accountant assessed a loss of \$176,182 disregarding interest.
- [41] The accountant's approach was to take the profits derived in the business before the breach and apply them over the remaining term of the lease, assuming an exercise of the remaining option. The base for the calculation was very limited – the business had only operated for two seasons. It closed in the winter months. Under Mr Moore's proprietorship and when Mr Moore took it over he said it was quite run down, with little maintenance having been done for some years. So, only one year's profit was available as the base from which to work.
- [42] Subject to what I have to say about the discount applied by the accountant, his approach seems a reasonable one. He assumed a modest increase of 3% per annum in the profits achieved in Mr Moore's second year of operations. Given that Mr Moore more than doubled the net profits of the business from his first year (\$30,296) to his second (\$65,159) that assumption seems conservative.
- [43] After determining the prospective profits the accountant then discounted the figure arrived at by 25% for "commercial uncertainty". Such a discount is typically applied where a valuer is called on to determine the amount that a reasonable purchaser would pay for a business – it reflects the capital value of the goodwill of the business (there being no attempt here to include any chattels). In the purchase and sale of a business the capital value paid is intended to reflect the certainty or uncertainty of achieving the assumed profits over the assumed life of the business. There are, no doubt, good reasons in the usual course for thinking that the prospect of those profits being achieved is sufficiently tenuous to justify so large a discount.
- [44] However if the task is to determine the consequential losses suffered by Mr Moore as a result of the breaches of contract complained of, which is the proper measure of loss for breach of contract, then what must be determined is not what he might have sold the business for at the date of breach but what potential profits he has foregone and, in this case, over a very limited period, a period of less than four years. It is entirely conventional to look at this loss of profits as sounding in damages - what are usually termed the "expectation damages".¹⁷ It would plainly have been in the contemplation of the parties at the inception of the lease of a waterslide park that a breach of it in the way that has occurred here would result in the lessee failing to achieve the profits expected and that provides the measure of the loss.
- [45] And one significant difference between the accountant's view of the fair sum that a prospective purchaser would be prepared to pay for the business and the principled assessment of damages for breach of contract is that in determining that latter figure

¹⁶ Cf. *Sellars v Adelaide Petroleum NL* (1992-1994) 179 CLR 332

¹⁷ The relevant principles are set out in *Hadley v Baxendale* (1854) 9 Ex 341 at 354, 156 ER 145 at 151; *C Czarnikow Ltd v Koufos* [1969] 1 AC 350 at 385; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64. And for their application to a breach of a lease contract: *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185; *Mira v Aylmer Square Investments Ltd* [1990] 1 EGLR 45

it is legitimate to bring into account the present knowledge of the events since breach.¹⁸

- [46] In short the future as at July 2007 was uncertain in many ways, but now, looking back, it is not, at least to the same degree. There was no evidence, for example, of any rival business commencing. Despite some earlier illness Mr Moore was still fit to run the business. There was no natural disaster until the flooding that struck Bundaberg in January 2011, which came towards the end of the relevant period and affected only a few weeks of trading. There was no evidence of the impact of flooding on the business, if any. As well the business was still in its fledgling state in 2007 and a reasonable case could be made for a substantially greater increase in profits than the 3% that has been assumed.
- [47] In these circumstances I cannot see that a discount of anything like 25% is justified in determining the probable loss of profits. While effectively I am assessing the loss of the chance that the business would have continued on in much the same way,¹⁹ it seems to me that chance was reasonably certain and there was a real prospect that the profits might continue to improve significantly, as they had in the 12 months prior. Mr Deaves submitted that a much more modest discount would be appropriate and suggested a discount of about 5%. While I accept there is good reason for some moderation in the extent of the discount, particularly given the modest increase in profitability assumed, there has been no positive evidence led of the lack of any effect of the flooding that devastated Bundaberg. Even if the subject land was not inundated – and I gather it was not given my understanding of the extent of the flood waters and the location of the business - the impact on the recreational activities of the city was profound.
- [48] To allow for this I propose to discount the accountant's assessment to 10%. I therefore assess the damages for loss of profits at \$235,000 rounding the figure to reflect the imprecision necessarily involved.
- [49] There are, however, two different measures involved here – one in tort for the trespass and one in contract for the breach of the lease. In general terms where damages are awarded in tort the object is to place the plaintiff in the same position in which the plaintiff would have been had the tort not been committed. Where damages are to be assessed for breach of contract the damages are the means of placing the plaintiff in the position the plaintiff would have been in had the contract been performed, including expectation loss: *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11-13; *Robinson v Harman* (1848) 1 Ex 850; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80.
- [50] I am satisfied that the \$235,000 figure represents the expectation loss resulting from the breach of contract. The question is whether the same measure applies in tort. While in theory the measure may be different it seems to me that there is no difference here. As was recognised in *Amann* in many cases there is a convergence

¹⁸ HTW Valuers (Central QLD) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640 at [39]. And see *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 at 431 per Lord Macnaghten on the duty of an arbitrator: "Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"

¹⁹ Applying the principles in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 and see the discussion in *Sellars v Adelaide Petroleum NL* (1992-1994) 179 CLR 332 at 349.

between the principles that apply, albeit by coincidence. Given that the fundamental basis for damages in both is compensation for the loss which directly and naturally flows from the breach tends to have that effect.

- [51] The damages that Mr Moore claims for the trespass seem to me to accord with general principles. There are many cases where loss of profits has been allowed in actions for trespass over the centuries.²⁰ I note that the usual tests of foreseeability and remoteness of the loss are irrelevant, not that that seems significant here. The relevant test seems to be satisfied if the loss or injury was either intended by the defendant or the “natural and probable consequence” of the tortious conduct: *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at 396 [13], 411 [73], 425 [114]. That case was concerned with the tort of injurious falsehood but the discussion of principles seems plainly to extend to all intentional torts such as trespass and was found to be so in *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 per Spigelman CJ at 352 [100].
- [52] In one sense the accountant’s calculation with its 25% discount does assess the loss as at the date of trespass. He effectively has assessed what a purchaser would have paid for the business, assuming a continuation of the lease, as at July 2007 when the trespass occurred. This assessment might be said to better accord with the general rule that damages in tort are to be assessed as at the date when the cause of action in tort arose: *Johnson v Perez* (1988) 166 CLR 351 at 355 per Mason CJ. That general rule will only be displaced where an alternative date is required more fairly to compensate the plaintiff for his or her loss: *Rentokil Pty Limited v Channon* (1990) 90 NSWLR 417 at 430, 432. It seems to me that the general rule can be displaced here for that reason, the substantial discount having been shown to be unnecessarily large given the events that have and have not occurred.
- [53] I note that no claim is made for damages for vindication of Mr Moore’s right to the exclusive use and occupation of the land.²¹
- [54] Mr Moore will also be entitled to interest pursuant to s 58 *Civil Proceedings Act* 2011 (formerly s 47 *Supreme Court Act* 1995). I assess that interest at \$62,561.²²

Remedies against the Assets of the Jadvek Berthelsen Family Trust

- [55] The final issue is whether Mr Moore can obtain any remedy against the assets of the Jadvek Berthelsen Family Trust (“JBFT”). No attempt is made here to pursue the assets of the beneficiaries of the JBFT. I note that the Trust deed expressly excludes any such right (cl 23(a)).²³ And no attempt was made to show that all remedies had been exhausted against the existing trustee, a necessary precondition: *Belar Pty Ltd In liq v Mahaffey* [2000] 1 Qd R 477 at p487 [21].

²⁰ Professor Fleming cites *Dunn v Large* (1783) 3 Doug. 335; 99 ER 683 where a claim was made for loss of custom caused by the shutting up of an inn. As to the general principles see *McGregor on Damages* 17th edn (2003) para 34-021 at p 1142; 12 *Halsbury* (4th edn) at para 1170 p 460

²¹ As to the availability of which see *Plenty v Dillon* (1991) 171 CLR 635 at 654–5. See also *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 365 [178]

²² My calculation - 28/02/11 - 28/02/13 = 2 years at 10% - \$47,000; 28/02/13 - 18/04/13 = 50 days (\$235k x 10% / 365 x 50) = \$3,219; 19/04/13 - 30/06/13 = 73 days (\$235k x 9% / 365 x 73) = \$4,230; 01/07/13 - 22/11/13 (today) = 145 days (\$235k x 8.75% / 365 x 145) = \$8,168; Total = \$62,617 (following the relevant practice directions – 7/2013 and 21/2012)

²³ Ex 9

- [56] The JBFT is not a legal entity, of course, and is not directly liable for a trustee's breach of contract or tort. The liability here in question is that of Devanjul. Devanjul was at the time the trustee of the JBFT and acting in that capacity when it breached the contract and committed the trespass. Upon judgment being given Mr Moore will become a creditor of Devanjul.
- [57] A creditor has no direct claim against trust assets but must look to the trustee personally: the principles that apply were comprehensively discussed by McPherson J (as his Honour then was) in *Kemtron Industries Pty Ltd v Commissioner Of Stamp Duties* [1984] 1 Qd R 576 at 584-585. The trustee has a right to be indemnified out of trust assets for all liabilities if reasonably incurred as trustee: s 72 *Trusts Act* 1973. Liabilities properly incurred by the trustee are paid out of the trust assets in priority to the claims of beneficiaries to their interests in the trust property: *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367.
- [58] One limitation on the right is that the liability be "properly" or "reasonably" incurred. In the context of the trespass having been effected by the directors of the corporate trustee, and indeed the beneficiaries of the trust, or some of them, apparently acting as the lessor with a right of re-entry, it could hardly be said that the actions of the trustee were in some way unauthorised or improper. In discussing this limitation, in a somewhat similar context, McPherson J said in *Ron Kingham Real Estate* (supra):
- "Something was sought to be made of the fact that there was no evidence that the liability leading to the judgment against [the trustee company] was one that was properly incurred by that company as trustee. In this context, the expression "properly incurred" (or, as s. 72 expresses it, "reasonably" incurred) means "not improperly incurred": see *Re Beddoe* [1893] 1 Ch. 547, 558. ... It is, of course, true that the mere fact that there is power to do an act does not mean that the power was properly exercised in particular circumstances; but it also has been said to be "a violent exercise" of the court's discretion to deprive a trustee of his charges and expenses: *Re Chennell* (1878) 8 Ch D 492, 302, per Jessel M.R. At the trial the defendants here produced nothing at all to suggest that the action of [the trustee company] in selling the trust property and incurring liability for the plaintiff's commission was in any way improper. Indeed, having as directors themselves authorised the sale to which the engagement of the plaintiff was incidental, the defendants as beneficiaries are not now in a position to complain of it as a breach of trust: see *Jacobs' Law of Trusts*, (5th ed., 1986), §§2121–2133."
- [59] Devanjul has been replaced as trustee but its right of indemnity does not end with its loss of office: *Kemtron* (supra at 585).
- [60] Thus I am satisfied that Devanjul is entitled to be indemnified out of trust assets.
- [61] However the assets have passed out of the hands of Devanjul and into, now, the hands of the existing trustee, the fifth defendant, Kailen Berthelsen. Mr Moore has no claim against Mr Berthelsen for any personal default. The nature of the trustee's interest is a proprietary one: *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226 at [49]. It is necessary that Mr Berthelsen be sued, as he has been, as the orders sought are against his interest in those assets albeit held by him on trust:

Belar Pty Ltd (in liq.) v Mahaffey [2000] 1 Qd R 447 at 487. In *Belar* the issue under consideration involved a former trustee seeking to have a subsequent trustee exercise the right to claim an indemnity from trust assets. I cannot see that any different consideration is relevant here. Mr Berthelsen failed to file a defence and so no issue was raised that the usual right of indemnity should not apply. Nonetheless the onus still lay on Mr Moore to demonstrate his right to relief and so his right to be subrogated to the rights of the former trustee to be indemnified from trust assets.

- [62] A creditor is ordinarily entitled to be subrogated to that right of the trustee: *Marginson v Ian Potter & Co* (1976) 136 CLR 161; *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439. The right extends to a victim of a tort as much as to an ordinary creditor: *Re Raybauld*; *Raybauld v Turner* [1900] 1 Ch 199 per Byrne J.
- [63] It must be shown that there must be a fund or asset to which the trustee's lien may attach in order to enforce the right of indemnity: *Belar* (supra at p488). That is satisfied here – the demised land remains an asset of the JBFT.²⁴
- [64] If it be necessary to first show that the trustee cannot meet the liability personally, that is satisfied here. Devanjul has been de-registered and in any case had a paid up share capital of only \$2. It has no capacity to meet the judgment. Proceedings against it would be pointless.²⁵
- [65] The rights sought to be exercised are the trustee's rights. It is necessary to consider the provisions of the trust deed to see if there is any relevant provision but noting that that right cannot be excluded by the trust instrument: s 65 *Trusts Act* 1973. There is nothing in the deed here that would appear to impact on that right to be indemnified, in fact the right to an indemnity is stated in expansive terms: see cl 23(b) of the deed.²⁶
- [66] So I conclude that Devanjul could enforce its right to be indemnified from trust assets against the existing trustee and Mr Moore is subrogated to that right.
- [67] The plaintiff submits that in order for any declaration that the plaintiff be subrogated to the trustee's right to indemnity out of the trust assets to have any practical effect it needs to be supported by the following consequential orders:
- (a) a declaration that the plaintiff has an equitable charge or lien over the assets from time to time of the JBFT including but not limited to the land and improvements described as Lot 2 on RP 186069 in the County of Cook, Parish of Kalkie contained in title reference 1647 5047 ("the Land");
 - (b) a declaration that such equitable charge or lien be enforceable against any person occupying the office of trustee of the JBFT or

²⁴ At least at the date of hearing and shortly thereafter: Ex 4. As well Mrs Berthelsen gave evidence in her attempt to have the proceedings re-opened (*Moore v Devanjul Pty Ltd & Ors (No 4)* [2013] QSC 291) and explained in some detail the assets and liabilities of the JBFT. She confirmed then that the land remained an asset of the JBFT.

²⁵ See *Deancrest Nominees Pty Ltd v Nixon* [2007] WASC 304 at [49]

²⁶ Ex 9

any person having present possession or legal ownership of the assets of the JBFT;

- (c) an order that an interest in the Land be transferred to the plaintiff to the extent of the equitable charge or lien.

[68] That submission raises the issue of what precisely are the rights that a trustee has over trust assets.

[69] I think the best description, for present purposes, of the right of the trustee to access trust assets is contained in the following passage from *Chief Commissioner of Stamp Duties v Buckle*:²⁷

“[48] Until the right to reimbursement or exoneration has been satisfied, "it is impossible to say what the trust fund is". The entitlement of the beneficiaries in respect of the assets held by the trustee which constitutes the "property" to which the beneficiaries are entitled in equity is to be distinguished from the assets themselves. The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question have been discharged or provision has been made for them. To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not "trust assets" or "trust property" in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.

[49] The entitlement to reimbursement and exoneration was identified by Lindley LJ as "the price paid by *cestuis que trust* for the gratuitous and onerous services of trustees". **The right of the trustee has been described as a first charge upon the assets vested in the trustee, as one upon the "trust assets", and as conferring upon the trustee an "interest in the trust property [which] amounts to a proprietary interest".**

[50] However, the starting point in the class of case under consideration is that the assets held by the trustee are "no longer property held solely in the interests of the beneficiaries of the trust". The term "trust assets" may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not "encumbered" by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment "takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation". **A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. In that sense, there is an equitable charge over the "trust assets" which may be enforced in the same way as any other equitable charge.** However, the enforcement of the charge is an exercise of the prior rights conferred upon the trustee as a necessary incident of the office of trustee. It is not a security interest or right which has been created, whether consensually or by operation of law, over the

²⁷ (1998) 192 CLR 226 at [48]-[50] with my emphasis and omission of the authorities cited

interests of the beneficiaries so as to encumber them in the sense required by s66(1) of the [*Stamp Duties*] Act....”

[70] In his careful submissions Mr Deaves of counsel submitted in addition that the following propositions were supported by authority:

- (1) A declaration can be made that a person entitled to be indemnified out of trust assets has an equitable charge or lien over those assets: *Rothmore Farms* (supra); and
- (2) A trustee's right to indemnity is in principle a cavaeatable interest and is not restricted to the asset existing at the time the liability was incurred but applies to the presently existing assets of the trust: *Re Caveats by Nymboida Pty Ltd (in liq)* (unreported 30 - September 1988 - 830/1988) per Ambrose J; *Amberley Aerospace Park Pty Ltd v Hartwood Architectural Timber & Joinery Pty Ltd* [2009] QSC 44 per Margaret Wilson J at [12].

[71] The point of imposing a charge on the trust property is to give the plaintiff the ability to appoint a receiver of the property or obtain an order for judicial sale. In discussing the difference between an equitable charge and an equitable mortgage in *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584 at 594-595, Buckley LJ said:

“An equitable charge which is not an equitable mortgage is said to be created when property is expressly or constructively made liable, or is specially appropriated, to the discharge of a debt or some other obligation, and confers on the chargee a right of realisation by judicial process, that is to say, by the appointment of a receiver or an order for sale: see *Fisher and Lightwood*, at 14.”²⁸

[72] In the light of these authorities I can see no reason why the orders sought, imposing a charge on the trust property, ought not be made. The considerations here are akin to those in *Ron Kingham Real Estate* where McPherson JA observed at p 445:

“[The trustee company] was, as the defendants themselves acknowledged, left with no assets at all once the proceeds of sale of the home unit were paid to them. Contrary to the defendants’ submissions, it would serve no useful purpose now to insist on administration of the trust or on a winding up of [the trustee company] in order to enable it to institute proceedings to enforce its indemnity as trustee or to recover from the defendants trust assets sufficient to satisfy the judgment debt in action no. 4921 of 1993. The case is one of those rare instances in which it can with confidence be predicated that there are, apart from the plaintiff, no other creditors with claims against the company. The statutory order of priorities and distribution in insolvency will not be disrupted by the judgment that has been given against the defendants in this instance. They are in no danger of being called on in the future to pay the amount of the judgment over again.”

[73] There are, however, two aspects of the orders sought which cause me concern. First, one of the orders that Mr Moore seeks is that a declaration be made that the equitable charge or lien be enforceable against “any person having present

²⁸ See *Fisher and Lightwood’s Law of Mortgage (Australian edn)* at para2.1 p 41 to the same effect

possession or legal ownership of the assets of the JBFT”. Any person having present possession of those assets would be subject to the order whether expressly stated or not. But I cannot accept that, at this stage, an order can or should be made against someone, perhaps a person not having notice of these proceedings, having the legal ownership of the assets. If real property is involved then there would almost certainly be issues of indefeasibility of title²⁹ to be considered and potentially issues of competing equities.³⁰

[74] The second problem is a related one. Mr Moore seeks an immediate order that an interest in the land be transferred to him to the extent of the equitable charge or lien. It is well accepted that the creditor’s rights cannot exceed those of the trustee. If the trustee has lawfully created interests in the trust assets in favour of third parties then the creditor must take subject to those interests: *Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2006] NSWSC 190 at [98]; *Zen Ridgeway Pty Ltd v Adams & Anor* [2009] QSC 117 per Margaret Wilson J. These concerns are alleviated when it is appreciated that a charging order “does not either displace existing charges over the property concerned, nor is it immune from subsequently acquired interests”: *United Travel Agencies Pty Ltd v Cain* (1990) 20 NSWLR 566 at 571 per Young J

[75] I will hear from counsel further as to the appropriate orders in light of these reasons but as presently advised, in my view, the following orders are appropriate:

- (1) the second defendant pay to the plaintiff the sum of \$297,561 including interest in the sum of \$62,561 to this day;
- (2) the second defendant pay the plaintiff’s costs of and incidental to the proceedings (including reserved costs) to be assessed.
- (3) It is declared that:
 - (i) Devanjul Pty Ltd in its capacity as trustee of the Jadvek Berthelsen Family Trust properly and reasonably incurred a liability to the plaintiff in the sum of \$297,561 including interest in the sum of \$62,561 to this day together with the plaintiff’s costs of and incidental to these proceedings (including reserved costs) assessed on the standard basis;
 - (ii) the assets both present and future, real and personal, of the Jadvek Berthelsen Family Trust do stand charged with the payment to Stanley Gordon William Moore as trustee of the Moore Investment Trust of the sum of \$297,561 together with the plaintiff’s costs of and incidental to these proceedings (including reserved costs) assessed on the standard basis;³¹
- (4) That Kailen Derek Berthelsen, as trustee of the Jadvek Berthelsen Family Trust, or such other person who may be trustee of the Jadvek Berthelsen Family Trust, be authorised to sell such of the assets of the Jadvek Berthelsen Family Trust as is necessary to discharge the said charge of the plaintiff and to apply such proceeds to discharge the said charge.

²⁹ See s37 *Land Title Act* 1994

³⁰ *Nolan v Collie* (2003) 7 VR 287 at 313 per Ormiston J

³¹ See the form of order suggested by Young J in *United Travel Agencies Pty Ltd v Cain* (1990) 20 NSWLR 566 at 571

- [76] I do not presently see the necessity of making declarations that explain why it is that an equitable charge or lien has been created, as Mr Moore seeks. The important point is that the charge or lien exists. The effect of the orders will be to give to the plaintiff an immediate right to caveat any real property owned by the JBFT and so prevent any further transactions impinging on his ability to recover the amount awarded. The passage that I have cited above from *Chief Commissioner of Stamp Duties v Buckle*³² justifies the final order being made.
- [77] I am reluctant to make the order sought that the land and improvements described as Lot 2 on RP 186069 in the County of Cook Parish of Kalkie contained in title reference number 16475047 stand charged with the payment mentioned. While the land so described was an asset of the JBFT as at the time of hearing that may not now be the case. The form I have adopted should cover the land if it remains an asset of the trust. Similarly I am not convinced that an order conveying an interest in that land is appropriate.
- [78] The orders will be as I have indicated.³³

³² See [68] above and para [50] of *Buckle*

³³ Following preparation of the draft reasons I heard further from Mr Deaves and I note that he then did not seek any different order from those contemplated by me as appropriate