SUPREME COURT OF QUEENSLAND

CITATION:	*Sino Iron Pty Ltd & Anor v Palmer & Anor* [2014] QSC 259
PARTIES:	**SINO IRON PTY LTD** ACN 058 429 708 (first plaintiff) and **KOREAN STEEL PTY LTD** ACN 058 429 600 (second plaintiff) v **CLIVE FREDERICK PALMER** (first defendant) and **COSMO DEVELOPMENTS PTY LTD** ACN 010 793 790 (second defendant)
FILE NO:	BS6791/14
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	20 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2014
JUDGE:	Jackson J
ORDERS:	**The order of the Court is that:** **1. The application filed 22 August 2014 is dismissed.** **2. Costs of the application be reserved until 26 November 2014.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where the defendants apply to have the proceedings stayed as an abuse of process as lacking reasonable grounds, as containing fictitious causes of action, as having a collateral and improper purpose and bringing the administration of justice into disrepute – where the parties had a contractual arrangement where the plaintiffs paid monies into a fund which was to be used for specified purposes under the contract – where it is alleged that the defendants were involved in breaches of trust – where the defendants submitted that the plaintiffs' action was bound to fail, as it could not be shown that the funds were impressed

with a trust – where the defendants submitted that the plaintiffs had suffered no loss as the monies remain in or had been paid back to the account – where the plaintiffs have failed to accept compromises offered by the defendants – where the defendant submits the proceeding is an impermissible parallel proceeding with a concurrent arbitration – whether the proceeding should be stayed as an abuse of process on any of the grounds alleged

Commercial Arbitration Act 2013 (Qld), s 27E, s 27F(5)

Ashby v Slipper (2014) 219 FCR 322, cited
Batistatos v Road and Traffic Authority of New South Wales (2006) 226 CLR 256, cited
Byrnes v Kendle (2011) 243 CLR 253, cited
Dey v Commissioner of Railways (1949) 78 CLR 62, cited
Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10, applied
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Hearne v Street (2008) 235 CLR 125, applied
Jessup v Queensland Housing Commission [2002] 2 Qd R 270, cited
Legal Services Board v Gillespie-Jones (2013) 249 CLR 493, cited
Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210, cited
Michael Wilson & Partners Ltd v Nicholls & Ors (2011) 244 CLR 427, applied
Personal Representatives of Tang Man Sit v Capacious Investments Ltd [1996] 1 AC 514, cited
Puma Australia Pty Ltd v Sportsman's Australia Limited (No 2) [1995] 2 Qd R 159, cited
R v Weisz; ex parte Hector MacDonald Ltd [1951] 2 KB 611, cited
Walton v Gardiner (1993) 177 CLR 378, cited
Webster v Lampard (1993) 177 CLR 598, cited
Williams v Spautz (1992) 174 CLR 509, considered
Youyang Pty Ltd v Minter Ellison (2003) 212 CLR 484, cited

COUNSEL: T Bradley QC and J Carter for the applicant defendants
A Bell SC and S Free for the respondent plaintiffs

SOLICITORS: Hopgood Ganim for the applicant defendants
Allens Arthur Robinson for the respondent plaintiffs

[1] **JACKSON J**: On various grounds, the defendants apply for an order that the proceeding be dismissed or stayed as an abuse of process.

[2] Each of the plaintiffs and Mineralogy Pty Ltd ("Mineralogy") are parties to a deed relating to the approval, development, administration and maintenance of facilities to be constructed on an area at or near Cape Preston in Western Australia. The deed between the first plaintiff and Mineralogy is called the "Sino Iron Facilities Deed".

The deed between the second plaintiff and Mineralogy is called the "Korean Facilities Deed".

[3] The statement of claim alleges that:

> "15. Each of the Sino Iron Facilities Deed (as amended) and the Korean Steel Facilities Deed (as amended) (together, the ***Facilities Deeds***) relevantly provide:
>
> (a) By recital D, the parties have agreed to enter into a contract in respect of the procedures for the approval, Development, operation, administration and maintenance of Facilities in the Preston Area, on the terms and conditions of the Deeds.
>
> (b) By clause 5:
>
> (i) Mineralogy may establish an Administrative Fund at any time after the Commencement Date;
> (ii) Mineralogy must use the Administrative Fund only to:
>
> (A) pay Administration Costs and the day to day expenses of operating, maintaining and repairing Approved Facilities;
> (B) reimbursing Company and Third Parties for operational, maintenance and repair work they have carried out to Approved Facilities which is approved by Mineralogy; and
> (C) any other matter needed to establish, maintain and operate Approved Facilities for Company, Mineralogy and/or Third Parties.
>
> (c) By clause 7.1, Mineralogy must prepare an annual budget for Administration Costs before the start of each Production Year and give the Company a copy of such budget.
>
> (d) By clause 1.1, 'Administration Costs' means:
>
> '*(a) insurance premiums;*
> *(b) insurance broker fees;*
> *(c) excesses on insurance policies;*
> *(d) management fees and other costs payable by Mineralogy to any party;*
> *(e) fees and other costs payable to an auditor or accountant appointed by Mineralogy;*
> *(f) costs and disbursements for stationery, postage, photocopying and related management costs; and*

(g) any other costs incurred by Mineralogy which are not costs for Shared Facilities according to clause 17.1 and the Shared Facilities Register.'

(e) By clause 7.2:

'***Budgets for administration costs***

Mineralogy may include in a budget for Administration Costs:

(a) how much money it will need during the next Production Year for its Administration Costs;
(b) money (other than Administrative Fund contributions) expected to be received in the next Production Year for Administration Costs;
(c) itemised details of the costs for each item of Administration Costs;
(d) the proportion which Company and each Third Party must contribute to Administration Costs for the next Production Year;
(e) the amount of the proportion which Company and each Third Party must contribute to Administration Costs for the next Production Year; and
(f) any other matter Mineralogy deems appropriate.'

(f) By clause 7.4:

'***Budgets for Administrative Fund and Sinking Fund***

Mineralogy must prepare budgets for the Administrative Fund and the Sinking Fund on a reasonable basis and must use its best endeavours to prepare budgets that are consistent with the reasonable operating costs and capital replacement requirements of the Facilities.'

(g) By clause 8.1, Mineralogy shall levy Company the contributions it will need for its Administrative Fund for each Production Year 120 days in advance and Company must make payment no later than 60 days before the commencement of the relevant Production Year.

(h) By clause 8.2(a), the amount of contributions for the Administrative Fund must be the amount determined by Mineralogy in the budge for Administrative Costs under clause 7.2 plus a margin of 5% and Company's contribution shall be calculated according to the formula stated in that clause.

(i) By clause 9.2(a), Mineralogy must keep separate records and account separately at Company's costs for, inter alia, Administration Costs.

(j) By clause 10:

'***10.1 Reconciliation***

Within three months after the end of each Production Year (or more often it (sic) determined by Mineralogy), Mineralogy must reconcile the amount of contributions it has received from each User against the use by (or benefit to) each User of each Shared Facility. The purpose of the reconciliation is to ensure that a User pays for their proportion of actual use of (or benefit derived from) each Shared Facility over the reconciliation period (regardless of the apportionment of costs in the budget for the reconciliation period). In the reconciliation, Mineralogy must identify:

(a) whether Company has overpaid any contributions and the amount of overpayment; and

(b) whether Company have [sic] *underpaid any contributions and the amount of underpayment, based on the Company's actual use of (or benefit derived from) Shared Facilities during the reconciliation period.*

10.2 Refunds by Mineralogy

Within 14 days after it carries out the reconciliation, Mineralogy must refund to Company any contributions Company has overpaid during the reconciliation period.'

(k) By clause 13.1:

'*Mineralogy must:*

(a) establish and maintain a bank or building society account or accounts in its name;

(b) deposit all contributions and any other money paid to Mineralogy into its bank or building society accounts.'

(l) By clause 13.2:

'Mineralogy may place money in an interest bearing deposit account at a bank or building society. If the account earns interest, Mineralogy may treat it as surplus funds and return it to any Third Party or

maintain such fund in the relevant fund as additional security or for future use.'

(m) By clause 15(a):

'If, at the end of a Production Year, the Administrative Fund has unspent amounts, those unspent amounts shall be refunded to Company and any other company that has contributed to the Administrative Fund ... in proportion to their respective contributions to the Administrative Fund ... during the Production Year, provided that such unspent amounts are not required:

(i) to be spent in the following 3 months; or

(ii) for environment rehabilitation plans which have been developed by Mineralogy in accordance with Legislative Requirements or are required for the operations and are provided for in the budget for the relevant Production Year.'

(n) By clause 1.1, 'Approved Facilities means, inter alia, Approved Company Facilities.

(o) By clause 1.1, 'Approved Company Facilities' means any one or more Company Facilities approved by Mineralogy in accordance with clauses 3 or 4.

(p) By clause 1.1, 'Company Facilities' means any one or more of the Facilities described in the Company Development Proposal from time to time to enable Company to export Company's Product for the purposes of the Company Project, or any item or land being used by Company for any purpose related to the Company Project or Company's operations.

(q) By clause 1.1, 'Facilities' means any one or more of:

(i) Marine Facilities (being the port to be developed at Cape Preston, including jetties, loading and unloading facilities and related infrastructure and any additional requirements of Mineralogy in accordance with sound operations of the Cape Preston Port);

(ii) Transport Facilities (being corridors, from Company's mine on the Project Area to or around Cape Preston, for power lines, pipelines, roads, bridges, causeways, railways, pipelines and maintenance facilities and other facilities necessary for Company's Development Proposal or Third Party Development Proposals or any other Approved Development Proposal);

(iii) Preston Facilities (being rail and rail unloading facilities, materials handling, conveyors, stock piles, stackers and reclaimers, desalination plants, power transmission lines, power plants, pipelines, marine facilities, jetties, tugs, causeways, ship loaders, port facilities, including but not limited to navigational aids, beacons, lighting, railway, roads and other appropriate infrastructure for the development of port facilities necessary to export hot briquetted iron and/or direct reduction iron, pellets produced from Iron Ore and/or concentrated forms of Iron Ore or Magnetite Ore not exceeding 72% Fe); and

(iv) any other Facilities approved by Mineralogy from time to time.

(r) By clause 1.1, 'Shared Facilities' means the Facilities identified by Mineralogy in the Shared Facilities Register as facilities which may service more than one user of Shared Facilities.

(s) By clause 22.1, Mineralogy must operate and maintain the Shared Facilities on behalf of the users.

(t) By clause 23.1, the Facilities Deeds shall be construed exclusively in accordance with the Laws for the time being in force in the State of Western Australia.

16. In all relevant dealings between Mineralogy and Sino Iron and Korean Steel (the ***Plaintiffs***):

(a) CITIC Pacific Mining Management Pty Ltd (***CPMM***) acted on behalf of both Plaintiffs; and

(b) Mineralogy and the Plaintiffs conducted themselves on the footing that there was one Administrative Fund, contributions to which were regulated by the Facilities Deeds.

17. On or about 22 February 2010, consistent with its obligation under clause 13.1 of the Facilities Deeds, Mineralogy caused to be opened an account styled 'Port Palmer Operations' with the National Australia Bank, being account number 16-939-3487 (***Administrative Fund Bank Account***).

…

21. On the dates appearing below, CPMM, on behalf of the Plaintiffs, made contributions to the Administrative Fund by making the following payments into the Administrative Fund Bank Account

(Administrative Fund Payments):

Date	Amount
1 April 2010	$1,800,000.00
25 June 2010	$1,500,000.00
4 March 2011	$3,936,354.35
17 January 2012	$5,546,917.53
23 November2012	$13,471,392.17

22. The Administrative Fund Payments were made following the issue of invoices by Mineralogy to CPMM on behalf of the Plaintiffs in respect of purported Administrative Costs for calendar years 2010, 2011, 2012 and 2013.

23. The Administrative Fund Payments were made for the sole and exclusive purpose of being used by Mineralogy for the payment of Administrative Costs within the meaning of that term in the Facilities Deeds.

24. Palmer, as signatory of the Facilities Deed and at all material times a director of Mineralogy, had knowledge of the terms of the Facilities Deeds.

25. At all material times, Mineralogy maintained in addition to the Administrative Fund Bank Account another or other bank account(s) for the purpose of its business.

Particulars

Mineralogy's Answers to Interrogatories in the Arbitration, answer to interrogatory 6.

26. By reason of the matters referred to in paragraphs 9 to 25 above, the Administrative Fund Bank Account was impressed with a trust and Mineralogy had the obligations of a trustee in respect of the Administrative Fund Bank Account including a duty not to use the funds in the Administrative Fund Bank Account for a purpose other than:

(a) for the payment of Administrative Costs; or, alternatively

(b) a purpose set out in clause 5 of the Facilities Deeds,

and a duty to keep separate records and accounts separately for Administrative Costs."

[4] At 5 August 2013, the balance of the Administrative Fund Bank Account ("the bank account") was $12,117,638.98. On 5 August 2013, the first defendant drew a cheque on the bank account for the sum of $10,000,000 payable to the second defendant. Payment was made from the bank account to the second defendant ("the $10 million payment").

[5] On 2 September 2013, the first defendant drew a cheque on the bank account for the sum of $2,167,065.60 payable to Media Circus Network Pty Ltd. Payment was made from the bank account to the payee ("the $2 million payment").

[6] The plaintiffs allege that each of the payments was made in breach of trust by Mineralogy. They allege further that the first defendant dishonestly procured, assisted and or participated in Mineralogy's breach of trust. They allege further that the second defendant received the $10 million payment knowing that it was paid from the bank account in breach of trust. The knowledge alleged is that of the first defendant who was the second defendant's sole director and controlling shareholder.

[7] Against the first defendant, the plaintiffs claim a declaration that the $10 million payment and the $2 million payment were made in breach of trust, a declaration that the first defendant dishonestly procured or was involved in or assisted the breaches of trust, an inquiry into profits made or derived by the first defendant and either an account of profits or equitable compensation from the first defendant.

[8] Against the second defendant, the plaintiffs claim a declaration that the $10 million payment was made in breach of trust, a constructive trust over that amount, an inquiry into profits made or derived by the second defendant and either an account of profits or equitable compensation from the second defendant. There is an alternative claim for $10 million as moneys had and received to the plaintiffs' use.

Proceeding without reasonable grounds

[9] The defendants submit that the proceeding should be dismissed or stayed as an abuse of process because it "can be clearly seen to be foredoomed to fail", relying on *Walton v Gardiner*.[1] The identified passage from *Walton* cross-refers to other well known like passages from other cases. One of them is *General Steel Industries Inc v Commissioner for Railways (NSW)*,[2] where Barwick CJ described the test for summary dismissal variously, including that the proceeding is "so obviously untenable that it cannot succeed". In turn, that passage cross-refers to another well known passage from *Dey v Commissioner of Railways*,[3] where Dixon J emphasised that "[a] case must be very clear indeed to justify the summary intervention of the court…".

[10] I would add reference to the penetrating analysis of this ground of abuse of process made by the plurality of the High Court in *Batistatos v Road and Traffic Authority of New South Wales*.[4] Adopting the statement of Lord Blackburn in *Metropolitan Bank Ltd v Pooley*,[5] the plurality referred to a "proceeding without reasonable grounds, so as to be vexatious and harassing" as an abuse of process.

[11] It should be borne in mind that early statements of principle as to abuse of process, as reiterated in the more recent cases, were formulated in the context of civil procedural laws that did not provide for summary judgment on the application of a defendant. In particular, they were made before the enactment of the power to grant

---

1 (1993) 177 CLR 378, 393.
2 (1964) 112 CLR 125, 128-130.
3 (1949) 78 CLR 62, 91.
4 (2006) 226 CLR 256, 265-266 [10]-[12] and 268-270 [17]-[26].
5 (1885) 10 App Cas 210, 220-221.

summary judgment in favour of a defendant such as that contained in *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), r 293.

[12] Under the UCPR, a defendant may apply for a stay under r 16(g), or apply to strike out a statement of claim as vexatious or an abuse of process under r 171(1)(d) or (e), or apply for summary judgment under r 293. These rules operate in addition to the inherent jurisdiction. They do not repeal the Court's inherent power to deal with such a question as an abuse of process.

[13] Nevertheless, the Court should be slow to interfere by dismissal or the grant of a stay on this ground, as an abuse of process, in a way which might undermine the procedure for summary judgment. In the first place, under UCPR r 293 a defendant is required to file a notice of intention to defend attaching a defence[6] before it is entitled to apply for summary judgment. Second, the standard which is to be applied is that the Court "is satisfied the plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim". That may be contrasted with the arguably lower standard in jurisdictions where a summary judgment rule does not contain such an express threshold, that the power must be exercised with "exceptional caution", as was held in *Webster v Lampard*.[7] Third, a successful summary judgment application by a defendant will produce a judgment for the defendant. The judgment will operate as a final judgment for the principles of res judicata. Against that background, and guided by the principle of finality, in my view it will only be an unusual case where it will be appropriate for the Court to dismiss a proceeding as an abuse of process as being without reasonable grounds in a manner that operates outside the rules and at a stage in the proceeding before the point is reached under the rules for the cognate question to be decided upon summary judgment.

[14] The point which forms the primary basis of the defendants' application in the present case that the proceeding is without reasonable grounds is that the allegation that "the Administrative Fund Bank Account was impressed with a trust" is an allegation on which the plaintiff cannot succeed.

[15] The defendants' primary submission is necessarily that there is no reasonable ground for the plaintiffs' allegation that the funds held in the bank account, or more accurately the plaintiffs' contributions deposited to the bank account, were held on trust by Mineralogy for the purposes of and subject to the terms of the provisions of the facilities deeds. In support of that submission, the defendants rely on numerous factors as to the provisions of the facilities deeds, including that:

(a) the facilities deeds do not use the language or concepts of trusts;
(b) Mineralogy was not required to keep either or both the plaintiffs' contributions in the bank account separate from the contributions of other parties, including Mineralogy;
(c) the plaintiffs are obliged to pay the contributions and to pay interest on late payments;
(d) a failure to pay the contributions may result in suspension of the defaulter's rights;
(e) the contribution payments are in the nature of prepayment of expenses to be incurred;

---

6 UCPR, r 139(1)(b).
7 (1993) 177 CLR 598, 602.

(f) third parties (including the plaintiffs as between themselves) were also to make contributions to the bank account;
(g) express provision was made for the resolution of disputes over the reconciliation of the account by arbitration; and
(h) there is an entire agreement clause in the facilities deeds.

[16] The plaintiffs submit that the factors in support of the conclusion that the contributions to the bank account are held on trust provided for in the facilities deeds include that:

(a) contributions are to be made to an identified "Administrative Fund";
(b) Mineralogy must only use the Administrative Fund for identified limited purposes;
(c) Mineralogy was required to establish and maintain a bank account in its name and to establish all contributions into it; and
(d) Mineralogy was required to keep separate records and to account separately for "Administrative Costs".

[17] In this State and in the circumstances of this case, the analysis of whether there is an express trust begins with *Jessup v Queensland Housing Commission*,[8] where McPherson JA referred to the reasons of Gibbs ACJ in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd*[9] and continued that the question is one of :

> "…finding the necessary intention which, as Gummow J said in re *Australian Elizabethan Theatre Trust*… 'is to be inferred from the language employed by the parties in question, and to that end the court may look also to the nature of the transaction and the relevant circumstances attending the relationship between them'". (citation omitted).

[18] Second, there are several statements of importance in the reasons of the members of the High Court in *Byrnes v Kendle*.[10] Among the points made are that the intention to be inferred is objective, so that the question "is whether a sufficient intention to create a trust **has been manifested**".[11] (emphasis added) Further, "in relation to trusts, as in relation to contracts, the search for 'intention' is only a search for the intention as revealed in the words the parties used, amplified by facts known to both parties".[12]

[19] Third, as was said by the High Court in *Legal Services Board v Gillespie-Jones,*[13] referring to *Kautner v Hilton,*[14] "the established rule is that in order to create a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries".

[20] The effect of the parties' agreements in the facilities deeds that there should be a separate bank account was relied on by both parties. It was discussed by

---

8 [2002] 2 Qd R 270.
9 (1978) 141 CLR 335, 353.
10 (2011) 243 CLR 253.
11 (2011) 243 CLR 253, 274 [55].
12 (2011) 243 CLR 253, 286 [105].
13 (2013) 249 CLR 493, 524 [116].
14 (1953) 90 CLR 86, 97.

McPherson A-CJ in *Puma Australia Pty Ltd v Sportsman's Australia Limited (No 2)*[15] as follows:

> "The problem of determining whether a person is a trustee of money of his 'principal' is not often capable of resolution by the simple expedient of asking whether the recipient of the proceeds is bound to keep the money in a separate account unmixed with his own. That is a hallmark duty of a trustee; but the result of such an inquiry in a particular case seldom affords a ready conclusion. A person is bound to keep the money in a separate account if he is a trustee; and he is a trustee if he is bound to keep the money in a separate account. The inquiry is circuitous and the answer inconclusive except where the notion of a duty to maintain a separate account for moneys received is so implausible as to compel the inference that a trust cannot possibly have been intended: see *Kirkham v. Peel* (1880) 43 L.T. 171, 172; *Palmer v. Carey* [1926] A.C. 703; *Cohen v. Cohen* (1929) 42C.L.R. 91; *Walker v.Corboy* (1990) 19 N.S.W.L.R. 382."

[21] The effect of an agreement that monies are advanced for exclusive and specific purposes and whether the monies are not intended to form part of the assets of the trustee has been discussed in many cases, including *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd*.[16] It was said to be "critical" to the question whether there is a trust in the Victorian Court of Appeal in *Legal Services Board v Gillespie-Jones*.[17] I note that on appeal the High Court overturned the decision in that case on the facts.[18]

[22] A trustee must provide an account of his receipts and payments: *Waterhouse v Waterhouse*.[19] But so must many who are not trustees.

[23] Both the detailed submissions made by the defendants that there was no trust in paragraphs 6 to 18 of their submissions, and the detailed submissions in response contained in the plaintiff's submissions, in paragraphs 7 to 17, are complex.

[24] Although Barwick CJ said in *General Steel* that cases which may be terminated summarily are not confined to those which do not admit of or require argument, even extensive argument, in my view his Honour did not mean to encourage the summary determination of the questions raised by such submissions. As was said in *Batistatos*, "[t]he statements in *General Steel* should not be given canonical force".[20] In my view, the allegation that the bank account was impressed with a trust in respect of the plaintiffs' contributions is not one that clearly satisfies the threshold that it is made without reasonable grounds. It is not appropriate on an application of this kind to express any further view as to the strength or otherwise of the plaintiffs' case on this point. No party submitted that the point should be decided as a separate question on the footing that no further facts might be relevant to a final determination.

---

15 [1995] 2 Qd R 159, 162.
16 (1978) 141 CLR 335.
17 [2012] VSCA 68, [56].
18 (2013) 249 CLR 493, 511 [61].
19 (1998) 46 NSWLR 449, 494.
20 (2006) 226 CLR 256, 275 [46].

[25] The defendants further submitted that the plaintiffs' claims were bound to fail on other grounds, namely because:

(a) the plaintiffs do not allege that any of the defendants have in fact made a profit from misuse of the funds for an account of profits;
(b) the plaintiffs also do not allege that any of the defendants have in fact made a profit from misuse of the funds for an order for equitable compensation; and
(c) the claim for declaratory relief will not be granted because it will produce no foreseeable consequences.

[26] In my view, the absence of a positive allegation of profit made by the defendants is not a defect which means that, at this stage, a claim for an account of profits is made without reasonable grounds.

[27] Second, in my view, a claim for an order for equitable compensation does not, in law, depend on whether a defendant has made a profit.

[28] Third, in my view, whether or not a claim for declaratory relief will be granted does not depend on whether other relief will be granted. The power to make a declaration of right does not as a matter of law turn on whether there is other relief to be granted. In the present case, it is not so clear that relief will not be granted that the claim for it is made without reasonable grounds.

Fictitious disputes

[29] The defendants submit that the proceeding is brought on a feigned issue, so as to conceal its true nature, which is for the purpose of "showing up" the defendants.

[30] The principal case relied on by the defendants in support of this submission is *R v Weisz; ex parte Hector MacDonald Ltd*.[21] The claim in that case was for a sum of money alleged to be due on an account stated. But it was uncontentious that there had never been an account stated between the parties. The true nature of the claim was for money won on bets. That claim was not maintainable at law. The purpose of pleading an account stated was to feign a claim, which was not the true claim, so that the threat of publicity would induce the defendant bookmakers to pay for the purpose of "showing them up" if they did not pay. An important point about the case is that the pleaded cause of action was fictitious – there was no legal basis for it at all.

[31] In my view, there is nothing fictitious about the causes of action pleaded in the claim and statement of claim filed by the plaintiffs in the present case. There may be a question whether the plaintiffs ought to have refused to accept the compromise or settlement offers made by Mineralogy prior to the plaintiffs starting this proceeding. But that is a different question. It does not mean that a cause of action for relief claimed in the proceeding is necessarily feigned. It is not a question which appears on the face of the statement of claim as it did in *R v Weisz*.

[32] If Mineralogy dealt with the funds in the bank account in breach of trust or in breach of fiduciary duty, on the assumption that the facts alleged in the statement of

---

21 [1951] 2 KB 611.

claim are otherwise made out, the defendants may be liable. The first defendant may be liable for the $10 million payment made to it under first limb *Barnes v Addy*[22] liability, which is the description adopted by the High Court in *Farah Constructions Pty Ltd & Ors v Say-Dee Pty Ltd*.[23] The second defendant may be liable for both payments under second limb *Barnes v Addy* liability,[24] or for procuring or inducing breach of trust by Mineralogy.[25] There is no fictitious cause of action involved.

Collateral and improper purpose

[33] On 19 May 2014, Mineralogy caused a sum of money equivalent to the amount alleged by the plaintiffs to have been paid in breach of trust from the bank account to be deposited to that account. The defendants submit that deposit shows that "the funds remain in the bank account". More accurately, if, as the plaintiffs allege, the payments were made from the account in breach of trust, it may show that an equivalent amount was restored to the account.

[34] The plaintiffs started this proceeding after that deposit was made. The defendants submit that the inference which follows is that the true nature of the proceeding is not to recover the monies claimed pursuant to a remedy known to law. That is, the plaintiffs' purpose in starting and continuing the proceeding is to embarrass the defendants and is an abuse of process as a proceeding brought for a collateral and improper purpose.

[35] The leading case of abuse of process constituted by starting or continuing a proceeding for a collateral and improper purpose is *Williams v Spautz*.[26] As was said in that case, it is doubtful that a litigant can be debarred from proceeding on a genuine cause of action which he would wish to pursue in any event, even if he can be shown also to have an ulterior purpose.[27] But that does not mean that a plaintiff who does not desire to proceed to judgment does not abuse the process of the court merely because he has a prima facie case.[28]

[36] In *Youyang Pty Ltd v Minter Ellison*,[29] the High Court considered the liability of a trustee who, in breach of trust, failed to obey the terms of the trust in wrongly paying away trust money. The Court recognised that the immediate duty to remedy the breach might result in a remedy to restore or replenish the trust funds thereafter to be held on trusts yet to be fully performed.[30] In my view, if Mineralogy restored the impugned payments, it will have reduced the amount of any loss to the plaintiffs and any liability of the defendants to account by way of constructive trust or for an order of compensation in respect of the sums alleged to have been paid in breach of trust.

---

22 (1874) LR 9 Ch App 244.
23 (2006-2007) 230 CLR 89, 140 [111].
24 Ibid, 140 [111].
25 For example, see *Farah Constructions Pty Ltd & Ors v Say-Dee Pty Ltd* (2007) 230 CLR 89, 159 [161].
26 (1992) 174 CLR 509.
27 (1992) 174 CLR 509, 522.
28 (1992) 174 CLR 509, 522.
29 (2003) 212 CLR 484.
30 (2003) 212 CLR 484, 499 [35]-[37].

[37] However, the plaintiffs submit that the deposit made to the account was not a restoration of the payments made in breach of trust. Further, the deposit does not necessarily reduce the defendants' liabilities, if any, to an order for an account of profits, if profits were made, or an order to compensate the plaintiffs for loss, if the plaintiffs suffered other loss.

[38] The plaintiffs submit that they are entitled to establish at trial, if they can, that the defendants made such profits or the plaintiffs suffered such losses, as well as an order that will compensate them for payments which have not been truly restored by Mineralogy. In support of the claim for relief by way of an account of profits, the plaintiffs submit that if they can make out their case of breach of trust by Mineralogy, and first limb *Barnes v Addy* liability against the first defendant, and second limb *Barnes v Addy* liability against the second defendant, they will be entitled to discovery or other inquiries against the defendants to support their claims for an account of profits or compensation, before they must elect between the two remedies, relying on *Personal Representatives of Tang Man Sit v Capacious Investments Ltd*.[31]

[39] The defendants submit that:

(a) the proper purpose of a proceeding such as this is to recover monies from the defendants;
(b) Mineralogy has proffered payment (to the plaintiffs) of sums at least equivalent to those sought to be recovered from the defendants;
(c) the plaintiffs refused to accept the proffered payments;
(d) a sum at least equivalent to that sought to be recovered remains in the account (because a company associated with the defendants has paid such an amount that has been deposited into that account);
(e) the plaintiffs cannot hope to achieve anything greater than the amounts previously offered;
(f) the plaintiffs have alerted the media to the proceedings; and
(g) the inference which follows is that the plaintiffs' predominant purpose is to "show up" the defendants.

[40] I accept that, on the evidence, there is an available inference that the plaintiffs are seeking to use the proceeding to embarrass the defendants. I do not, however, accept that the plaintiffs cannot hope to achieve anything "greater" in the proceeding than the amounts previously offered. The amounts offered to the plaintiffs by Mineralogy were not a contractual right the plaintiffs have. They were an offer of compromise in the nature of an offer to vary the parties' contractual rights. The plaintiffs were not obliged to accept that outcome and it was not a remedy for the breaches of trust alleged by the plaintiffs against Mineralogy or the causes of action the plaintiffs allege against the defendants. I also do not find that the plaintiffs did alert the media.

[41] In my view, even if the inference were drawn that the plaintiffs seek to use the proceeding to embarrass the defendants, there is no reason to think that the plaintiffs do not also desire to proceed to judgment on the relief claimed, or that they do not have a prima facie case. For abuse of process on this ground, the defendants need to show that the proceeding was started or continued for the purpose of embarrassing

---

31 [1996] 1 AC 514, 521-522.

the defendants, that such a purpose was improper and that it was the plaintiffs' predominant purpose.

[42] The circumstances of each case on such a question are individual. Nevertheless, the recent warning of the Full Court of the Federal Court in *Ashby v Slipper*[32] bears repeating, namely that the "onus of satisfying the Court that there [is] an abuse of process [is] a 'heavy one' that could only be exercised in 'the most exceptional circumstances': *Williams v Spautz*… at 529".

[43] On the evidence, I do not find that it was the predominant purpose of the plaintiffs to embarrass the defendants. Accordingly, in my view, the proceeding should not be stayed on the ground that it is an abuse of process because it is brought for a collateral and improper purpose.

Otherwise brings the administration of justice into disrepute

[44] The defendants submit that:

(a) by starting and continuing the proceeding the plaintiffs are acting in breach of the implied undertaking not to abuse information or documents made available by compulsory process;
(b) section 27E(2) of the *Commercial Arbitration Act* 2013 (Qld) prohibits disclosure of information which is referred to in the particulars of the statement of claim; and
(c) this proceeding is an abuse of process as a parallel proceeding to the arbitration on foot between the plaintiffs and Mineralogy.

[45] I do not accept that any of these points warrants a stay of the proceeding. First, this proceeding is not an impermissible parallel proceeding to the arbitration. I accept that "[o]ne recognised class of abuse of process is where proceedings are instituted against a party in a second forum when there are proceedings against that party pending in another and the continuance of the second would be an abuse of the process of the first".[33]

[46] But that is not this case. The parties are not the same. The defendants are not parties to the arbitration. Mineralogy is not a party to this proceeding. The defendants are not parties to the facilities deeds and are not, therefore, parties to the arbitration agreements in them. The claims in the present proceeding could not be brought in the arbitration. Thus, this proceeding is not an abuse of process as a second claim by the plaintiffs for the same relief sought against Mineralogy in the arbitration.

[47] Second, I accept that under the general law there is an implied obligation "to accord to documents disclosed for the purposes of the arbitration the same confidentiality which would attach to those documents if they were litigating their disputes as distinct from arbitrating them".[34] However, that statement of principle does not necessarily apply without adaptation in the context of the arbitration in this case. The general law obligation is now affected by the *Commercial Arbitration Act* 2013 (Qld). Section 27E of that Act provides that "[t]he parties must not disclose

---

32 (2014) 219 FCR 322, 343 [59].
33 *Michael Wilson & Partners Ltd v Nicholls & ors* (2011) 244 CLR 427, 452 [90].
34 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 33.

confidential information in relation to the arbitral proceedings", subject to a range of exceptions. As defined in s 2 of that Act, "confidential information" includes, inter alia, pleadings, submissions to the arbitral tribunal, information supplied by a party to another party in compliance with a direction of the arbitral tribunal and evidence supplied to the arbitral tribunal.

[48] I also accept that, in Australia, "where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence".[35] There may be a question whether the leave required to use the documents or information is that of the arbitrator or the court. Be that as it may, s 27G of the *Commercial Arbitration Act* 2013 operates in some circumstances as an exception to the statutory prohibition in s 27E. It provides that an arbitral tribunal may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the proceedings in circumstances other than those mentioned in s 27F.

[49] Section 27F of the *Commercial Arbitration Act* 2013 also operates as an exception to s 27E in some circumstances. It provides, in part:

> "(1) This section sets out the circumstances in which confidential information in relation to arbitral proceedings may be disclosed by—
>
> (a) a party;
>
> …
>
> (5) The information may be disclosed if it is necessary for the establishment or protection of a party's legal rights in relation to a third party and the disclosure is no more than reasonable for that purpose…"

[50] Where s 27F(5) authorises the disclosure of confidential information from an arbitration, it does so in relation to documents or information disclosed by compulsion in the arbitration. Within the meaning of s 27F(5), each of the defendants is a "third party" and this proceeding is brought to claim the plaintiffs' "legal rights in relation to" those third parties. Accordingly, under s 27F(5), disclosure which is necessary for the establishment or protection of the plaintiffs' legal rights in relation to the defendants is permitted, provided that it is no more than reasonable.

[51] The defendants submit that there is a "flagrant breach" of s 27F(5). But they do not contend that the disclosure made in the particulars to the statement of claim is not necessary for the establishment of the rights the plaintiffs allege in the statement of claim or that it is more than is reasonable, leaving to one side their arguments about collateral and improper purpose.

[52] In the circumstances, I do not find that there is a breach of s 27E of the *Commercial Arbitration Act* 2013 or of a general law implied obligation to accord documents or information disclosed in the arbitration confidentiality.

---

35 *Hearne v Street* (2008) 235 CLR 125, 155 [96].

Conclusion

[53] The application must be dismissed. I will hear the parties on costs.