SUPREME COURT OF QUEENSLAND

CITATION:	*Haggarty v Wood (No 2)* [2015] QSC 244
PARTIES:	**JOHN PETER JOSEPH HAGGARTY** (first plaintiff/first respondent) AND **JUSTIN THOMAS HAGGARTY, SCOTT JON HAGGARTY, DARREN GEOFFREY HAGGARTY, JOANNE KELLI DAVIS AND BRETT JOHN DAVIS** (second plaintiffs/second respondents) v **JOAN WOOD** (defendant/applicant)
FILE NO:	BS5303 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	26 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 June 2015
JUDGE:	Jackson J
ORDERS:	**The order of the court is that:** **1. The plaintiffs' claim is dismissed.** **2. The plaintiffs pay the defendant's costs of the proceeding.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiffs allege that the testator entered into a testamentary contract to bequeath 5 lots to the respondents – where a company was the registered proprietor of the 5 lots – where the testator transferred the shares to himself and the defendant jointly – where the company sold the 5 lots during the testator's life – where the shares in the company passed by survivorship to the defendant – where the plaintiffs claim a constructive trust over the shares to the extent of their contributions in relation to the assets and value of the company – whether there should be summary judgment for the defendant *Judicature Act* 1876 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), rr 171, 293

Rules of the Supreme Court 1883 (UK), o 14
Rules of the Supreme Court 1900 (Qld), o 18, 22, 29, 38

Blair v Curran (1939) 62 CLR 464; [1939] HCA 23, followed
Dey v Victorian Railways Commissioner (1949) 78 CLR 62; [1949] HCA 1, cited
Eastgate v Equity Trustees Executors & Agency Co Ltd (1964) 110 CLR 275; [1964] HCA 14, referred to
Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA, cited
Haggarty v Wood [2013] QSC 327, related
Port of Melbourne Authority v Anshun (1981) 147 CLR 589; [1981] HCA 45, considered
Riches v Hogben [1985] 2 Qd R 292, referred to
Salomon v A Salomon & Co Ltd [1897] AC 22; [1896] UKHL 1, followed
Sons of Gwalia Ltd v Margaretic (2007) 231 CLR 160; [2007] HCA 1, followed
The Cloverdell Lumber Company Pty Ltd v Abbott (1924) 34 CLR 122; [1924] HCA 4, considered
Webster v Lampard (1993) 177 CLR 598; [1993] HCA 57, referred to

COUNSEL: D A Savage QC with C Brewer for the applicant
K C Fleming QC with A Marks for the respondent

SOLICITORS: McNamara & Associates for the applicant
Walker Pender for the respondent

[1] **JACKSON J**: On 29 November 2013, I made orders in this proceeding, including an order striking out the statement of claim.[1] Since then, the statement of claim has been amended. The defendant now applies for an order for summary judgment or striking out the second further amended statement of claim ("FASOC2").

[2] For convenience, I repeat some of the background facts.

[3] A testator, Jack Haggarty, owned all of the shares in J Haggarty & Co Pty Ltd ("the company"). The company was the registered proprietor of 5 lots of land near Ipswich.

[4] In 1991, Jack Haggarty and his wife, Irene Haggarty, executed wills. Each will provided for the whole of the testator's estate to be left to the first plaintiff and Beverley Dewitt.

[5] In 1997, Irene Haggarty died, leaving her estate to the first plaintiff and Ms Dewitt.

[6] In 1997, after Irene Haggarty's death, Jack Haggarty made another will ("1997 will"), again leaving the whole of his estate to the first plaintiff and Ms Dewitt equally.

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1 *Haggarty v Wood* [2013] QSC 327.

[7] In 2004, Jack Haggarty made another will ("2004 will") leaving his estate to the defendant.

[8] In 2006, Jack Haggarty transferred the shares in the company to himself and the defendant as joint tenants.

[9] In 2006 and 2007, the company sold the 5 lots under Jack Haggarty's direction.

[10] In 2010, Jack Haggarty made his last will. He revoked his former wills and left the whole of his estate to the defendant.

[11] Jack Haggarty died on 10 August 2012.

The current claim

[12] The earlier claim by the first plaintiff that the will was procured by the undue influence of the defendant was struck out.[2] The starting point now is that the plaintiffs neither challenge the validity of Jack Haggarty's last will, nor do they make any claim against his estate. The executor of the will is not a party to the proceeding.[3]

By the FASOC2, the plaintiffs now claim:

> "(a) A declaration that the defendant holds the company shares on constructive trust for the benefit of the first and second plaintiffs to the extent of the first and second plaintiffs' contribution to the assets and value of the company;
> (b) Further and/or in the alternative an order that the first and second plaintiff recover from the defendant such further and/or other relief as may be appropriate in the circumstances, including equitable compensation;
> (c) Interest pursuant to the *Civil Proceedings Act* 2011;
> (d) Costs."

[13] The basis of the claim is an alleged multi-part contract. One part is that Jack Haggarty and Irene Haggarty made a contract resembling a contract for mutual wills. Another part is that they promised to make testamentary dispositions of the 5 lots to the second plaintiffs. A third part is that they promised to make testamentary dispositions of the residues of their estates to the first plaintiff and his sister, Beverley Dewitt. The overall contract is described in the pleading as the "testamentary contract".

[14] The FASOC2 alleges that Jack Haggarty acted "unconscientiously or unconscionably" in:

> "(i) revoking his 1997 will and making his 2004 will;
> (ii) transferring 50% of the company to the defendant;
> (iii) selling the 5 lots"

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2 *Haggarty v Wood* [2013] QSC 327.

3 The FASOC2 names the defendant as first defendant because the prior pleading purported to name the executor as second defendant. However, the executor was not joined as a party at any stage.

[15] Each of those actions is also alleged to have been made by Jack Haggarty in breach of the testamentary contract.

[16] It was agreed between the parties that the amount left in the estate of Jack Haggarty is insufficient to meet a claim for damages for breach of the alleged testamentary contract. That appears to be why the executor has not been joined as a party to the proceeding, notwithstanding that the amended statement of claim as filed purports to name her a party.

[17] The claim is made against the defendant alone. The only relevant allegation made against her is that Jack Haggarty transferred "50% of the company to" her on 30 November 2006. In fact, Jack Haggarty transferred an interest to her as a joint holder of all of the shares in the company. The interest was held as joint tenants. The whole of the interest in the shares passed to her by survivorship on Jack Haggarty's death. That interest did not pass to the defendant under Jack Haggarty's last will.

The testamentary contract

[18] The parties to the alleged testamentary contract are the first and second plaintiffs, Beverley Dewitt, Jack Haggarty and Irene Haggarty.

[19] Some of the alleged terms are described in the pleading as the "testamentary provisions". They are that:

- each of the second plaintiffs was to receive one of the 5 lots;
- the first plaintiff and Beverley Dewitt were each to receive half of the rest and residue of the estates of Jack Haggarty and Irene Haggarty; and
- the survivor of Jack Haggarty and Irene Haggarty was to "maintain the testamentary provisions" until their death so as to ensure that the second plaintiffs received a lot each from the 5 lots as promised to them.

[20] The first plaintiff is alleged to have given consideration by way of his contribution to the growth, success and profitability of the company. It is alleged that as a consequence of the first plaintiff's management of the company, the testator was able to acquire personal and real estate assets and draw money from the company for recreational pursuits.

[21] Paragraph 7 of the FASOC2 refers to the regular work which the second plaintiffs undertook for Jack Haggarty and Irene Haggarty, which includes contribution to the management, improvement and maintenance of the company's property, Jack Haggarty and Irene Haggarty's property and the operation of the company's business.

[22] The consideration of the second plaintiffs is alleged to be "the management, improvement and maintenance of the company's and the testator's and his wife's real property assets as particularised in paragraph [7] above".

[23] So summarised, the alleged testamentary contract does not fall simply within the class of contracts for mutual wills. The first and second plaintiffs are alleged to be

parties to the testamentary contract, not the mere beneficiaries of the testators' bounties to be given to them by will.

[24] There is an added complication. In 1983, the company sold its business to a company controlled by the first plaintiff and his wife on trust for a family trust of their family members, including the second plaintiffs. The sale included land from which the business was and has been conducted, which was not included in the 5 lots.

[25] It is not clear that the first and second plaintiffs allege consideration at law, that is, executory contractual promises by them for the promises of Jack Haggarty, rather than the performance of acts that were not consideration at law. Nor is it clear how the sale of the company's business to the family trust might have affected matters.

[26] However, it is not necessary to delay on those points. It may be assumed that the testamentary contract was made and performed as alleged. An important point is that the FASOC2 does not allege that the company was a party to the testamentary contract. The company is not a party to the proceeding.

Alleged mutual wills

[27] As previously stated, the FASOC2 alleges that in 1991 each of Jack Haggarty and Irene Haggarty made a will leaving the whole of their estate to the first plaintiff and Ms Dewitt.

[28] The plaintiffs allege further that Irene Haggarty died in 1997 "having given effect to the testamentary contract". However, it is not alleged that she did more than leave the whole of her estate to the first plaintiff and Ms Dewitt. It is not alleged that she left any of her estate to Jack Haggarty on the faith of a promise by him to leave any of it to any of the plaintiffs. It is not alleged that she held any interest in the shares of the company. It is not alleged that she held any interest in the 5 lots.

[29] Also as previously stated, the plaintiffs allege that in 1997, after the death of Irene Haggarty, Jack Haggarty made a further will leaving the whole of his estate to the first plaintiff and Ms Dewitt. This is alleged to have "[given] effect to the testamentary contract". However, it is not alleged that Jack Haggarty did more than make the 1991 will or the 1997 will in performance of the testamentary contract.

First difficulty about the 5 lots

[30] In my view, there is an initial logical flaw in the allegation that the 1997 will gave effect to the alleged testamentary contract. By leaving the whole of his estate to the first plaintiff and Ms Dewitt, Jack Haggarty did not leave any of the 5 lots to the second plaintiffs.

[31] There are two considerations. First, it is not alleged that Jack Haggarty was the proprietor or equitable owner of any of the 5 lots. They were property of the company.

[32] Second, had Jack Haggarty owned the 5 lots, a will leaving them to the first plaintiff and Ms Dewitt would not have left them to the second plaintiffs. At law, whether or not the second plaintiffs would benefit would have depended on dispositions to be made by the first plaintiff and Ms Dewitt as the whole of the estate would have been

in their hands. The 1997 will did not leave the shares in the company to them on trust for the second plaintiffs. It did not contain any precatory direction that the first plaintiff and Ms Dewitt were to see that the 5 lots were to be transferred to the second plaintiffs.

[33] On the face of the alleged terms of the testamentary contract, there was no express promise that Jack Haggarty would leave the shares in the company to the first plaintiff and Ms Dewitt by his will (or leave his shares in the company to Irene Haggarty who would leave them to the first plaintiff and Ms Dewitt in her will).

[34] Even if it had been an express or implied term of the testamentary contract that Jack Haggarty's shares in the company would be left to the first plaintiff and Ms Dewitt the result would have been the same. That disposition would have given them the power to control the company if the shares were held by Jack Haggarty at his death. If the company then held the 5 lots, the director or directors of the company might have resolved to transfer a lot to each of the second plaintiffs, subject to their duties as directors. But those possibilities are a far cry from Jack Haggarty giving effect to the testamentary contract to transfer the 5 lots and the residue of his estate as alleged in the FASOC2.

Second difficulty about the 5 lots

[35] If there was a valid testamentary contract by Jack Haggarty upon the terms of the testamentary provisions, events overtook those provisions about the 5 lots.

[36] Under the rule in *Salomon v A Salomon & Co Ltd*,[4] the separate legal existence of the company cannot be ignored. Yet the FASOC2 does just that, or proceeds on the footing that the promises as to the disposition of the 5 lots were made personally by Jack Haggarty and Irene Haggarty, notwithstanding that the company owned the 5 lots.

[37] The 5 lots were sold by the company in 2006 and 2007.

[38] On sale of the 5 lots, the proceeds of sale would have become property of the company.

[39] As previously mentioned, the company is not alleged to have been a party to the testamentary contract.

[40] The FASOC2 alleges that the sale of the 5 lots was a breach of (presumably several or joint and several) contractual promises made by Jack Haggarty. That is an allegation of breach of contract by Jack Haggarty as against the second plaintiffs.

[41] As previously stated, there is no claim made by the plaintiffs for damages for breach of contract against Jack Haggarty's estate.

[42] The only claim made by the plaintiffs is against the defendant. It is only for the imposition of a constructive trust over the shares in the company, or some form of equitable compensation, or other unspecified relief.

Third difficulty about the 5 lots

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4 [1897] AC 22. See also *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160.

[43] The FASOC2 alleges that the defendant holds her interest in the company (which apparently must mean the shares as there is no allegation of any other interest) on trust for the plaintiffs to the extent of the first and second plaintiffs' contribution to the assets and value of the company.

[44] The second difficulty about the 5 lots is an obvious hurdle in the way of such a claim based on the testamentary contract about the 5 lots.

[45] The relief sought is not about the 5 lots, or the proceeds of sale of the 5 lots. It is a proprietary or personal claim against the defendant for a different species of relief, by way of constructive trust over the shares in the company to the extent of the value of the alleged "contribution" provided by the second plaintiffs as consideration for the 5 lots described as being to "the value of the company".

[46] There is no allegation in the FASOC2 of the value of the alleged consideration or contribution provided by the second plaintiffs. But that point also may be passed by.

[47] The defendant became a joint holder of the shares in the company during the life of Jack Haggarty. Her interest in the shares was held as a joint tenant with Jack Haggarty.

[48] Although it is not alleged in the FASOC2, there is some evidence suggesting that Jack Haggarty, with the assistance of lawyers, may have sought to alienate his property inter vivos so as to protect his estate from claims. That strategy appears to have commenced in 2004 or 2006 following friction between the first plaintiff and Jack Haggarty.

[49] The transfer of the shares in the company to Jack Haggarty and the defendant as joint tenants may have been part of such a strategy. The reason for the transfer is unexplained on the evidence. In 2006, it was not necessary that there be more than one shareholder of a proprietary company. Nor was it necessary that there be more than one director. Jack Haggarty may have been concerned as to what might happen if he were to lose capacity, following the falling out between him and the first plaintiff. But the reason for the transfer of the shares is not established.

[50] Whatever be the fact, the FASOC2 does not allege that Jack Haggarty transferred the shares to himself and the defendant as joint tenants so as to defeat the plaintiffs' expectations or any claim they may make in reliance on the testamentary contract upon his death.

[51] For present purposes, the point to be made is that there is no challenge to the validity of the transfer of the shares to Jack Haggarty and the defendant as joint tenants. At law, it was a valid inter vivos transfer.

[52] A consequence of that transfer, and an incident of the defendant's interest in the shares at law, was that on the death of Jack Haggarty, she became entitled to be registered as the sole holder of the shares by survivorship.[5] That is, no interest in the shares passed to the defendant under Jack Haggarty's will.

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[5] See for example, *Eastgate v Equity Trustees Executors & Agency Co Ltd* (1964) 110 CLR 275, 282-284.

[53] Returning to the alleged testamentary contract, it is not alleged that the second plaintiffs were promised any interest in the shares or expected any interest in the shares.

[54] That is, there is no connection alleged between each of the second plaintiffs' expectations that he or she would receive one of the 5 lots and the defendant's interest as the holder of the shares.

Difficulty as to the rest and residue

[55] As to the first plaintiff, it is alleged that he was to receive half of the rest and residue of the estate. However, it is not alleged that any promise was made to him about the shares as such.

[56] It is, however, alleged that the transfer to the defendant of her interest in the shares, described as 50% of the company, was made in breach of contract by Jack Haggarty.

[57] It is also alleged that Jack Haggarty thereby acted unconscientiously or unconscionably.

Consequences of the difficulties

[58] In view of the difficulties already mentioned, I note that the FASOC2 does not allege that:

(a) the plaintiffs or any of them had an equitable interest in the shares at the time when the defendant became a joint holder of the shares which persists against the defendant;
(b) Jack Haggarty held the shares on trust for the plaintiffs or any of them;
(c) Jack Haggarty would have been estopped in equity from denying that he held the shares on trust for the plaintiffs or any of them;
(d) the transfer by Jack Haggarty to the defendant as joint holder of the shares was made in breach of trust;
(e) the defendant was a recipient of trust property with notice of Jack Haggarty's breach of trust;
(f) the defendant received her interest in the shares by way of gift from Jack Haggarty; or
(g) the defendant acted unconscionably or unconscientiously.

[59] Instead, there is simply a claim for relief against the defendant as constructive trustee of the shares, measured by the value of the plaintiffs' respective contributions to, inter alia, the assets and value of the company. That claim is based in the alleged breaches of the testamentary contract. Without more, those breaches are alleged to have constituted unconscientious or unconscionable conduct by Jack Haggarty.

[60] How those allegations give rise to a proprietary or personal claim against the defendant as constructive trustee of the shares is not explained or supported by any other allegation of fact. Nor is there an allegation of fact that explains a personal claim against the defendant for compensation or other relief.

[61] So explained, in my view, there is a gap in the logic of the FASOC2 as against the defendant, in making out a viable cause of action against her. In my view, the claim is not supportable as pleaded and, at the least, the FASOC2 should be struck out under *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), r 171.

Summary judgment

[62] However, this is not merely an application to strike out the FASOC2. It is for summary judgment under UCPR, r 293 on the ground that the plaintiffs do not have a reasonable prospect on the claim.

[63] Unusually, perhaps, the application does not proceed on affidavit evidence as to the primary facts, except for the defendant's denial of the allegation that the first plaintiff was unrewarded by Jack Haggarty for his contribution to the business of the company.

[64] As previously explained, the business of the company was sold to a company controlled by the first plaintiff and his wife as trustee for their family trust.

[65] The argument on the application proceeded more in the fashion of a demurrer, where the question for debate was whether the material facts alleged could give rise to the relief claimed.

[66] Rule 293 of the UCPR first introduced a statutory power for the court to grant summary judgment for a defendant. The history of the modern rules of court authorising the grant of summary judgment began with the commencement of order 14 of the English *Rules of the Supreme Court* in 1883. Queensland (and other Australian jurisdictions) soon followed. Until the introduction of the UCPR in 1999, the power was confined to summary judgment on the application of a plaintiff on the claim or counterclaim.[6] There was no power to grant summary judgment in favour of the defendant to the claim or on the counter claim in Queensland.

[67] Before the introduction of r 293 UCPR in 1999, a defendant could demur to the statement of claim.[7] This is not an occasion to discuss demurrers in detail. They are now abolished. It is enough to mention that a demurrer proceeds on the assumption that the facts alleged in the pleading are true. Alternatively, an application could be made to strike out a statement of claim under one of the rules of court on the ground that it disclosed no reasonable cause of action.[8] Such an application proceeded on the same assumption as to the truth of the facts alleged as a demurrer.

[68] In either case, the question was confined to the adequacy of the pleading and whether it set forth a cause of action that could result in a judgment in the plaintiff's favour. No evidence was admissible, either as to the facts alleged in the pleading or by way of confession and avoidance.

[69] Under the *Rules of the Supreme Court* 1900 (Qld) the plaintiff might be given leave to replead when a demurrer was allowed,[9] or overruled,[10] but the general object was

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6 *Rules of the Supreme Court* 1900 (Qld), o 18, r 1.
7 *Rules of the Supreme Court* 1900 (Qld), o 29, r 1.
8 *Rules of the Supreme Court* 1900 (Qld), o 22, r 31.
9 *Rules of the Supreme Court* 1900 (Qld), o 29, r 10.

that if the demurrer was allowed or overruled the successful party would obtain judgment without a trial.

[70] Alternatively, on an application to strike out a statement of claim on the ground that it disclosed no reasonable cause of action, the plaintiff might be given leave to replead the statement of claim, or the court might order that the action be stayed or dismissed.[11]

[71] Overlapping the specific provisions of the rules of court, the court might make an order to stay or strike out the action in the inherent jurisdiction, so as to relieve the defendant from the oppression of meeting a hopeless case at trial - a "groundless claim" - where it was apparent that the plaintiff could not plead a viable case.[12] On an application made in the inherent jurisdiction, evidence might be received.[13]

[72] Until the introduction of UCPR r 293, and leaving to one side the hearing of a separate questions of law and issues without pleadings,[14] these were the processes available to a defendant for summary dismissal of an action. As previously stated, there was no summary judgment procedure for a defendant equivalent to that available to a plaintiff.

[73] Apart from proceeding upon a demurrer, such orders may still be made under the UCPR. The relevant rule to strike out a statement of claim is now UCPR r 171. Although the express scope of UCPR r 171 covers much of the same ground, the inherent jurisdiction is preserved, including the jurisdiction to stay or strike out the proceeding.

[74] The interrelationship of the older procedures available to a defendant and the relatively recent procedure for a defendant apply for summary judgment is not generally explored in the case law. By way of exception, *Webster v Lampard*[15] is a decision in 1993 of the High Court of Australia dealing with the power to grant summary judgment in favour of a defendant. That power was introduced by a rule of court of the Supreme Court of Western Australia. In discussing the approach to be taken to the exercise of the power to grant summary judgment, the court deployed the familiar tests developed in the context of applications to strike out a statement of claim or to stay or dismiss an action in the inherent jurisdiction:

> "It is important to note at the outset that the issue before the learned Master on the application for summary judgment was not whether Mr. and Mrs. Webster would probably succeed in their action against Sergeant Lampard. It was whether the material before the Master demonstrated that that action should not be permitted to go to trial in the ordinary way because it was apparent that it must fail. The power to order summary judgment must be exercised with 'exceptional caution' and 'should never be exercised unless it is clear that there is no real question to be tried'. As Dixon J. commented in *Dey v. Victorian Railways Commissioners*:

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10 *Rules of the Supreme Court* 1900 (Qld), o 29, r 12.
11 *Rules of the Supreme Court* 1900 (Qld), o 22, r 31.
12 *Dey v Victorian Railways Commissioner* (1949) 78 CLR 62, 84, 91 and 109.
13 *Dey v Victorian Railways Commissioner* (1949) 78 CLR 62, 109.
14 *Rules of the Supreme Court* 1900 (Qld), o 38.
15 (1993) 177 CLR 598.

> 'A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.'

> Nowhere is that need for exceptional caution more important than in a case where the ultimate outcome turns upon the resolution of some disputed issue or issues of fact. In such a case, it is essential that "great care … be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal" (footnotes omitted)[16]

[75] However, the scope and operation of r 293 UCPR, as a rule authorising the grant of summary judgment, differs from the powers to strike out the statement of claim or to strike out or dismiss a proceeding under either r 171 UCPR or in the inherent jurisdiction.

[76] First, that is because the test to be applied is expressly stated in the rule. The rule states:

> "**293 Summary judgment for defendant**
> (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
> (2) If the court is satisfied—
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
> (b) there is no need for a trial of the claim or the part of the claim;
> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[77] Second, that is because the judgment granted on an application for summary judgment operates as a res judicata or cause of action estoppel, as explained by Dixon J in *Blair v Curran*.[17] The operation of the rules as to estoppel by judgment

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16 (1993) 177 CLR 598, 602-603.
17 (1939) 62 CLR 464, 532.

flow into the cognate principle restated in *Port of Melbourne Authority v Anshun*.[18] By way of contrast, an order staying or striking out a proceeding does not operate as a res judicata.

[78] Where a necessary factual element of a plaintiff's case can be decided against the plaintiff on a summary basis, a clear case for the application of r 293 UCPR exists. The court is right to give judgment on the claim or relevant part of the claim in those circumstances. This was understood as the purpose of the original rule providing for summary judgment for a plaintiff, as opposed to a proceeding on demurrer or to strike out a pleading where the facts alleged could not be examined. The proceeding on summary judgment as introduced under the English order 14 was explained partly in this way by Isaacs J in *The Cloverdell Lumber Company Pty Ltd v Abbott*:[19]

> "The Lord Chancellor said:—'People do not seem to understand that the effect of Order XIV is, that, upon the allegation of the one side or the other, *a man is not to be permitted to defend himself in a Court; that his rights are not to be litigated at all*. There are some things *too plain for argument*; and where there were pleas put in *simply for the purpose of delay*, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.' Lord *James of Hereford* said:—'The view which I think ought to be taken of Order XIV is that the tribunal to which the application is made should simply determine, '*Is there a triable issue to go* before a jury or a Court?' It is *not for that tribunal to enter into the merits of the case at all*. It ought to make the order only when it can say to the person who opposes the order, '*You have no defence*. You could not by general demurrer, if it were a point of law, raise a defence here. We think it *impossible* for you to go before any tribunal to determine the question of fact.'"[20]

[79] Another possible case for the application of r 293 UCPR exists where a defendant would have been entitled to judgment on demurrer under the old practice. There are differences in the procedures. One example already mentioned, in the case of a general demurrer at common law, the price of proceeding upon demurrer was that the demurring party admitted the allegations of fact in the pleading. So, if the cause of action or defence demurred to was held to be good, judgment went in favour of the other party, unless a defendant was allowed to demur and plead a defence as well. As might be expected, given that the allegations in the pleading demurred to were admitted for the purpose of the procedure, evidence was not admissible. A jury was not empanelled to try any issue.

[80] But there can be difficulties in dealing with this class of case under r 293 UCPR. There may have been better justification for cases to be finally decided on demurrer

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18 (1981) 147 CLR 589, 597.
19 (1924) 34 CLR 122.
20 (1924) 34 CLR 122, 132.

when the pleading rules were as exacting as they were under the procedures which pre-dated the reforms brought by the *Judicature Act* 1876 (Qld). It would be false to compare the proceeding on general demurrer directly to summary judgment without acknowledging that there may be greater scope for an essential allegation to be omitted or inadequately expressed in the present day system of pleading.

[81] In my view, it will not be appropriate always under r 293 UCPR to give final judgment in a case in the fashion of a decision upon demurrer where a plaintiff has not pleaded a viable case capable of proof at trial by evidence, but might be able to. However, an application under r 293 UCPR presupposes that the defendant has filed a defence in response to a properly prepared and filed claim and statement of claim, so the court should not be too wary of treating a plaintiff as having nailed their colours to the mast. That approach is all the more justified where the plaintiff has had numerous attempts to articulate their case over a lengthy period.

[82] Whether a particular case fits into this category calls for the exercise of a discretionary judgment. Sometimes, a pleader's skills may be the problem but the facts otherwise proved or indicated by the evidence will give pause to a Judge acting under r 293 UCPR. However, in other cases, the difficulty will lie in the absence of a factual stratum to make a necessary allegation, not in the failure to allege it in the pleading. In my view, r 293 UCPR is properly engaged in such a case.

[83] In the present case, the plaintiffs do not allege or prove any facts suggesting unconscientious or unconscionable conduct by the defendant. The plaintiffs rely on the equity of expectation as explained by McPherson J in *Riches v Hogben*,[21] in a judgment that became important in the later development of the law of equitable estoppel in the High Court of Australia.[22] But the unconscientious conduct or unconscionable conduct relied on is that of Jack Haggarty, not the defendant.

[84] Given those circumstances, it seems to me that the possibility of a successful claim would depend on the plaintiffs being able to make out an equitable interest in the shares before Jack Haggarty transferred an interest in those shares to the defendant. But the plaintiffs do not allege that they had such an interest, or that the defendant is bound by it, or facts to support such a case.

[85] In my view, the plaintiffs have not put forward facts from which they have a real prospect of succeeding on such a case.

[86] Accordingly, the plaintiffs' claim, as pleaded, and as disclosed by the evidence, has no real prospect of succeeding, for the reasons I have previously mentioned. The plaintiffs' claim must be dismissed under UCPR, r 293.

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21 [1985] 2 Qd R 292, 300-301.

22 *Giumelli v Giumelli* (1999) 196 CLR 101, [3]-[6].