SUPREME COURT OF QUEENSLAND

CITATION:	*Mio Art Pty Ltd v Mango Boulevard Pty Ltd & Ors* [2016] QSC 205
PARTIES:	**MIO ART PTY LTD ACN 121 010 875** (plaintiff) v **MANGO BOULEVARD PTY LTD ACN 101 544 601** (first defendant) and **SILVANA PEROVICH** (second defendant) and **ROBERT WILLIAM WHITTON as trustee of the estate of SILVANA PEROVICH** (third defendant) and **BMD HOLDINGS PTY LTD ACN 010 093 348** (fourth defendant)
FILE NO/S:	BS1714/11
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	9 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. the application is dismissed.** **2. the applicants pay the plaintiff's costs of the application.**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – INTERPLEADER – BY STAKEHOLDERS OR SIMILAR PERSONS – where judgment was entered in favour of the plaintiff against the first and fourth defendants for sums payable under a share sale agreement – where other claimants had previously given notice to the first and fourth defendants that they had been assigned the right to payment under the share sale agreement – where the first and fourth defendants

applied to interplead in answer to the judgment debt in relation to adverse claims by the possible assignees – whether an interpleader order could be made after final judgment had been delivered

Civil Proceedings Act 2011 (Qld), s 19
Interpleader Act 1831 (Eng), s 1
Property Law Act 1974 (Qld), s 199
Rules of the Supreme Court 1883 (Eng), O 57
Uniform Civil Procedure Rules 1999 (Qld), r 949

Chamberlain v Deputy Commissioner of Taxation (1988) 164 CLR 502; [1988] HCA 21, cited
Goldberg v Beckett [2015] NSWSC 1966, distinguished
H Stevenson & Son Ltd v Brownell [1912] 2 Ch 344, considered
Hamilton v Marks (1852) 5 De G & Sm 638, considered
Jones v Thomas (1854) 2 Sm & G 186; 65 ER 358, distinguished
Larabrie v Brown (1857) 1 De G & J 204, considered
Mango Boulevard Pty Ltd & Anor v Mio Art Pty Ltd & Ors [2016] QCA 148, cited
Mio Art Pty Ltd as T'ee of Spencer Family Trust v Mango Boulevard Pty Ltd & Ors (No 6) [2015] QSC 116, cited
Randall v Lithgow (1884) 12 QBD 525, considered
Reading v School Board for London (1886) 16 QBD 686, considered

COUNSEL:
D Keane for the plaintiff
D Butler for the first and fourth defendants
Second defendant in person
No appearance for the third defendant
M Brady for Traditional Values Management Pty Ltd
M Bennett (Solicitor) for Earning Pty Ltd, ACN 128 854 820 Pty Ltd, ACN 128 854 759 Pty Ltd, ACN 128 854 768 Pty Ltd and ACN 127 567 373 Pty Ltd ("Earning and Associates")
J Lavercombe (Solicitor) for Lillas & Loel
No appearance for R Winny
No appearance for ASIC
No appearance for Compensation Finance (Aust) Pty Ltd

SOLICITORS:
Delta Law for the plaintiff
Carter Newell for the first and fourth defendants
Mills Oakley Lawyers for Traditional Management Pty Ltd
Ashurst Australia for Earning & Associates
Lillas & Loel for Lillas & Loel

[1] **Jackson J**: The first and fourth defendants apply for an interpleader order.

[2] On 22 May 2015, P McMurdo J declared that, subject to any right to set-off any sum as pleaded in paras 29U(c) and (d) of the sixth further amended defence of the first

and fourth defendants, the plaintiff is entitled to payment by the first defendant, pursuant to cl 5.1(a) of the SSA (Share Sale Agreement) made between them dated 4 July 2003, of the sum of $602,729.[1]

[3] On 5 August 2015, P McMurdo J by consent gave judgment in favour of the plaintiff against the first and fourth defendants in the sum of $643,019.96, such sum being inclusive of interest up until and including 5 August 2015.[2] In addition, his Honour ordered that the first and fourth defendants pay that sum into court and that enforcement of the judgment be stayed until 21 days after the Court of Appeal delivered judgment in CA6097/15.

[4] On 10 August 2015, the first and fourth defendants' solicitors wrote to the solicitors for Traditional Values Management Pty Ltd ("TVM") in response to a demand for payment from the judgment sum. The letter recited that the judgment had been stayed pending appeal and concluded as follows:

> "In summary our clients therefore reject your client's demand.
>
> That said, our clients are on notice of your client's asserted entitlement to any amount found due pursuant to the Share Sale Agreement. Should any amount be found due pursuant to the Share Sale agreement (which is denied), our clients intend to take such steps as they consider necessary to ensure that that amount is paid to its rightful owner. Those steps may including interpleading."

[5] On 7 June 2016, the Court of Appeal dismissed the appeal with costs.[3]

[6] The stay of the judgment is now lifted, by virtue of the time that has elapsed since the Court of Appeal dismissed the appeal.

[7] The present application is for an interpleader order of the kind foreshadowed in the letter of 10 August 2015.

[8] The reason an interpleader order is sought is that the first and fourth defendants are potentially subject to adverse claims from others in relation to the judgment debt owed to the plaintiff. The potential adverse claimants may be summarised as follows.

[9] On 9 June 2005, Mr Spencer, the plaintiff's predecessor as trustee of the Spencer Family Trust ("the former trustee") entered into a series of contracts and deeds. For present purposes the relevance is that the former trustee assigned his right title and interest under the Share Sale Agreement to TVM. It appears that the assignment was

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1 See *Mio Art Pty Ltd as T'ee of Spencer Family Trust v Mango Boulevard Pty Ltd & Ors (No 6)* [2015] QSC 116.

2 It may seem a quibble but the judgment is not in the form of a money judgment under Form 58 to the *Uniform Civil Procedure Rules* 1999 (Qld). That form for a money judgment is that the "defendant pay to the plaintiff the amount of $(amount)". That form is a departure of the form of a money judgment at common law as provided for in the forms appended to the *Rules of the Supreme Court* 1900 (Qld). Under those rules and their predecessors a money judgment took the form that the "plaintiff do recover against the defendant the sum of $(amount)". The difference is that the judgment in Form 58 is an order to do an act whereas the older form was a right to recover enforceable by legal process of execution at law. However, it does not seem to have been suggested so far that a plaintiff would be able to enforce a judgment in Form 58 by an order for attachment.

3 *Mango Boulevard Pty Ltd & Anor v Mio Art Pty Ltd & Ors* [2016] QCA 148.

made by way of security for an advance by TVM to the former trustee of $2,325,000. Also on 9 June 2005, the former trustee and TVM gave notice of the assignment to the first defendant.

[10] On 14 September 2005, the former trustee and TVM entered into a deed of amendment. The amendment appears to have been intended to limit the extent or amount of the assignment of the former trustee's right title and interests under the Shares Sale Agreement.

[11] On 12 April 2006, TVM obtained judgment against the former trustee in the sum of $2,050,521.75 together with interest in the sum of $99,492.33 and indemnity costs.

[12] As at 20 April 2016, TVM claims that it was owed $5,909,699.70 by the former trustee and by the second defendant.

[13] Second, on 15 September 2005 the former trustee and the second defendant entered into a contract with Salarypackaging.com.au Pty Ltd. By cl 1 of the contract, the former trustee assigned his right title and interest under the Share Sale Agreement to receive the first $1,000,000 of the amount payable under cl 5 to Salarypackaging.com.au Pty Ltd.

[14] On 14 July 2006, the former trustee and the second defendant gave notice to the first defendant that they had assigned to Earning Pty Ltd ("Earning") the right to receive $2,700,000 out of the money remaining unpaid under the Share Sale Agreement.

[15] On 5 and 8 September 2006 the former trustee and the second defendant issued further notices to the first defendant, in similar terms to the 14 July 2006 notice, except they related to amounts of $550,000 and $430,000 respectively.

[16] On 2 February 2008, ACN 127 567 373 Pty Ltd, ACN 128 854 759 Pty Ltd and ACN 128 854 768 Pty Ltd ("Associates") purported to give notice to the first defendant of their entitlements as assignees to amounts of $1,000,000, $5,591,926 and $1,940,245 respectively from monies due under the terms of the Share Sale Agreement.

[17] Third, on 1 August 2006, the former trustee and the second defendant gave notice to the first defendant that they had assigned to Robert Winny the right to receive $125,000 out of the money remaining unpaid under the Share Sale Agreement.

[18] Fourth, on 4 June 2015, Lillas & Loel Lawyers asserted a lien over any judgment sum payable by the first and fourth defendant to the plaintiff in this proceeding. Lillas & Loel by letter of that date stated:

> "To the extent that [the judgment] sum exceeds any claim for a set-off, our firm claims a fruits of litigation lien having previously acted for Mio Art Pty Ltd against Mango Boulevard Pty Ltd, on that sum up to $260,437.49 in assessed costs owing to our firm plus post-judgment interest of $138,759.67 from 20 October 2009 to today (for a grand total of $399,197.16)."

[19] Fifth, on 23 November 2007 the plaintiff assigned to Standard Builders Pty Ltd up to $1,000,000 (plus premium) of the plaintiff's right title and interest in payments due to the plaintiff under the Share Sale Agreement.

[20] On 16 January 2011 Standard Builders Pty Ltd was deregistered.

[21] Sixth, by statutory declaration dated 14 September 2006 the former trustee referred to an assignment to Compensation Finance Pty Ltd dated 24 June 2005.

[22] Thus, there is a range of persons who have potential claims against the first and fourth defendants in respect of sums payable under the Share Sale Agreement to the plaintiff. The first and fourth defendants gave notice of this application to interplead to each of those potential claimants.

[23] The essence of the application is that the first and fourth defendants should be permitted to interplead in answer to the judgment debt payable by them to the plaintiff in relation to adverse claims by the possible assignees of the debt or parts of the debt owing under the Share Sale Agreement and the claim to a fruits of litigation lien asserted by Lillas & Loel.

[24] The application is made pursuant to r 949 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") and s 19 of the *Civil Proceedings Act* 2011 (Qld) ("CPA").

[25] Rule 949 of the UCPR provides:

> "**949 Stakeholder's interpleader**
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> (1) A person may apply for an interpleader order if the person is under a liability for property that is, or the person expects may become, the subject of adverse claims by 2 or more other persons.
> (2) If a stakeholder is sued, an application under subrule (1) may be made in the proceeding.
> (3) If neither the stakeholder nor the claimants are parties to a proceeding, interpleader relief may be sought by application.
> (4) An application under this rule must be served on each of the competing claimants."

[26] Section 19 of the CPA provides:

> "**19 Interpleader orders**
>
> (1) On an application for relief by way of interpleader, the court may do 1 or more of the following—
> (a) if a proceeding is pending against the applicant—order a claimant be included as a defendant in the proceeding in addition to or in substitution for the applicant;
> (b) order a question between the claimants be stated and tried and direct which of the claimants is to be the plaintiff and which the defendant and give any necessary directions for the trial;
> (c) order the applicant to pay or transfer all or part of the property in dispute or the proceeds of sale into court or otherwise dispose of the property or proceeds of sale;
> (d) if a claimant claims to be entitled to any of the property by way of security for a debt—make orders for the sale

> of all or part of the property and for the application of the proceeds of sale;
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> (e) decide in a summary way a question of law or fact arising on the application;
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> (f) make an order it considers appropriate, including an order finally disposing of all issues arising in the proceeding.
>
> (2) If—
>
> (a) an application for relief by way of interpleader is made; and
>
> (b) several proceedings are pending in the court for or about any or all of the property in dispute; and
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> (c) the court makes an order in any 2 or more of the proceedings;
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> the order is binding on all the parties to all the proceedings to which it applies."

[27] Interpleader was originally an equitable remedy, instituted by bill of interpleader under the practice of the Court of Chancery, where a person "not knowing to which of the claimants he ought of right to render a debt", obtained an interpleader order for the purpose of causing the rival claimants to interplead.[4]

[28] The equitable procedure was made the subject of statute so as to be available in courts of common law beginning with the *Interpleader Act* 1831 (Eng), ("1831 Act"), followed by the *Common Law Procedure Act* 1860 (Eng) and the *Judicature Acts* of 1873 and 1875.

[29] The relevant practice in what became the High Court of Justice of England and Wales was consolidated[5] into a single procedure by O 57 of the *Rules of the Supreme Court* 1883 (Eng). Order 57 r 1 provided that relief by way of an interpleader may be granted where a person seeking relief (called the applicant) was under a liability for any debt, money, goods or chattels for or in respect of which he was, or expected to be, sued by two or more parties (called the claimants) making adverse claims thereto.

[30] Corresponding statutes were introduced in Queensland, in the form of the *Interdict Act* 1867 (Qld), ss 22-31 and the *Judicature Act* 1876 (Qld), s 5(6) and rules of court in the form of *Rules of the Supreme Court* 1900 (Qld), O 59 rr 1-19.

[31] So far as the statutory basis is concerned, s 19 of the CPA and s 199(1) of the *Property Law Act* 1974 (Qld) ("PLA") now replace the repealed provisions of the *Interdict Act* 1867 (Qld) and *Judicature Act* 1876 (Qld). The former rules of court were repealed and replaced by r 949 of the UCPR as introduced in 1999.

[32] Within the meaning of r 949(1), "property" is defined in r 948 to mean "a debt or personal property subject to a claim under [chapter 21]". Such a debt is one capable of assignment at law or in equity.

[33] A legal assignment of a debt may be made under s 199(1) of the PLA. That section is the modern replacement of s 5(6) of the *Judicature Act* 1876 (Qld). Under s 199(2)

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4 *Daniels Chancery Practice*, 7th ed, (1901), Stevens and Sons Limited, Vol 2, p 1275.

5 The *Statute Law Revision Act* 1883 (Eng) repealed the 1831 Act and the relevant provisions of the *Common Law Procedure Act* 1860 (Eng), except s 17.

of the PLA a debtor may call upon disputing claimants in cases of disputed statutory assignments of debts or any other opposing or conflicting claims to such debt to interplead or to pay into court under and in conformity with the provisions of the Acts relating to the relief of trustees. For the relevant provision relating to the relief of trustees, s 102(1) of the *Trusts Act* 1973 (Qld) permits a trustee to pay into court so that the payment then shall subject to the rules of court and be dealt with according to the orders of the court.

[34] The unusual feature in the present case is that the plaintiff's claim against the first and fourth defendants has proceeded to judgment for a money sum payable by them to the plaintiff. That is an existing final judgment of the court.

[35] The form of order sought by the first and fourth defendants is as follows:

> (1) That, pursuant to rule 949 of the *Uniform Civil Procedure Rules* 1999 (Qld), and / or section 19 of the *Civil Proceedings Act* 2011 (Qld), the first and fourth defendants' payment into Court of the sum of $643,019.96 on 5 August 2015 be in full and final satisfaction of the judgment against them for that amount, in favour of the plaintiff, dated 5 August 2015.
> (2) That the sum of $643,019.96 paid into Court on 5 August 2015 by the first and fourth defendants, plus any accretions thereto, be held in Court until further order.
> (3) Such other orders as the Court deems necessary.

[36] None of the possible assignees who appeared, or Lillas & Loel, opposes the order sought by the first and fourth defendants. In particular, if an interpleader order is made, TVM and Lillas & Loel wish to be made parties to the interpleader proceeding as claimants. None of the other parties has made an application to be added as a claimant, although Mr Winny in correspondence at least foreshadowed that was his intention. In the end, however, he did not appear at the hearing of the application.

[37] The plaintiff opposes any interpleader order. It raises a number of discrete and inter-related grounds.

[38] First, the plaintiff submits that the application for an interpleader order is made too late. It submits that if the first and fourth defendants wished to interplead, they should have done so before the 5 August 2015 judgment. The plaintiff submits that having allowed the proceeding to go to judgment without applying for and obtaining such an order, the first and fourth defendants cannot now undermine the judgment against them in favour of the plaintiff by an interpleader order which would potentially contradict the final judgment made by the court without setting it aside.

[39] There is nothing in either s 19 of the CPA or r 949 of the UCPR that expressly provides whether or not an application for an interpleader order may be made after judgment. It is appropriate to begin with the text of those provisions.

[40] The order which may be made under r 949 is an "interpleader order". That term is defined in r 948 to mean an order under s 19 of the CPA. Section 19(1)(a) refers to including a defendant in a proceeding "pending" against the applicant. That does not apply, because the existing proceeding by the plaintiff is not pending against the first

and fourth defendants in relation to the amount of the 5 August 2015 judgment. The plaintiff has final judgment against each of them for that amount.

[41] The first and fourth defendants did not rely upon s 19(b) to 19(e). They relied on the court's power "on an application for relief by way of interpleader" under s 19(f) to make an order it considers appropriate. However, if the application is not for an order under any of the prior paras, it is necessary to ascertain whether the order sought is an order on an application for relief by way of interpleader.

[42] It is not necessary to go further back than the 1831 Act to answer that question. Section 1 provided that upon an application made by any defendant sued in any action of assumpsit or debt, if the defendant "does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same" the court could make a wide range of identified orders to settle the dispute as between the plaintiff, defendant and the third parties. The substance of the orders that might be made was that further proceedings in the action would be stayed against the defendant and that the named third parties to the application ("claimants") would be restrained from commencing proceedings in respect of the subject matter against the defendant.[6]

[43] There were a number of limits to the court's power to make such orders under the 1831 Act. One was that the application had to be made before plea (defence) by the defendant. That requirement was relaxed in later rules to any time after service of the writ of summons,[7] but no express power was given to bring the application after judgment.

[44] But most importantly, for present purposes, under the 1831 Act the defendant was required to allege that he or she made no claim to any interest in the subject of the suit. Put simply, it was not then possible for a defendant to defend and interplead at the same time as to the same debt or part of a debt claimed by the plaintiff against the defendant. The affidavits to be made in support of an application to interplead reflected that requirement.[8]

[45] The plaintiff relies on *The Law and Practice of Interpleader in the High Court and County Courts*,[9] where it is stated that:

> "Where a defendant has permitted two claims for the same debt to ripen into separate judgments he will be refused relief. If it were otherwise, an interpleader issue would become in effect an appeal from a judgment already recovered…
>
> On the other hand, where the action was confined to the mere quantum of the liability, a defendant, after a verdict against him at law, was allowed to maintain a bill of interpleader."

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6 M Cababe, *Interpleader*, 3rd ed, (1900) Sweet & Maxwell, App C pp 170 and 175.
7 For example, *Rules of the Supreme Court* 1900 (Qld), O 59 r 6.
8 M Cababe, *Interpleader*, 3rd ed, (1900) Sweet & Maxwell, 1900, App C p 171.
9 SPJ Merlin, *The Law and Practice of Interpleader in the High Court and County Courts*, (1907) Butterworth & Co, p 28.

[46] The cases cited by the author in support of those propositions were *Larabrie v Brown*[10] and *Hamilton v Marks*.[11] They were decided before the English predecessors to the *Judicature Act* 1876 (Qld) were passed. In other words, they were decided before the creation of the High Court of Justice of England and Wales where law and equity were administered in the one court.

[47] In *Larabrie*, a question arose whether D had bought coals from P or T. P had physically supplied the coals. P recovered judgment for the price of the coals against D. D sought to interplead in Chancery for the amount of the judgment on the ground that he was liable to T rather than P on the footing that there were back to back sale contracts between P and T and then T and D, so that T claimed the price from D. The application by D for an injunction restraining P from proceeding on the judgment at law was refused. Turner LJ said:

> "The question is whether [D] are debtors at law to [P] and it has been decided at law that they are."[12]

[48] *Hamilton* is a little more complex. In that case D was liable to P upon an insurance policy but the amount of the insured loss suffered by P was disputed. On 16 April 1852, it was ordered that D pay an amount of £700 to P on part of the claim. On 22 April 1852, D filed a bill of interpleader against P and other claimants. On 24 April 1852, it was ordered that D pay the £700 into court and an injunction was granted to restrain proceedings at law. P moved to dissolve the injunction, on the ground that a bill of interpleader filed after judgment in the proceeding at law was too late. However, the application was refused on the ground that the "dispute at law was confined to the quantum of demand, which could only be settled at law."[13]

[49] However, there are other cases and authorities that support the conclusion that it is too late after final judgment on a claim for a debt for the defendant to apply for interpleader relief as against adverse claimants whose claims precede the judgment. For example, the annotations in the *Supreme Court Practice (UK)* to the modern interpleader rule for the High Court of Justice of England and Wales, O 17 r 1,[14] state:

> "A person cannot protect himself by interpleader proceedings against a claim on which the claimant has obtained judgment (*H Stevenson & Son Ltd v Brownell* [1912] 2 Ch 344 … *Randall v Lithgow* (1884) 12 QBD 525)…"[15]

[50] In *Randall*, P recovered judgment against D for a money sum. P thereupon obtained a garnishee order against G for a sum G owed to D. G did not dispute the liability to pay the garnisheed amount to P. After it was ascertained that G owed an amount exceeding the garnisheed amount to D, P pressed G for payment under the garnishee order. G sought interplead the amount that it owed to D on the basis that D had assigned to T the amount of the debt G owed to him. G did not attempt to set aside the garnishee order. Williams J said:

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10 (1857) 1 De G & J 204.
11 (1852) 5 De G & Sm 638.
12 (1857) 1 De G & J 204, 207.
13 (1852) 5 De G & Sm 638, 643.
14 Note that this has now been repealed by the *Civil Procedure (Amendment) Rules* 2014 (UK) and replaced by a new Pt 86 entitled "Stakeholder Claims and Applications".
15 *Civil Procedure*, (2010) Sweet and Maxwell, Vol 1 p 2114.

> "Then the question arises whether [G] being pressed with these rival claims are entitled to be relieved from their difficulty by the process of interpleader.
>
> We think that they are not. The plaintiff is in the position of a judgment creditor of [G] … and unless that judgment or order has been satisfied in whole or in part he is entitled to issue execution against [G] for that amount."[16]

[51] In *H Stevenson & Son*, on 22 February 1912, P recovered judgment for a money sum against D. The basis of the judgment was a claim to royalties on product sales. On 28 February 1912, D issued an interpleader summons to P and T. An interpleader order was made at first instance. On appeal, D contended that the limitation in time upon an interpleader order under the 1831 Act was altered by the rule of court that permitted service of the application for interpleader relief at any time after service of the writ. Cozens Hardy MR referred to the provision in O 17 r 1 of the English rule of court that "the person seeking [interpleader] relief is under liability for any debt … for or in respect of which he is, or expects to be, sued by two or more parties…" and continued:

> "[D] are not being sued by two persons; they were being sued by one and there was a threat that they might be sued by another. There are not two pending proceedings at all. One matter has ripened into a judgment, and there is nothing whatever to which this rule will apply."[17]

[52] The comparison between O 17 r 1 (then and now) and r 949, as set out above, is close.

[53] The plaintiff submits that the debt that was owing by the first defendant and the fourth defendant under the Share Sale Agreement has merged in the judgment of 5 August 2015,[18] at least in part.

[54] Against the proposition that it is too late to apply for an interpleader order after one of the claims has ripened into judgment, the first and fourth defendants rely on *Jones v Thomas*[19] and *Goldberg v Beckett*.[20] However, in part, both of those cases concerned an interpleader order made after assignment of a judgment debt, not an interpleader order for a debt assigned before judgment where the application for an interpleader order was made after judgment. That is not the same case as the case of an assignment of a debt which has not passed into judgment. I leave to one side the question of the lien claimed by the solicitor for the plaintiff in *Jones* until I deal with the position of Lillas & Loel.

[55] If it is accepted (as in my view it must be) that an essential feature of a claim for interpleader relief in a case like the present is that the applicant for that relief makes no claim to the subject matter of the proceeding, it is difficult to escape the conclusion

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16 *Randall v Lithgow* (1884) 12 QBD 525, 529.
17 *H Stevenson & Son Ltd v Brownell* [1912] 2 Ch 344, 347.
18 *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502, 510.
19 (1854) 2 Sm & G 186.
20 [2015] NSWSC 1966.

that a defendant cannot at the same time both defend the proceeding brought against him or her by the plaintiff and interplead.[21]

[56] Where a defendant's defence is only to part of the claim, he or she may defend as to the excess and interplead as to the admitted amount. That is what was done in *Reading v School Board for London*.[22] The defendant in that case had obtained an order permitting it to interplead as to part of the claimed debt while defending as to the balance. The plaintiff on appeal submitted there was no power to make such an interpleader order under the interpleader rules in O 57 of the *Rules of the Supreme Court* 1883 (Eng). The court rejected that proposition. Wills J said:

> "… I cannot understand why relief should not be granted as to [part of the debt] and the claim against the defendants satisfied as to that amount because another [amount] is said to be due from them; to so hold would be to inflict unnecessary injustice." [23]

[57] In my view, these cases support the plaintiff's contention that it is too late for the defendant in the present case to apply for an interpleader order when the plaintiff's claim has passed into judgment, at least as against the assignees whose assignments, and notice to the defendant of their assignments, antedated the judgment.

[58] However, there is an unattractive feature of that conclusion. It is by no means unlikely that a defendant may have a reasonable defence to part of a plaintiff's claim but be subject to adverse claims from both the plaintiff and a third party claimant at the same time. There does not seem to be any reason why a defendant should be forced into electing between defending a possibly excessive claim and interpleading where multiple claimants allege entitlement to payment to the exclusion of one another.

[59] That seems to have been the point of *Hamilton* although that case does not seem to have been subsequently followed. Fortunately, in my view, under the statutes and rules of court that have regulated procedure since the *Judicature Acts* were passed, a defendant faced with this problem is not powerless. Although the defendant cannot interplead, there is no reason in principle I can see why it would be impossible for the defendant to join the other adverse claimants to the proceeding started against it by the plaintiff so that all questions of liability will be resolved in the one proceeding, under s 7 of the CPA.

[60] For present purposes, the point is that in a single court administering law and equity, and with wide statutory power to grant declaratory relief as to the rights of the parties inter se, the appropriate procedure for a defendant who wishes to defend but is also subject to adverse claims by other claimants is to join the other potential claimants as parties to the proceeding so that they will be bound by the outcome. However, since that point was not argued in the present case in any detail, I refrain from expanding upon it further.

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21 I note that the requirement of disclaiming interest in the subject matter has been discussed in American commentary: see, eg, G C Hazard Jr and M Moskovitz, "An Historical and Critical Analysis of Interpleader" (1964) 52 *California Law Review* 706, 744-749; Z Chafee Jr, "The Federal Interpleader Act of 1936" (1936) 45 *Yale Law Journal* 963, 978-980.

22 (1886) 16 QBD 686.

23 (1886) 16 QBD 686, 690.

[61] Subject to the potential claim of Lillas & Loel, in my view, the plaintiff's submission that it is too late to apply for an interpleader order in the present case should be accepted.

[62] As to Lillas & Loel, the claim of a solicitor to a lien on the fruits of litigation may be in a different category. That is because the lien is over the fruits, which implies the existence of a judgment or at least a settlement sum agreed to be paid. It seems that both *Jones v Thomas* and *Goldberg v Beckett* possibly support that an interpleader order or similar may be made where a defendant receives notice of a solicitor's claim to such a lien.

[63] However that may be, in my view it is not necessary to consider this point further. That is because the species of lien claimed is one where the solicitor is acting or has acted for the party in the litigation that results in the judgment. But that is not the present case; Lillas & Loel have not been the solicitors for the plaintiff in the present proceeding at any stage.

[64] It follows, in my view, that the application must be dismissed.

[65] In the circumstances, it is unnecessary to consider any of the other grounds raised by the plaintiff in opposition to the application for an interpleader order.