DISTRICT COURT OF QUEENSLAND

CITATION:	*Schebella v Schebella & Ors* [2020] QDC 74
PARTIES:	**KEVIN CHARLES SCHEBELLA** (applicant / plaintiff) **v** **MARK ANDREW SCHEBELLA** (first respondent / first defendant) **and** **KAREN JANE SCHEBELLA** (second respondent / second defendant) **and** **BLACSKY PTY LTD** **(ACN 079 291 919)** **(Deregistered) as Trustee of the Schebella Family Trust** (third defendant)
FILE NO/S:	D121/2019
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Maroochydore District Court
DELIVERED ON:	8 May 2020
DELIVERED AT:	Maroochydore District Court
HEARING DATE:	27 February 2020
JUDGE:	Long SC, DCJ
ORDER:	**1. Within 28 days, the first and/or second defendants are to disclose to the plaintiff the documents described as follows:** **(a) those relating to and evidencing the transfer of the property at 8 Verdon Street, Golden Beach, Queensland, on or about 22 August 2019; and** **(b) unredacted copies of the following bank statements:** **(i) Westpac Bank account No. 17-7219, for the periods from 18 November 2004 to 17 December 2004 and 18 July 2007 to 18 January 2010; and** **(ii) Westpac Bank account No 39-4656, for the period 22 June 2012 to 13**

November 2015.

2. **In the absence of disclosure of the documents identified at subparagraph 1(b) above, the first and second defendants are to file and serve an affidavit stating the basis upon which any specified document does not exist.**
3. **The first and second defendants are to pay the plaintiff's costs of this application, up to and including 24 January 2020 and thereafter, each party is to bear their own costs.**

CATCHWORDS: PROCEDURE – DISCLOSURE – DISCLOSURE UNDER UCPR r 223 – Where the plaintiff seeks disclosure by the first and second defendants of financial statements, financial documents, company records, documents evidencing the sale of property, and unredacted bank statements – Whether "special circumstances and the interests of justice" require disclosure – Whether, as a matter of objective likelihood, the first and second defendants have the documents within their possession or control – Facilitating the just and expeditious resolution of issues in the proceeding

PROCEDURE – DISCLOSURE – DISCLOSURE UNDER UCPR r 211 – Where the first and second defendants previously disclosed redacted bank statements – Where the plaintiff seeks disclosure of unredacted bank statements – Where it is contended that unredacted bank statements are available to the first and second defendants from the banks presently holding them – Where the general principle provides for disclosure of the whole of any document containing relevant information – Whether, pursuant to the debtor/creditor relationship, the bank statements held by the bank are within the possession or control of the first and second defendants

PROCEDURE – DISCLOSURE – RELEVANCE – Whether documents evidencing the sale of real property by the first and second defendants to a third party are directly relevant to any allegation in issue – Likelihood of facilitating the just and expeditious resolution of the real issues

PROCEDURE – COSTS – DISCRETION TO AWARD COSTS – Whether costs should follow the event – Whether there should be departure from the general rule having regard to mixed success of each party upon issues raised in the application

LEGISLATION: *Corporations Act* 2001 ss 197, 601AD

Trusts Act 1973 s 113

Uniform Civil Procedure Rules 1999 rr 5, 211, 223, 225, 681

CASES: *Bowenbrae Pty Ltd & Anor v Flying Fighters Maintenance and Restoration* [2010] QDC 347

Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No 6) [2020] FCA 64

Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd [2001] QSC 259

Erskine v McDowell [2001] QDC 192

Foley v Hill (1848) 9 ER 1002

Gibson v The Minister for Finance, Natural Resources and the Arts [2012] QSC 12

Menkins v Wintour [2007] 2 Qd R 40

Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd [2001] 1 Qd R 276

Taylor v Santos Ltd (1998) 71 SASR 434

Xstrata Queensland Ltd v Santos Ltd [2005] QSC 323

COUNSEL: K.C.Kelso for the plaintiff

SJ.Tan for the first and second defendants

SOLICITORS: Black Bear Legal for the plaintiff

Tucker & Cowen Solicitors for the first and second defendants

Introduction

[1] The parties in this matter are at issue in respect of the disclosure obligations of the first and second defendants in connection with a claim filed on 8 August 2019.

[2] In that claim, the plaintiff claims as against the first and second defendants, on a further or alternative basis:

(a) $225,000 as a debt due and owing;

(b) damages in the amount of $225,000 for breach of loan deed;

(c) damages in the amount of $225,000 for money had and received;

(d) an order that the first and second defendant indemnify Blacsky Pty Ltd (ACN 079 291 919) in respect of the monies loaned by the plaintiff;

(e) an order pursuant to s 197 of the *Corporations Act* 2001 that the first and second defendants indemnify Blacsky Pty Ltd (ACN 079 291 919) in respect of monies loaned by the plaintiff;

(f) an order pursuant to s 113 of the *Trusts Act* 1973 that the first and second defendants indemnify Blacsky Pty Ltd (ACN 079 291 919) in respect of the monies loaned by the plaintiff;

(g) an order that the first and second defendants set aside a fund sufficient to meet such claims.

Further or alternatively, the claims against the third defendant are, on a further or alternative basis:

(a) $225,000 as a debt due and owing;

(b) damages in the amount of $225,000 for breach of loan deed;

(c) damages in the amount of $225,000 for money had and received.

Against all defendants, interest is claimed pursuant to the *Civil Proceedings Act* 2011 and also costs.

[3] The Statement of Claim proceeds upon the basis that the plaintiff is the father of the first defendant and father-in-law of the second defendant ("the respondents") and that at all material times, the third defendant carried on business as the corporate trustee of the Schebella Family Trust, with the respondents, periodically and respectively, its directors, until deregistration on 17 July 2019. At the epicentre of the claims are the allegations that, in connection with the occupation by the plaintiff and his wife of real property owned by the third defendant from July 2004, and by 9

August 2007, a total amount of $225,000 had been loaned to the third defendant by them, pursuant to a loan deed, which loan has not been repaid (with or without accrued interest) upon demand made of each defendant, on or about 14 May 2019.

[4] Contextually to the claims for relief, it is pleaded that:

(a) by the payment and receipt of the monies loaned, the plaintiff obtained an equitable interest in the property. Although it is not pleaded as to how that occurred and neither is this assertion explained to underpin or be related to any of the claimed relief;

(b) subsequently, the obligations of the third defendant to the plaintiff under the loan deed, were assigned to the first and second defendants and, on 8 January 2010 the real property was transferred to the first and second defendants, as joint tenants, for $430,000; and

(c) on 17 July 2019, the third defendant was deregistered, upon application made by the second defendant for voluntary deregistration, which included declarations that the third defendant had no outstanding liabilities and that all members agreed to deregistration.

[5] Accordingly, the claim for relief is premised upon contentions that the respondents:

(a) remain indebted to the plaintiff and are in breach of the obligation to repay $225,000 plus accrued interest; and

(b) remain unjustly enriched to that extent.

[6] In the context of further contentions that the respondents are liable to the plaintiff for the monies loaned and estopped from denying that they have taken over the rights and obligations of the third defendant under the loan deed, the further pleading is:

"45. In the premises:

(a) the first and second defendant have an equitable obligation to indemnify Blacsky in respect of the Monies Loaned and any accrued interest; and

(b) the plaintiff is entitled to the indemnity owed to Blacsky by the first and second defendants.

46. Further or alternatively:

(a) the first and second defendant have an obligation pursuant to Section 113 of the *Trusts Act* 1973 to indemnify Blacsky; and

(b) the plaintiff is entitled to the indemnity owed to Blacsky by the first and second defendants.

47. Further or alternatively:

(a) the first and second defendant are liable to compensate the plaintiff pursuant to section 197 of the *Corporations Act* 2001;

(b) the plaintiff is entitled to the indemnity owed by the first and second defendants pursuant to section 197 of the *Corporations Act* 2001."

[7] Only the respondents have filed a notice of intention to defend. In their joint Defence, filed 30 September 2019, they substantially admit the pleaded arrangements in respect of the acquisition and occupancy of the property and the subsequent transfer of ownership to the first and second defendants, as well as the pleaded circumstances of the deregistration of the third defendant, including the pleaded declarations made by the second defendant in making the application for voluntary deregistration. However and in the last respect, it is denied that the second defendant made any declaration on behalf of the first defendant. Otherwise, it may be noted that:

(a) whilst there are issues raised as to the precise sequence of payments, it is admitted that a total sum of $225,000 was paid (but not "advanced") by the plaintiff and his wife to the third defendant, by 9 August 2007, and that some records (noted as produced by the plaintiff pursuant to r 222 of the *Uniform Civil Procedure Rules* ("UCPR") are in the nature of documents styled "investment account" maintained by the third defendant and which contain records, "on its face", of amounts of interest paid on sums paid by the plaintiff and his wife;

(b) whilst denying that the document pleaded by the plaintiff as the "loan deed" is either a deed or a loan agreement, otherwise plead that "the defendants will rely at trial on the 'alleged deed' for its full terms, true meaning and effect" and set out, in the Defence, clauses 1

through 10 of that document, some of which expressly refer to the prospect of loans by the plaintiff and his wife and the payment of interest in respect of any such loans. For example, clause 10 is set out as follows:

> "Blacsky will keep and maintain a record of all financial transactions applying in respect of the property. Those records will include particulars of monies loaned by Kevin and Bernice, rentals paid by Kevin and Bernice, interest accrued on the monies from time to time calculated in accordance with this agreement and monies dispersed, whether by way of return of loan monies capital and/or interest by Blacsky to Kevin and Bernice. Blacsky will provide a quarterly statement (in arrears) to Kevin and Bernice which unless it contains a manifest error and is not objected to by Kevin and Bernice within thirty (30) days of issue shall be regarded as prima facie conclusive evidence of the financial records for the previous quarter."

(c) there are pleaded denials:

(i) of the allegation as to assignment of the third defendant's obligations and it is expressly pleaded that "Blacsky did not assign any obligations to the plaintiff or to the first and second defendants as alleged";

(ii) that the first and second defendants are in breach of the loan deed, as they are not parties to the alleged deed and have not breached it;

(iii) that the first and second defendants remain unjustly enriched by the payments made by the plaintiff as they "have at no time been under any obligation to pay or repay any monies to the plaintiff as alleged";

(iv) that any of the premises pleaded by the plaintiff give rise to any cause of action or estoppel against the first and second defendants or prevent their denials "that they have taken over the rights and obligations of Blacsky under the loan deed" or "that the first and second defendants are not liable to the plaintiff in respect of the alleged 'loan monies'"; and

(d) in the Defence there are frequent references to assertions of vagueness, irrelevance and/or lack of particularity of allegation in the Statement of Claim, "so as to be liable to be struck out", including in

the following pleading in response to paragraph 46 of the Statement of Claim:

> "46. As to paragraph 46 of the Statement of Claim, the Defendants:-
>
> (a) as to paragraph 46(a) deny the allegations contained therein and believe the same to be untrue because:-
>
> (i) Section 113 of the *Trusts Act* 1973 provides for remedies to be available by a person who has suffered loss by a wrongful distribution of trust property by a trustee;
>
> (ii) it is not alleged by the Plaintiff in this proceeding (and it is not the case) that the First and Second Defendants were at any material time trustees of any property the subject of this proceeding;
>
> (iii) it is not alleged by the Plaintiff in this proceeding (and it is not the case) that the First and Second Defendants were at any material time recipients of a wrongful distribution of any trust property the subject of this proceeding;
>
> (iv) of the facts, matters, and circumstances pleaded in paragraph 6 to 45 of this Defence;
>
> (v) allegations are otherwise vague and so lacking in particularity as to likely prejudice a fair trial of the action, and thus liable to be struck out;
>
> (b) as to paragraph 46(b) deny as untrue the allegations contained therein because there is no indemnity owed to Blacsky by the First and Second Defendants and by reason of the facts, matters, and circumstances pleaded in paragraph 46(a) of this Defence"; and

(e) in response to the specific bases identified in paragraphs 45 and 47 of the Statement of Claim, there is a pleaded denial; because, in the case of paragraph 45, "belief that the same are untrue or unable to be admitted" and the absence of any equitable obligation and any identified foundation for the alleged equitable obligation; and in respect of paragraph 47, due to the defendants being under no obligation to compensate the plaintiff pursuant to section 197 of the *Corporations Act* 2001 and because of "the facts, matters and circumstances" otherwise pleaded in the defence, and there is also a

notation that the allegations are "otherwise vague and so lacking in particularity as to likely prejudice a fair trial of the action, and thus liable to be struck out".

The Application

[8] It is in that context, that the application which remains before this court, was filed on 20 December 2019, seeking orders pursuant to *UCPR* 223 and 225(2)(c) that "the first and second defendants provide their list of documents (pursuant to R 214) and copies of such documents mentioned therein, within seven (7) days". That occurred in the context of the following course of events:

(a) on 16 December 2019 and after correspondence between the solicitors for the parties, which had commenced on 5 November 2019,[1] a notice was served on the respondents pursuant to *UCPR* 444 and in respect of the applicant's complaint that their list of documents had not been delivered in accordance with *UCPR* 214;[2] and

(b) notwithstanding that on 19 December 2019, the solicitors for the respondents, in a communication pursuant to *UCPR* 445, had proposed to provide the list by 23 January 2020 and otherwise noted that they were late in doing so, due to being "preoccupied dealing with the serious illness of a close dear friend who has been in hospital for an extended period" and because "some aspects of the Proceedings concern events which occurred more than 15 years ago and our clients are still reviewing documents which they have had to obtain from storage facilities".[3]

[9] By the return date of the application, on 24 January 2020, the respondents had, on 21 January 2020, delivered a list of documents and an electronic copy of all the documents so disclosed.[4] However and on 24 January 2020, the applicant pressed the hearing of the application, seeking orders of a similar nature as sought in the application, on the basis of dissatisfaction as to the extent of disclosure by the respondents. In particular and in response to the open offer of the respondents

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1 Affidavit of MJ Turner, filed 20/12/19 at [4] and MJT1.
2 Ibid at [12] and MJT5.
3 Ibid at [14] and MJT6.
4 Affidavit BS Nearhos, filed 24/1/20 at [19]-[20] and BSN1 at pp 32-41.

(available for acceptance by 4.00pm on 22 January 2020) that the application be dismissed by consent, with no order as to costs,[5] the solicitors for the applicant indicated, by email on 21 January 2020, the remaining concerns that:

(a) apart from some previously disclosed documents the remainder "are either 'part' documents or have been redacted";

(b) "it appears that the only matters addressed by your client's disclosure are in relation to dates upon which payments were made by our client";

(c) in the writer's view, "there remains extensive documentation that your clients ought reasonably possess or control that would be relevant to the issues".[6]

The response was an email from the respondents' solicitors simply stating:

> "We are instructed that our clients have complied with their duty of disclosure."

[10] In these circumstances and on the state of the evidence and submissions then before the Court, the following order was made, on 24 January 2020:

> "1. Pursuant to r 223 of the *Uniform Civil Procedure Rules* 1999, the First and Second Defendants, on or before 7 February 2020, must:-
>
> (a) provide complete and unredacted disclosure of the documents previously disclosed by the first and second defendant and contained at Exhibit 'MJT2' of the second affidavit of Michael John Turner affirmed 24 January 2020;
>
> (b) deliver a list of documents pursuant to r 216 of the *Uniform Civil Procedure Rules* 1999 of any documents to which the First and Second Defendants have a duty to disclose pursuant to r 211 of the *Uniform Civil Procedure Rules* 1999, including, any documents within the following classes of documents:
>
> (i) the financial transactions related to the property in dispute;
>
> (ii) the investment accounts produced by the Defendants;
>
> (iii) the asset position of the Third Defendant;
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> (iv) the distributions of trust property by the Third Defendant;

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5 Ibid at [21] and BSN1 at pp 42-44.

6 Ibid at [22] and BSN1 at p 45.

(v) emails or other written correspondence between the parties;
(vi) sale documents related to the property in dispute;
(vii) written instructions provided by the Plaintiff to any of the Defendants;
(viii) records of meetings between the Parties;
(ix) bank records related to the moneys in dispute;
(x) any written deeds, agreements or the like between the Parties related to the property in dispute and/or the moneys in dispute;

(c) in the absence of disclosure of the documents identified at paragraph (a) and (b) above, file and serve an affidavit stating:-
(i) the basis for the non-disclosure;
(ii) whether the specified documents or classes of documents does not exist or has a never existed; and/or
(iii) where necessary, the circumstances in which they ceased to exist or passed out of the possession or control of each of the Defendants; and/or
(iv) where necessary, the identity of any non-party that may possess or control such documents."

Otherwise the application was adjourned to 27 February 2020, with costs reserved.

[11] The underlying basis for the order made on 24 January 2020, in terms of the then apparent objective likelihood of each of the matters identified in *UCPR* 223(4)(b), was confirmed by 27 February 2020. As noted in the further written submissions of the plaintiff, by then the respondents had produced some additional documents.[7] They had each also filed an affidavit,[8] attesting to compliance with their duty of disclosure and seeking to explain why other documentation which may have been within their past possession and control, was no longer so. This included what had, notably, not been previously explained as to the disclosure of only the redacted copies of documents, in terms of them being the only copies remaining in their possession; those documents having been so redacted for past provision, in that form, to the plaintiff. Whilst it may have been expected that the plaintiff would have been aware of the earlier provision of such redacted documentation, the same may not be true in respect of what was said to remain in the possession and control of the respondents.

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7 See Further Written Submissions of the Plaintiff, filed 13/03/2020.
8 Affidavit of MA Schebella, filed 10/02/2020; Affidavit of KJW Schebella, filed 10/02/2020.

[12] The plaintiff remained dissatisfied with such explanations and position, and remained so after cross-examination of both respondents upon their affidavit, on 27 February 2020. Accordingly, the plaintiff was directed to provide a further written submission to succinctly identify the basis of "any objective likelihood that the duty to disclose has not been complied with and identifying precisely the document or class of documents" to which any such claim is made. And the respondents were given an opportunity to respond, in further written submissions.

Discussion

[13] On a review of the contentions engaged in those submissions and the evidence before the Court, except in two respects, it should be concluded that the plaintiff has not established any sufficient basis for any further or re-iterated order pursuant to *UCPR* 223(4)(b), as sought in paragraph [36] of the further written submissions, as follows:

> "(a) within 14 days, the First and/or Second Defendant produce the class of documents set out within Schedule A to these further submissions, comprising:
>
> (i) A – Investment Accounts Numbered 1, 3, and 9 produced by the Third Defendant.
>
> (ii) B – Financial Documents related to and evidencing the First, Second or Third Defendants' use of the $25,000 paid to the Third Defendant.
>
> (iii) C – Company Records of Blacsky Pty Ltd and records related [sic] the Schebella Family Trust.
>
> (iv) D – Property Sale Documents related to the sale between the Third Defendant and First and Second Defendant for 8 Verdon Street, Golden Beach, Queensland.
>
> (v) E – Property Sale Documents related to the sale between the First and Second Defendant and a third party for 8 Verdon Street, Golden Beach, Queensland.
>
> (vi) F – Unredacted bank statements previously disclosed.[9]
>
> (b) In the absence of disclosure of the documents identified at sub-paragraph (a) above, file and serve an affidavit stating:
>
> (i) the basis for the non-disclosure;
>
> (ii) whether the specified documents or classes of documents does not exist or has never existed or the circumstances in which they cease to exist or past out of the possession or control of each of the defendants."

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[9] Note: by error, the original repeats the letter "E", which has been changed, as appears to have been intended, to be "F", in order to avoid subsequent confusion.

[14] In particular and as contended for the respondents, it should be accepted that, except in respect of unredacted copies of the bank statements (identified as category "F") and the property sale documents (identified as category "E"), they have provided all documents, directly relevant to issues raised in the pleadings, which are in their possession or control, including by seeking to ascertain whether any such documents may be now retrieved from past agents, such as any accountants' records.[10] Whilst it may be accepted that the respondents remain responsible for keeping the books of the third defendant for three years after de-registration,[11] apart from adopting a position that they therefore should have such records, there is no concrete contention advanced nor anything identified in the evidence before the Court, to contradict the evidence of the respondents that, except to the extent that has been disclosed, they have not done so, in circumstances where the third defendant has not traded for many years.[12] And leaving aside the documents in the category identified as "E" and relating to the more recent sale of the real property by the respondents to a third party, the other dealings with the real property, as is a focus of the plaintiff's pleading, had all occurred by January 2010.

[15] The appropriate conclusion is that it is not established, as a matter of objective likelihood, that, save in respect of bank statements identified as category "F" and the property transfer documents referred to as category "E", the respondents do have any further such records in their possession or control. Neither would there be, in such circumstances, any perceived utility, having regard to *UCPR* 5 or otherwise,[13] in effectively remaking the order made on 24 January 2020 and particularly as to requiring further explanation by way of affidavit.

[16] As is also correctly pointed out for the respondents, the further submissions for the plaintiff seek to enlarge what had been understood to be the basis upon which further disclosure was sought, and as had been incorporated in the direction made on 27 February 2020 for the further written submissions. That is because of the further contention that *UCPR* 223(4)(a) is "enlivened and special circumstances in the interests of justice require orders be made requiring that:

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10 See Further Written Submissions of First and Second Defendants, filed 20/03/2020, at [14] – [17].
11 S 601AD(5) of the *Corporations Act* 2001 (Cth).
12 The second defendant thought that it had not traded since 2012; T(27/02/20)1-103.45.
13 Cf: *Gibson v The Minister for Finance, Natural Resources and the Arts* [2012] QSC 12 at [9].

(a) Within 14 days, the First and/or Second Defendant is to disclose to the Plaintiff documents in their possession or under their control (including documents of the Third Defendant) that show:

(i) any exercise of the Third Defendant's powers as Trustee of the Schebella Family Trust to distribute, pay, deal with or otherwise transfer any trust property, including, but not limited to:

1. the amounts totalling $175,000 paid by the Plaintiff to the Third Defendant as alleged at paragraph 9(b) of the Defence;

2. the amount of $50,000 paid by the Plaintiff to the Third Defendant as alleged at sub-paragraph 16(a) of the Defence; and

3. the property acquired by the Third Defendant on 5 July 2004, as alleged at paragraph 6 of the Defence.

(b) in the absence of disclosure of the documents identified at sub-paragraph (a) above, file and serve an affidavit stating:

(i) the basis for the non-disclosure; and

(ii) whether the specified documents or classes of documents does not exist or has a(sic) never existed or the circumstances in which they ceased to exist or passed out of the possession or control of each of the defendants."

[17] The identified circumstances contended to engage considerations of special circumstances and the interests of justice are that "the First and Second Defendants otherwise seek to hide behind their decision to de-register the Third Defendant to avoid disclosure because of the involvement of ASIC and the operation of Section 601AD of the *Corporations Act* 2001 (Cth)",[14] and what is contended to be "the narrow approach" of the respondents to their disclosure.[15] Notably, those written submissions do not repeat or amplify an oral submission made on 27 February 2020, and criticized in the respondents' Further Written Submissions as indicative of the "fishing" nature of the applicant's pursuit of disclosure,[16] in the bare prospect that the funds of the third defendant might be now found in some bank account operated by or for that entity.

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14 See Further Written Submissions of the Plaintiff, filed 13/03/2020, at [31], in reference to the Affidavit of MA Schebella, filed 10/2/20 at [76(b)].

15 Ibid at [26].

16 Further Written Submissions for the First and Second Defendants, filed 20/03/2020, at [4(c)].

[18] As has been noted, the tenor of the pleadings is that the third defendant, which has not defended the claim and was not made a party to this application, is de-registered and without assets.[17] And as may be particularly seen from the claim made against the respondents for indemnification of the third defendant for the unmet debt of the third defendant, there appears to be no need to understand how the assets of the third defendant may have been distributed. However a particular focus of the Further Written Submissions for the plaintiff is upon some issues joined in the pleadings, and as to whether the first and second defendants:

(a) have been "….enriched (whether unjustly or otherwise) by any payments made by the plaintiff…."; and
(b) have been "…. recipients of a wrongful distribution of any trust property…"[18]

Whilst, as has been noted, the Defence raises issues as to the efficacy of these pleaded claims, as matters stand they remain in issue on those pleadings.

[19] Nevertheless, the resort to "special circumstances and the interests of justice" cannot change the reality of the conclusion as to the absence of objective likelihood of the respondents having possession or control of any further documents which would be disclosable as being directly relevant to the issues in the pleadings, save for the bank statements and those relating to the recent property transfer. Neither in the course of the hearing on 27 February 2020, nor in the further written submissions, has the plaintiff identified any reason to conclude, contrary to the evidence of the first and second defendants, that they do not have any other documents within their physical possession or control, including any as capable of being retrieved from the records of past agents.

[20] The first exception is in respect of the availability of the bank statements. As is confirmed by the partial extent of disclosure of them, such may be seen as bearing some direct relevance to issues in the pleadings. But in their redacted form there is the objective likelihood of the exclusion of entries which would also be of direct relevance to issues such as the allegation of unjust enrichment.[19] Notably, that partial disclosure is said to be only because of and in respect of such of those

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17 The effect of s 601AD(1) of the *Corporations Act* 2001 (Cth) is that the company ceases to exist, although and pursuant to s 601AD(2): "On deregistration, all the company's property (other than any property held by the company on trust) vests in ASIC" .

18 See Further Written Submissions of the Plaintiff, filed 13/03/2020, at [27] – [28].

19 *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd* [2001] 1 Qd R 276 at 282 – 3; *Xstrata Queensland Ltd v Santos Ltd* [2005] QSC 323 at [45].

records which remain in the possession of the respondents. The general principle is that the whole of any document containing relevant information is disclosable, notwithstanding that it may also contain irrelevant information, and there has been no attempt to engage consideration of the matters noted in *Menkins v Wintour*,[20] which might allow for departure from that general principle.

[21] Particularly in the context of the ongoing obligation of the respondents pursuant to s 601AD(5) of the *Corporations Act*, as to maintenance of the records of the third defendant, it is put in contention that these records are available to the respondents from the banks presently holding such records, in unredacted form. It may be noted that the submissions for the respondents do not endorse or press what may be regarded as the spurious claim in their affidavits, as to concern, due to past occasions of "computer hacking" of the plaintiff's records, that their personal banking details may be obtained by others.[21] However the respondents do submit that such records are not to be regarded as disclosable pursuant to *UCPR* 211(1)(a), as being "in the possession or under the control" of them. That submission is premised upon reference to the following observation of Doyle CJ in *Taylor v Santos Ltd*:[22]

> "… the obligation to discover hinges upon having a right or actual and immediate ability to examine the document. A person does not have that right or actual immediate ability if the person is able to inspect the document only if a third person, who has control of the document, agrees to permit inspection, or agrees to refrain from so exercising that person's control as to prevent inspection."

[22] Difficulty may be seen in the submission which is consequently made:

> "The fact that the son and daughter-in-law have to pay for the bank statements are indicative that they are not in their possession and control. The bank is essentially not agreeing to permit inspection of the bank statements without payment of a presently unknown sum (although given the period of time that the Third Defendant was active prior to its de-registration, it would not be surprising that the amount would be not insignificant."[23]

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20 [2007] 2 Qd R 40 at 42-43.

21 See Affidavit of MA Schebella, filed 20/2/20 at [71] and Affidavit of KJW Schebella, filed 20/2/20, at [72].

22 (1998) 71 SASR 434 at 438, noted to have been cited with approval in *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No 6)* [2020] FCA 64 at [71].

23 Further Written Submissions for the First and Second Defendants, filed 20/03/2020, at [18].

In the first instance, the requirement in *UCPR* 211(1)(a) is disjunctive and it may be seen that the concept of being "under the control" of a party is directed at a wider application than documents which are under such control in the sense of being in the possession of a party.

[23] Neither is it expressly recognised that the observations of Doyle CJ were made in reference to a discovery, or disclosure, obligation couched in terms of "documents that are or have been in its 'possession, custody or power'",[24] nor that they were particularly expressed in consideration of the concept of documents which may be regarded as in the power of a party.[25] That is why as a precursor to the passage which is cited, it was observed:

> "… my view is that the obligation to discover a document is limited to a document that the person in question has the legal power or (I can think of no better expression) actual and immediate ability to inspect, even though the document is the property of or is held by another person."[26]

And shortly after the cited passage, it was further observed:

> "The point I wish to emphasise is that to the extent that the concept of power extends beyond a presently enforceable legal right, it should be held to so extend only when the court can say that the person in question does have the actual immediate ability to inspect the document."[27]

[24] Some examination of the potentially different shades of meaning that may be involved, is to be found in the other decision to which there is express reference: *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No. 6)*:[28]

> "[70] The term "control" in relation to a document is defined in the Dictionary to the *Rules* as meaning "possession, custody or power". In a passage adopted in the *Full Court Judgment* at [149], Dunn J stated in *B v B* at 186 that
>
> > … "possession" means "the right to the possession of a document." "Custody" means "the actual, physical or corporeal holding of a document regardless of the right to its possession," for example, a holding of a document by a party as servant or agent of the true owner. "Power" means "an enforceable right to inspect the document or to obtain possession or control of the document from the person who ordinarily has it in fact."

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24 See at p 436.
25 Ibid at 437-8.
26 Ibid at 438.
27 Ibid at 438.
28 [2020] FCA 64 at [70] – [71].

> [71] In addition, a person (including a company) will also have "power" over a document where the person has an actual and immediate ability to inspect it, even though the document is the property of, or is held by, another person. A person will not have such an ability if the person is only able to inspect the document if a third person agrees to permit inspection, or otherwise agrees to refrain from preventing inspection." (citations omitted)

[25] As may be seen, that discussion (which continued in respect of the meaning of "custody") was in reference to a rule which required discovery of relevant documents "in the party's control" and where "control" was defined as "possession, custody or power".

[26] The concern here is with the concept of documents being "under the control of the …. party" and therefore the extent to which there is extension of the concept of documents which are "in the possession….of the….party". In *Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd*,[29] Helman J noted the contrast of the provision in *UCPR* 211(1)(a) with those in other Australian jurisdictions couched in terms of "possession, custody or power", and further noted that:

> "It is most certainly arguable that there is no material difference in meaning between the expression 'in the possession or under the control of...' and the expression 'in the possession or power of…'".

There is no definition of the term "control" in the *UCPR*. However, it is to be noted that some guidance may be obtained from the Macquarie Dictionary, 5th Edition, in that the first meaning provided for "control", as a noun, is:

> "4. the act or power of controlling; regulation; domination or command".

[27] In the present circumstances, it is clear that the ability to obtain copies of the unredacted bank statements, which have, in part, already been disclosed, lies within the control of the respondents, as far as such records are still held by the relevant bank. And so much is implicit in the evidence given by each of the respondents, conceding some enquiry of the bank and knowledge of a prospect of a fee being chargeable for retrieval of any such records:

(a) As the first defendant said:

> "…we made inquiries and were told that we could possibly pay for bank statements, but they were not readily available";[30] and

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29 [2001] QSC 259.

30 T(27/02/20)1-64.11-12.

(b) As the second defendant said:

> "I would have to go to Westpac, I would have to order it and I would have to pay for them, I guess".[31]

Although it is not clear that there was, in this evidence, any clear distinction recognized as between the statements relating to the account operated by the third defendant and what was, on occasions, otherwise referred to as the joint accounts of the respondents,[32] to the extent that the statements do not relate to personal accounts of the respondents, the position of the respondents pursuant to s 601AD(5) of the *Corporations Act* is a particularly relevant circumstance.

[28] Such concessions may be seen as being consistent with the contractual and debtor/creditor nature of the relationship between a bank and account holder,[33] and common understanding of the availability of such records.[34] In this sense, different problems are identified in cases such as *Erskine v McDowell*,[35] and *Bowenbrae Pty Ltd & Anor v Flying Fighters Maintenance and Restoration*,[36] and where relevant documents, which might only be obtained upon successful applications under freedom of information legislation,[37] were involved and which, in each instance, led to an order pursuant to *UCPR* 367. As noted in *Erskine v McDowell*:[38]

> "It is difficult to conclude that in the ordinary sense of the meaning of 'control' the defendant here has an ability to 'direct' or 'command' the Commonwealth agencies to provide her with copies of the document."

Neither is the contended impediment of a kind that was considered in *Taylor v Santos Ltd*, and it may be noted that even in the context of the recognition of the separate legal personality of related corporations, it was also recognised that in some circumstances the de facto position may be that there is "an actual immediate

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31 T(27/02/20)1-93.22-23.
32 T(27/02/20)1-22.15-30.
33 *Foley v Hill* (1848) 9 ER 1002.
34 Such as may be confirmed by reference to *The New Banking Code of Practice*, at Chapter 37 [146] – [150], which commenced on 1 July 2019 and is available on the website of the Australian Banking Association: https://www.ausbanking.org.au/wp-content/uploads/2020/03/Banking-Code-of-Practice-2019-web.pdf.
35 [2001] QDC 192.
36 [2010] QDC 347.
37 Now in Queensland referable to the *Right to Information Act* 2009.
38 [2001] QDC 192 at [11].

ability, to obtain inspection of a document without needing the consent of another person".[39] And as further accepted by Doyle CJ:

> "… there may be cases in which a document can be said to be in the power of a party, even though some intermediate weight or power must be exercised before an enforceable right to inspect the document or have possession of it will arise".[40]

[29] Here the only impediment to such direction or command, which is identified by the respondents, is the prospect of having to pay a fee, payment of which would also be within the control of the respondents. It is not to be regarded as such an impediment as to warrant a finding that the documents so obtainable, are not under the control of the respondents, just as it could not be said that such a finding might be warranted, for example, if the impediment to obtaining documents held in storage by a party under contract or bailment, required the payment of some retrieval charges.

[30] The second exception is in respect of the documents in the category identified as "E" and relating to the more recent sale of the real property, by the respondents, to a third party. There is no contention that they are unavailable, rather the position of the respondents in resisting disclosure, is on the basis of absence of any direct relevance to any allegation in issue. The applicant attests to knowledge of the sale of that property, by the respondents, on 22 August 2019 for $575,000.[41] The applicant seeks disclosure of the documents relating to that sale, including the contract, settlement statement, release of mortgage and loan account settlement statement.

[31] Although the basis of contention of direct relevance is in part expressed as being related to an issue in contention as to "if and when the monies paid by the plaintiff were used to purchase the property", in the context of the allegation as the plaintiff obtaining an equitable interest in the property, there is also reference to the issues relating to unjust enrichment of the respondents. Whilst the former contentions may attract the difficulties which have been noted as to the pleading in respect of the assertion of equitable interest in the property,[42] and also in linking any such contention to the claiming of relief upon premises of wrongful distribution of trust property, in the context of otherwise seeking recovery of debt in the nature of a

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39 (1998) 71 SASR 434, at 438-9.
40 Ibid at 442.
41 Affidavit of KC Schebella, filed 26/2/20, at [35].
42 See paragraph [7(d)], above.

loan, these contentions remain as issues on the pleadings and it may be noted that the plaintiff pleads the later issue, in terms that the respondents "remain unjustly enriched by the payments made by the plaintiff to the extent of $225,000.00 plus accrued interest",[43] which allegation is, in part, put in issue on the basis that the respondents "have not been enriched (whether unjustly or otherwise) by any payments made by the plaintiff as alleged".[44]

[32] The better view is that the applicant's contention that these documents are directly relevant (at least in the sense of tending to prove or disproving the allegation of unjust enrichment of the respondents), should be accepted. Alternatively, there is also merit to be found in the reliance upon the observations of Pincus JA, in *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd*,[45] as to the likelihood of facilitation of the just and expeditious resolution of the real issues in this matter, as a basis for a further disclosure order.

Costs

[33] Each of the respective parties seeks that the other pay their costs of the application. A particular feature of the respondents' submission is to point to the mixed character of any success achieved by the applicant up until 27 February 2020.[46] And the submissions for each are not made in knowledge of the extent of success achieved by the applicant upon the further contest after that date. Unsurprisingly the applicant points to the success which has been achieved in his application and particularly in obtaining the order made on 24 January 2020.

[34] Notwithstanding that the applicant was not initially successful upon all of the issues raised in the application as heard on 24 January 2020, his substantial success in obtaining the order made on that date, is such as to engage the general rule embodied in *UCPR* 681, rather than to allow departure from it. However and subsequently to 24 January 2020 and notwithstanding that the applicant has been successful in obtaining a further order on his application, the relative successes on

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43 Statement of Claim at [41].
44 Defence at [41(c)].
45 [2001] 1 Qd R 276, at 283.
46 Eg: the extent to which there was unsuccessful pursuit of an argument in respect of some "without prejudice" correspondence on 24/1/20 and 27/2/20.

each side is so mixed in respect of the extent of further issues which have been litigated, so as to warrant a different view and that each side should bear their own costs.

Conclusion

[35] Accordingly, the applicant has satisfied the Court that there is an appropriate basis for only the following further orders:

1. Within 28 days, the first and/or second defendants are to disclose to the plaintiff the documents described as follows:

(a) those relating to and evidencing the transfer of the property at 8 Verdon Street, Golden Beach, Queensland, on or about 22 August 2019; and

(b) unredacted copies of the following bank statements:

(i) Westpac Bank account No. 17-7219, for the periods from 18 November 2004 to 17 December 2004 and 18 July 2007 to 18 January 2010; and

(ii) Westpac Bank account No 39-4656, for the period 22 June 2012 to 13 November 2015.

2. In the absence of disclosure of the documents identified at subparagraph 1(b) above, the first and second defendants are to file and serve an affidavit stating the basis upon which any specified document does not exist.

3. The first and second defendants are to pay the plaintiff's costs of this application, up to and including 24 January 2020 and thereafter, each party is to bear their own costs.