

# SUPREME COURT OF QUEENSLAND

CITATION: *Moore v Devanjul Pty Ltd & Ors (No 3)* [2012] QSC 355

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

v

**DEVANJUL PTY LTD**  
(A.C.N. 117 644 0087) AS TRUSTEE OF THE JADVEK  
BERTHELSEN FAMILY TRUST  
(First Defendant)

AND

**VANESSA RUTH BERTHELSEN**  
(Second Defendant)

AND

**DEREK BURNETT BERTHELSEN**  
(Third Defendant)

AND

**DAVID EDGAR WILSON**  
(Fourth Defendant)

AND

**VANESSA RUTH BERTHELSEN AS TRUSTEE of the  
JADVEK BERTHELSEN FAMILY TRUST**  
(Fifth Defendant)

AND

**ROBYN GAIL MOORE**  
(Defendant added by Counterclaim)

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

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING  
COURT: Supreme Court Bundaberg

DELIVERED ON: 14 November 2012

DELIVERED AT: Rockhampton

HEARING DATE: 8 October 2012

JUDGE: McMeekin J

- ORDERS:
1. Devanjul Pty Ltd is removed as a party to these proceedings;
  2. Kailen Derek Berthelsen, in his capacity as the trustee of the Jadvek Berthelsen Family Trust, is substituted for the fifth defendant;
  3. The plaintiff's application for judgment in default of appearance is dismissed;
  4. Leave to discontinue the counterclaim brought against the plaintiff and Robyn Gail Moore in proceedings 21 of 2009 is refused and the counterclaim is struck out;
  5. Caveat number 714391590 lodged in respect of land described as Lot 2 on SP 224257 County of Cook Parish of Bundaberg having Title Reference Number 50772873 be removed;
  6. The plaintiff has leave to amend his Claim and Statement of Claim in accordance with exhibit "ADG 2" to the affidavit of Allan Donald Grant filed 31 August 2012 subject to:
    - a. The deletion of the reference to Devanjul Pty Ltd as the first defendant;
    - b. Consequential amendments being made to properly reflect the removal of Devanjul Pty Ltd as a party;
    - c. The further pleading of the assumptions underlying the claim for damages in paragraph 30 of the proposed Second Further Amended Statement of Claim being exhibit "ADG 2" to the affidavit of Allan Donald Grant filed 31 August 2012;
  7. The plaintiff file and serve his Second Further Amended Claim and Statement of Claim on the second, third and fourth defendants on or before 4pm on 21 November 2012;
  8. The plaintiff serve a copy of these reasons and of his Second Further Amended Claim and Statement of Claim personally on Kailen Derek Berthelsen on or before 4pm on 21 November 2012;
  9. The defendants have leave to file and serve any amended Defence or Defence and Counterclaim as they might be advised on or before 4pm on 19 December 2012;
  10. The defendants' applications to strike out the plaintiff's Claim and Statement of Claim, to join Robyn Gail Moore as a party, for injunctions, and for an order under r 389A are dismissed;
  11. The costs incurred by the plaintiff in respect of the application to substitute the fifth defendant are reserved to the trial judge;
  12. The defendants pay:
    - i. the costs of Robyn Gail Moore in respect of

the application to join her as a party, in respect of the application to strike out the counterclaim, and in respect of the application to remove the caveat;

- ii. the costs of the plaintiff in respect of the applications for an injunction and for an order under r 389A;

13. No order as to costs:

- i. in respect of the plaintiff's application to amend the Claim and Statement of Claim and for judgment in default of appearance;
- ii. in respect of the defendants' application to strike out the plaintiff's Claim and Statement of Claim.

**CATCHWORDS:** PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – where application by plaintiff to amend Claim and Statement of Claim, substitute a party and for default judgment – where application by second and third defendants to strike out plaintiff's Claim and Statement of Claim, to join a party, for an order pursuant to r 389A UCPR and for an injunction – where application by defendant added by counterclaim to strike out the counterclaim and for removal of caveat

*Corporations Act 2001* ss 197, 601AD

*Land Title Act 1994* s 127

*Personal Injuries Proceedings Act 2002*

*Property Law Act 1974*

*Uniform Civil Procedure Rules 1999* rr 62, 63, 67, 69 70, 155, 165, 171, 178, 260A, 292, 304, 305, 377, 378, 387, 389A

*Concrete Developments Pty Ltd v Queensland Housing Commission & Anor* [1961] Qd R 356

*Henry v Henry* (1995) 185 CLR 571

*Moore v Devanjul Pty Ltd* [2012] QSC 66

*Moore v Devanjul Pty Ltd* [2010] QSC 250

*Moore & Anor v Devanjul Pty Ltd* [2010] QDC 353

*Moore & Anor v Devanjul Pty Ltd* [2007] QDC 366

*Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319

*Pennington v Cayley* (1912) 106 LT 591

*Re Burman's Caveat* [1994] 1 Qd R 123

*TM Fairclough & Sons Limited v Berliner* [1931] 1 Ch 60

*Walton v Gardiner* (1993) 177 CLR 378

COUNSEL: SJ Deaves for the Plaintiff  
 Second and Fifth Defendant in person  
 Third Defendant in person  
 No appearance by the Fourth Defendant  
 RW Haddrick for the Defendant added by counterclaim

SOLICITORS: Carswell & Company for the Plaintiff  
 Second and Fifth Defendant in person  
 Third Defendant in person  
 McKays Solicitors for the Defendant added by counterclaim

- [1] **McMeekin J:** The following applications are before the Court:
- (a) an application by the plaintiff:
    - (i) to amend the Claim and Statement of Claim;
    - (ii) to substitute Kailen Derek Berthelsen, in his capacity as the trustee of the Jadvek Berthelsen Family Trust, for the fifth defendant;
    - (iii) for judgment against the third and fourth defendants in default of appearance;
  - (b) an application by the second and third defendants:
    - (i) to strike out the plaintiff's Claim and Statement of Claim;
    - (ii) to have Robyn Gail Moore added as a plaintiff to the claim;
    - (iii) for an order pursuant to r 389A *Uniform Civil Procedure Rules* 1999 (UCPR) that the plaintiff not make any further application in relation to this proceeding and not start any similar proceeding in any other court against any party in this proceeding;
    - (iv) That until the determination of proceedings filed in the Magistrates' Court by Kailen Derek Berthelsen as trustee for the Jadvek Berthelsen Family Trust an injunction issue restraining Stanley Gordon Moore and Robyn Gail Moore from dealing in any way with any interest they hold in any property whether it be held personally or as trustee. A like injunction is sought to be imposed on Kailen Derek Berthelsen as trustee for the Jadvek Berthelsen Family Trust limited to any dealings with the trust property;
    - (v) That the balance of outstanding matters be dismissed;
  - (c) an application by the defendant added by counterclaim:
    - (i) to strike out the counterclaim;
    - (ii) to have a caveat over her property removed.

## Background

- [2] The plaintiff is Stanley Gordon William Moore. He brings action as trustee for the Moore Investment Trust.
- [3] Robyn Gail Moore is the former wife of the plaintiff. She separated from Mr Moore long ago and resigned as trustee of the Moore Investment Trust in August 2005. Mrs Moore was not a party to these proceedings until joined by counterclaim filed by the fifth defendant on 25 June 2012 purportedly on behalf of the Jadvek Berthelsen Family Trust.<sup>1</sup>
- [4] The dispute has its genesis in a lease over certain land on which was conducted a waterslide business.
- [5] The relationship between the parties of lessor and lessee came about this way. In 2002 part of the subject land was leased by its then owner under a registered lease. The lease was assigned to Mr and Mrs Moore by the original lessee in May 2005. They were registered as holding as trustees. Devanjul Pty Ltd (“Devanjul”) acquired the reversion in the subject land in March 2006. It was then acting as trustee of the Jadvek Berthelsen Family Trust. The second and third defendants, Mr and Mrs Berthelsen, and the fourth defendant, Mr Wilson, (“the Berthelsen interests”) were the directors and shareholders of Devanjul.
- [6] The plaintiff contends that while entitled to quiet enjoyment of the premises the second and third defendants entered into the premises, broke locks, damaged or took the plaintiff’s property, changed locks and effectively destroyed the plaintiff’s ability to carry on the business. It is claimed that the defendants were acting on their own behalf, with the consent of the fourth defendant, and on behalf of the trustee of the Jadvek Berthelsen Family Trust, then Devanjul Pty Ltd.
- [7] The defendants deny the claims against them.
- [8] An injunction issued at one point to restrain the lessor from re-entering the premises or interfering with the Moore’s business. The lessor twice claimed a right of re-entry and forfeiture. On each occasion the District Court relieved against forfeiture.<sup>2</sup> The re-entries were declared void.
- [9] As mentioned Mrs Moore had been a trustee of the Moore Investment Trust. Although she resigned that position in August 2005 she remained registered as a lessee in respect of the subject land.
- [10] The dispute between Mr Moore on the one hand and the Berthelsen interests on the other has been before the Courts many times in various guises. These proceedings have been before me on many occasions on interlocutory applications. Ms Berthelsen invariably appears in person to present the arguments for the defendants’ side and has done so again here.

## THE PLAINTIFF’S APPLICATIONS

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<sup>1</sup> For some reason documents are being filed on two files – 1890/10, a Brisbane registry file number, and 21/09 a Bundaberg file. Proceeding 1890/10 was transferred from the Brisbane registry to the Bundaberg registry and allotted the file number 21/09. There is but the one proceeding.

<sup>2</sup> Deardon DCJ - 36/06 – 23/10/06; [2007] QDC 366 per Dodds DCJ. McMurdo J pointed out that a more apt order would have been a declaration that there had in fact been no forfeiture given the findings that the purported notice was fatally flawed: *Moore v Devanjul Pty Ltd* [2010] QSC 250

- [11] The Berthelsen interests oppose leave being granted to amend the Claim and Statement of Claim. They contend that it should be struck out. I propose to grant the leave sought. I will deal with the defendants' arguments below.
- [12] Save that the defendants contend that the Statement of Claim should be struck out there is no opposition to the substitution of Kailen Derek Berthelsen, in his capacity as the trustee of the Jadvek Berthelsen Family Trust, for the fifth defendant. Kailen Berthelsen is the son of the second and third defendants. It is not shown that he has been served – indeed the plaintiff's side only learnt of his identity a few days before the hearing. It is evident from Ms Berthelsen's statements that he is aware of the proceedings before the court. The plaintiff is still within the limitation period. In the circumstances there seems no good reason not to allow the plaintiff to proceed: see r 70(2) UCPR.
- [13] The plaintiff's claim for default judgment seems misconceived. It was referred to the Court by the Registrar. There has been no default of appearance. No submissions were made in relation to the application. I am not sure that Mr Deaves, who appeared for the plaintiff, was aware that it had been filed.

## **MRS MOORE'S APPLICATIONS**

### **The Counterclaim**

- [14] Mrs Moore applies to strike out the counterclaim brought against her. Rule 171 UCPR is relevant. It provides:
- Striking out pleadings**
- (1) This rule applies if a pleading or part of a pleading—
- (a) discloses no reasonable cause of action or defence; or
- (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
- (c) is unnecessary or scandalous; or
- (d) is frivolous or vexatious; or
- (e) is otherwise an abuse of the process of the court.
- (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.
- (3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading
- [15] Ms Berthelsen brought the counterclaim against Mrs Moore purporting to act as trustee for the Jadvek Berthelsen Family Trust. Mrs Moore was served with the counterclaim. In doing so Mrs Moore became a party to these proceedings: r 178(3) UCPR. I mention that matter as at one point Ms Berthelsen submitted that Mrs Moore was not a party.
- [16] A Conditional Notice of Defence was filed. One of the many points taken was that Ms Berthelsen had not pleaded that she had standing to bring the suit. It emerged in the course of a hearing on a prior occasion that Ms Berthelsen was not in fact the trustee of the Jadvek Berthelsen Family Trust and had no standing to bring those proceedings. Ms Berthelsen deposes that she has since consulted her son and the present trustee, Kailen Berthelsen, who refuses to ratify her actions.

- [17] Prior to the application coming on for hearing a Notice of Discontinuance was filed. Once a defence has been filed a plaintiff cannot discontinue without leave: r 304(2) UCPR. Similarly in respect to a counterclaim: r 305 UCPR.
- [18] Mr Haddrick, who appeared for Mrs Moore, submitted that given the content of the counterclaim the proper course was to strike out the pleading.
- [19] Mr Haddrick submits that the pleading merits being struck out on many grounds including that it is incoherent, vexatious, scandalous, breaches several rules of pleading, pleads no cause of action known to the law and seeks to litigate anew a case which has already been disposed of by earlier proceedings. He cites in support the judgment of Mason CJ, Deane and Dawson JJ in *Walton v Gardiner*<sup>3</sup> particularly the passages highlighted:
- “The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.** Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail. Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them. **Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings.** The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* as **‘the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people’.**”<sup>4</sup>
- [20] The counterclaim is fatally flawed for many reasons, and not merely because Ms Berthelsen had no standing to bring it. It is not restricted to material facts. It contains comment and evidence. It is in many respects incoherent. It contains allegations that are scandalous and unsupported by the facts alleged in the pleading. It proceeds in large part on a mis-statement of the legal effect of the separation that occurred between Mr and Mrs Moore on their rights and obligations as lessees of the property. Ms Berthelsen persists in these allegations despite, McGill DCJ<sup>5</sup> and McMurdo J<sup>6</sup> each having pointed out to her previously that they have not the

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<sup>3</sup> (1993) 177 CLR 378 at 392-393

<sup>4</sup> Emphases by Mr Haddrick - citation of authority omitted

<sup>5</sup> *Moore & Anor v Devanjul Pty Ltd* [2010] QDC 353 at [49]-[54]; Dodds DCJ recognised the continuing relationship of lessee too: *Moore & Anor v Devanjul Pty Ltd* [2007] QDC 366 at [3]

<sup>6</sup> *Moore v Devanjul Pty Ltd* [2010] QSC 250 [15]-[20]

slightest foundation in law. It seeks relief that cannot be granted, the relief being in the form of sanctions appropriate for criminal conduct – that itself being inappropriate in civil proceedings but as well no fact is disclosed that shows any such conduct. The damages claimed in part relates to personal injury, a claim made long after the apparent limitation period has expired and with no attempt made to comply with the *Personal Injuries Proceedings Act 2002*. Damages described as parasitic, aggravated, exemplary and contemptuous are sought, and for injury to reputation, for which no rational ground emerges in the pleading.

- [21] The criticisms that Mr Haddrick makes of the pleading are plainly well justified. I have mentioned only a few of those criticisms, sufficient to dispose of the matter.<sup>7</sup>
- [22] To the extent that the defendants wish to contend that Mrs Moore breached her obligations as lessee and thereby caused them loss then they are entitled to sue for that loss. The pleading as it presently stands does not coherently set out such a claim.
- [23] The counterclaim should be struck out. If the defendants wish to bring a claim against Mrs Moore then they will have leave to file a counterclaim joining her and particularising the claim as required by the UCPR.

### **The Caveat**

- [24] A caveat has been lodged over Mrs Moore's home, a residential unit. The caveatable interest alleged is "an equitable share or interest in fee simple dependent upon Supreme Court judgment/Order". The grounds of the claim identify proceedings 21/09 as being relevant and refer to an application to join Mrs Moore in those proceedings.
- [25] The court has power to remove a caveat under s 127 *Land Title Act 1994*.
- [26] The counterclaim brought against Mrs Moore, and which I have discussed above, makes no allegation that would give rise to any interest, equitable or otherwise, in her property. In any case it has been struck out.
- [27] What Ms Berthelsen seeks is in effect a Mareva injunction to preserve Mrs Moore's assets should judgment ever be obtained against her. Rule 260A UCPR and Practice Direction No 1 of 2007 are relevant. No grounds are shown to justify any such order. As to those grounds see *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 per Gleeson CJ at 321-2.
- [28] Even if that were not so and Ms Berthelsen could demonstrate some caveatable interest or ground for an injunction the balance of convenience is plainly against leaving the caveat in place: see *Re Burman's Caveat* [1994] 1 Qd R 123. It is not shown that Mrs Moore has any intention of selling her home, no undertaking is offered as to damages, and it is doubtful that any undertaking would be of any worth.
- [29] The caveat should be removed.

### **THE DEFENDANTS' APPLICATIONS**

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<sup>7</sup> Mr Haddrick's analysis runs for some 20 pages of cogent, detailed and accurate criticism



## Joinder of Mrs Moore

[30] The defendants seek to join Mrs Moore as party to the proceedings. Their application seeks her joinder as a joint plaintiff. Mrs Moore wants nothing to do with these proceedings.

[31] Rules 62, 63, 67 and 69 UCPR are relevant:

### **62. Necessary parties**

- (1) Each person whose presence is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in a proceeding must be included as a party to the proceeding.
- (2) The court may order a person to be included as a party whose presence as a party is necessary to enable the court to adjudicate effectually and completely on all issues raised in the proceeding.
- (3) A person who is required under this rule to be included as a plaintiff or applicant and does not consent to be included in this way may be included as a defendant or respondent.”

### **63. Joint entitlement**

- (1) If a plaintiff or applicant seeks relief to which another person is entitled jointly with the plaintiff or applicant, all persons entitled to the relief must be parties to the proceeding.
- (2) A person entitled to seek relief who does not agree to be a plaintiff or applicant must be made a defendant or respondent.

### **67. Parties incorrectly included or not included**

Despite rules 62 and 63, the court may decide a proceeding even if a person is incorrectly included or not included as a party and may deal with the proceeding as it affects the rights of the parties before it.

### **69. Including, substituting or removing party**

- (1) The court may at any stage of a proceeding order that—
  - ...
  - (b) any of the following persons be included as a party—
    - (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;
    - (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.
  - ....

[32] Mrs Moore does not consent to her joinder. Mr Moore does not seek that she be joined or consent to her being joined. In those circumstances I perceive the law to be that Mrs Moore cannot be joined as a plaintiff: *Pennington v Cayley* (1912) 106 LT 591. The provisions in the UCPR are consistent with that long standing principle.

[33] Mrs Moore may be included as a defendant if it is shown that her presence before the court is “necessary” or “desirable, just and convenient” to “enable the court to adjudicate effectually and completely on all matters in dispute in or connected with the proceeding”. Her presence would be necessary if the relief that Mr Moore seeks

is relief to which he is entitled to jointly with Mrs Moore: r 63. I cannot see that there is any claim for any such relief. As McMurdo J explained in his analysis of the pleadings in these proceedings<sup>8</sup> Mrs Moore is not a necessary party as the plaintiff does not seek relief against forfeiture but rather he argues that there never was a forfeiture. In the former case, if successful, the court's orders would have the effect of reimposing the lessees' obligations on Mrs Moore. That cannot be done without her presence before the court: *TM Fairclough & Sons Limited v Berliner* [1931] 1 Ch 60 at 66. In the latter case there is no such effect – Mrs Moore is in the same position she has always been in.

- [34] Nor does it seem to me that it is shown that Mrs Moore's presence is "desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute". Given that she is well aware of the proceedings and chooses not to be involved I see no discretionary ground that would require her presence.
- [35] The defendants' submission is that Mrs Moore is an "integral party to these proceedings" and that "she placed herself back in the centre ring ... when she ratified before Judge McGill everything that [a solicitor] had done...". That is a reference to Mrs Moore ratifying the actions of the solicitor in commencing proceedings on behalf of Mr Moore seeking relief against forfeiture of the subject lease. Mrs Moore's actions in those proceedings have no bearing on the proceedings before this Court.
- [36] Mrs Moore is of course compellable as a witness. But her presence as a party is not needed for the rights of the litigants to be determined and for any necessary orders to be made, at least as the pleadings presently stand. If the defendants contend that they, or any one of them, has a legitimate claim against Mrs Moore, particularly if it arises out of the subject lease, then she can be joined by an appropriate counterclaim.
- [37] I dismiss the application to join Mrs Moore as a party.

### **Rule 389A Application**

- [38] The rule provides so far as relevant:
- 389A. Restricting applications that are frivolous, vexatious or abuse of court's process**
- (1) This rule applies if the court is satisfied that a party (the *relevant party*) to a proceeding (the *existing proceeding*) has made more than 1 application in relation to the existing proceeding that is frivolous, vexatious or an abuse of process.
- (2) The court may make an order under this rule on application by a party to the existing proceeding or on its own initiative.
- ....
- [39] The plaintiff's side have made two applications to amend their pleadings which have come before the court on a number of occasions. As well there has been an application for default judgment which, so far as I am aware, has never been pressed. It appears to have been filed in error.

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<sup>8</sup> *Moore v Devanjul Pty Ltd* [2010] QSC 250 at [7]

- [40] The present application to amend was made following my direction that the plaintiff file any such application by a certain date.
- [41] The plaintiff has a right to amend his Statement of Claim but needs leave to amend the originating proceeding: rr 377 and 378 UCPR.
- [42] It is true that the plaintiff, or rather his legal advisors, have struggled to properly articulate his claim. The principal difficulty, but not, it should be said, the only one, seems to have come about by reason of the plaintiff's concern to obtain an effective judgment. To that end the plaintiff seeks to have access to the assets of the Jadvek Berthelsen Family Trust.<sup>9</sup> There is a perception that the current trustee of the Jadvek Berthelsen Family Trust should be a party to the proceedings. The identity of that trustee has changed. Devanjul was de-registered without notice to the plaintiff. Ms Berthelsen was then the trustee for a period of time. At a prior hearing Ms Berthelsen refused to disclose the identity of the current trustee. She has now disclosed the name of the current trustee. The motive behind these changes brought about on the defendants' side is not relevant but they have had the effect of causing the plaintiff some difficulties. But it cannot be said that the plaintiff's attempts to meet these changes, or in seeking to comply with the UCPR, or in better particularising his claims amount to conduct that could be characterised as "frivolous, vexatious or an abuse of process".
- [43] A further aspect of Ms Berthelsen's application was to prevent any proceedings being brought in any other jurisdiction. She expressly mentioned the proceedings brought in the District Court at an earlier stage. Given that the plaintiff was, so far as I am aware, successful in each application brought in the District Court they could hardly be described as "frivolous, vexatious or an abuse of process".
- [44] The application is dismissed.

### **Injunction**

- [45] Upon the filing of the Notice of Discontinuance in respect of the counterclaim against Mrs Moore, which the present trustee of the Jadvek Berthelsen Family Trust, Kailen Derek Berthelsen, declined to ratify, proceedings were filed in the Magistrates' Court by him as trustee for the Jadvek Berthelsen Family Trust.
- [46] The defendants seek that until the determination of those proceedings in the Magistrates' Court an injunction issue restraining Stanley Gordon William Moore and Robyn Gail Moore from dealing in any way with any interest they hold in any property whether it be held personally or as trustee.
- [47] No good reason is shown why any injunction should issue. Again it is in the nature of a Mareva injunction. Again no proper basis is even attempted to be shown. Again no undertaking as to damages is offered. The injunction is extraordinarily wide. Even if there was some basis for it the limits and undertakings contemplated by the usual orders made in such applications have been ignored: see the Appendix to Practice Direction No 1 of 2007.

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<sup>9</sup> My response to some of the plaintiff's manoeuvrings can be seen at *Moore v Devanjul Pty Ltd* [2012] QSC 66

- [48] I have left to one side the application to subject Kailen Derek Berthelsen as trustee for the Jadvek Berthelsen Family Trust to a like injunction restricted in his case to dealing with the assets of that trust. I assume from what Ms Berthelsen has told me that Mr Kailen Berthelsen has no objection to the order being made. Nonetheless there is no basis shown why any such injunction should issue.
- [49] The applications for injunctions are dismissed.
- [50] Before leaving this subject I wish to say something further about the proceedings in the Magistrates' Court. The thinking behind the filing of the Magistrates' Court proceedings seems to be that those proceedings will in some way take precedence over the proceedings pending in the Supreme Court. There is no good reason why any legitimate claims by the defendants arising out of the dealings between the parties surrounding the subject lease should not be dealt with in the one proceeding and good reason why there should not be proceedings in different courts. Apart from the wasting of costs, generally speaking, there should not be running concurrently in different courts litigation over the same or related issues which could yield conflicting outcomes.
- [51] When the Magistrates' Court proceedings were filed there was pending before this Court the counterclaim brought by Mrs Berthelsen, purportedly acting as trustee of the Jadvek Berthelsen Family Trust. The High Court said in *Henry v Henry* (1995) 185 CLR 571 at 591, "[i]t is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue." If Mrs Berthelsen had standing to bring the counterclaim then the bringing of those second proceedings would have been plainly vexatious and oppressive and they were liable to be struck out. But she lacked standing and so the principle mentioned in *Henry* is not directly applicable albeit that the spirit of the law was breached.
- [52] But there remains a further principle mentioned by Philp J in *Concrete Developments Pty Ltd v Queensland Housing Commission & Anor* [1961] Qd R 356 at 364 that "[i]t is the rule that when an inferior tribunal is informed that the question before it is also before the Supreme Court, the inferior tribunal should stay its hand...". Here the claims on each side turn on whether either party has breached their obligations owed to the other under the registered lease governing their relationship. To succeed the plaintiff must show that the defendants entered onto the subject property when they had no right to do so. To succeed in the Magistrates' Court the fifth defendant must show the converse. Presumably the magistrate who is called on to hear the matter will stay those proceedings pending any decision in this Court.
- [53] Plainly the proceedings pending in this Court are the appropriate vehicle to agitate those claims as the plaintiff's quantification of his loss falls within the jurisdiction of this Court as it was at the time of initial filing.

### **The Amendment of the Claim and Statement of Claim and the Strike Out Application**

- [54] The defendants submit that the plaintiff's pleading contains "frivolous, scandalous and vexatious allegations directed toward irrelevant and unrelated parties." The precise paragraphs of the pleading that are said to merit this description are not

identified. It is pointed out that the plaintiff has had numerous opportunities to amend his pleadings. That is true. It is said that the pleading still does not disclose a reasonable cause of action. That is not true.

- [55] In my view the Statement of Claim articulates plainly the causes of action that are being pursued.
- [56] Liability is sought to be established against Devanjul on the ground that by its agents it trespassed onto the demised premises and took or damaged certain property damaging the plaintiff's business. If the plaintiff is successful in establishing that liability then consequential orders are sought that will affect the interests of the former directors of Devanjul – the second, third and fourth defendants - and the beneficiaries of the Jadvek Berthelsen Family Trust. Hence the plaintiff's interest in maintaining the presence of the fifth defendant although no primary cause of action is alleged against the present trustee, Kailen Derek Berthelsen.
- [57] Liability is sought to be established against the second, third and fourth defendants on two grounds. First, it is alleged that they were the persons who trespassed onto the demised premises and took or damaged the plaintiff's property. Second, as directors of a trustee corporation, they are liable to discharge the liability of the first defendant pursuant to s 197 *Corporations Act* 2001. They only become liable to discharge the first defendant's liability if the first defendant is not entitled to be indemnified out of the assets of the Jadvek Berthelsen Family Trust. Whether Devanjul is so entitled depends on the terms of the Trust Deed appointing it and whether it is shown that its actions, whatever they might turn out to have been, were authorised. If the first defendant is entitled to be indemnified then orders are sought to enable the plaintiff to enforce that indemnity.
- [58] As to the potential liability of the directors and of the trust fund I note that there is no issue here that Devanjul cannot discharge any liability it might have to the plaintiff – it is common ground that it is deregistered and in any case had a paid up capital of only \$2. I recently refused the plaintiff's application to reinstate the deregistered corporation because it had no assets.
- [59] Depending on whether and which of the facts alleged in the Statement of Claim are made out the plaintiff may succeed to one or more of the orders and declarations sought in the amended Claim:
- (a) damages in the sum of \$261,672 for breach of the lease by the first defendant;
  - (b) damages in the same sum against the first, second, third and fourth defendants for trespass and consequential destruction of the plaintiff's business;
  - (c) declarations:
    - (i) that the first defendant cannot discharge any liability to the plaintiff as may be adjudged in these proceedings;
    - (ii) that the first defendant is or may not be entitled to be fully indemnified against liability out of the assets of the Jadvek Berthelsen Family Trust;
    - (iii) that the second, third and fourth defendants as directors of the first defendant are persons liable pursuant to s 197 of the

*Corporations Act 2001* to discharge any liability of the first defendant;

- (d) An order that the fifth defendant indemnify the first defendant out of the assets of the Jadvek Berthelsen Family Trust for any liability to the plaintiff as may be adjudged in these proceedings;
- (e) An order that the plaintiff be subrogated to the first defendant's right to be indemnified out of the assets of the Jadvek Berthelsen Family Trust for any liability to the plaintiff as may be adjudged in these proceedings.

[60] Thus I reject the defendants' submission that the proposed pleading contains "frivolous, scandalous and vexatious allegations directed toward irrelevant and unrelated parties." None of the allegations merits any such description.

[61] However I have two criticisms of the plaintiff's proposed pleading.

[62] First, the Claim and Statement of Claim were drafted on the assumption that the first defendant, Devanjul, would be reinstated. Despite my rejection of that application Mr Deaves argued that there remained the prospect that Devanjul might be reinstated at some future time and so it should remain as a defendant. I do not agree. While it is essential to the plaintiff's purposes to establish the liability of Devanjul it is not necessary that Devanjul itself be a party to the proceedings to bring that about. Upon deregistration Devanjul ceased to exist: s 601AD(1) *Corporations Act 2001*. It is not possible to have a non-existent entity as a party to the proceedings. If it ever becomes necessary to reinstate Devanjul and to permit its rejoinder as a party then appropriate orders can be made.

[63] It will be necessary then that Devanjul be removed as a party and I propose to so order: see r 69(1) UCPR. There will need to be consequential amendments made so that references to the "first defendant" become references to "Devanjul Pty Ltd".

[64] The second criticism relates to the pleading of the plaintiff's losses. The Statement of Claim discloses only that the plaintiff claims for the loss of income that he would have enjoyed from the business conducted on the demised premises had it not been destroyed by the actions of the defendants and then sets out the total annual profit lost for each of several years. The defendants would be entitled to better particulars of how those profits are calculated – presumably there are assumptions made as to gross income and operating expenses to arrive at the net profit lost: see r 155(2)(c) UCPR.

[65] Mr Deaves submitted that given the extensive alterations affected by the amendments it would be more convenient if the plaintiff were permitted to file the amended Claim and Statement of Claim in a form that incorporated but did not distinguish the amendments made: see r 387(7) UCPR. He has conveniently supplied two versions of the proposed amendments, one distinguishing the amendments and one not. Hence the defendants are able to identify the alterations to the pleading. It is certainly far easier to read the amended document without the distraction of the earlier matters pleaded which have now been abandoned. I agree with the submission.

[66] Given my intended order it will be necessary that the defendants plead their defence to the claim as now particularised.

- [67] In the hope of avoiding any further interlocutory skirmishes I point out that the most recent Defence filed is not adequate. In terms it is a defence by Ms Berthelsen solely and only in her capacity as the trustee of the Jadvek Berthelsen Family Trust – a position she does not in fact hold. Reference to the remaining defendants has been deleted. Defendants do not avoid liability by these stratagems. If this position is maintained then the defendants will be at risk of immediate judgment in default of pleading any defence: see r 292 UCPR.
- [68] In its entirety the most recent Defence reads: “The Defendant denies the allegations throughout the entirety of the Plaintiff’s Claim and Statement of Claim because there is absolutely no truth in any such allegations, as none of the Defendants has ever had any contractual obligation, lease or otherwise with the Plaintiff at any time whatsoever.” Given what I suspect are the real issues between the parties such a pleading offends many of the rules relating to pleadings. If no better defence is offered then the defendants would or may be precluded from tendering any evidence: see r 165(2) UCPR.
- [69] While it is a matter for the defendants as to what they plead it seems plain that by operation of the provisions of the *Property Law Act 1974* and the *Land Title Act 1994* Mr and Mrs Moore on the one hand and Devanjul on the other were in a relationship of lessor and lessee. I note that the premise under which the Magistrates’ Court proceedings have been brought by the present trustee of the Jadvek Berthelsen Family Trust is that Mr and Mrs Moore as lessees owed obligations to the former trustee as lessor under a registered lease, consistently with my observation. Conversely the lessor owed the lessees obligations too.
- [70] I point out too that the claim brought in the Magistrates’ Court, as pleaded, is liable to attack on several grounds, particularly in relation to its particularisation of the damages suffered. I mention that as I am concerned that its terms might be repeated in any amended pleading filed in this Court.
- [71] What is in issue is whether any of the parties has breached the obligations owed to the other and with what consequent loss and damage, that loss and damage being sufficiently particularised as the nature of the claim will allow in accordance with r 155 UCPR.

### **The Orders**

- [72] The orders are:
- (a) Devanjul Pty Ltd is removed as a party to these proceedings;
  - (b) Kailen Derek Berthelsen, in his capacity as the trustee of the Jadvek Berthelsen Family Trust, is substituted for the fifth defendant;
  - (c) Leave to discontinue the counterclaim against the plaintiff and Robyn Gail Moore in proceedings 21 of 2009 is refused and the counterclaim is struck out;
  - (d) Caveat number 714391590 lodged in respect of land described as Lot 2 on SP 224257 County of Cook Parish of Bundaberg having Title Reference Number 50772873 be removed;
  - (e) The plaintiff has leave to amend his Claim and Statement of Claim in accordance with exhibit “ADG 2” to the affidavit of Allan Donald Grant filed 31 August 2012 subject to:

- (i) The deletion of the reference to Devanjul Pty Ltd as the first defendant;
- (ii) Consequential amendments being made to properly reflect the removal of Devanjul Pty Ltd as a party;
- (iii) The further pleading of the assumptions underlying the claim for damages in paragraph 30 of the proposed Second Further Amended Statement of Claim being exhibit "ADG 2" to the affidavit of Allan Donald Grant filed 31 August 2012;
- (f) The plaintiff file and serve his Second Further Amended Claim and Statement of Claim on the second, third and fourth defendants on or before 4pm on 21 November 2012;
- (g) The defendants have leave to file and serve any amended Defence or Defence and Counterclaim as they might be advised on or before 4pm on 19 December 2012;
- (h) The defendants' applications to strike out the plaintiff's Claim and Statement of Claim, to join Robyn Gail Moore as a party, for injunctions, and for an order under r 389A are dismissed.

[73] I direct that the plaintiff cause a copy of these reasons and of his Second Further Amended Claim and Statement of Claim to be served personally on Kailen Derek Berthelsen on or before 4pm on 21 November 2012.

[74] Ms Berthelsen has applied for an order that "the balance of outstanding matters be dismissed". I have endeavoured to deal with each of the outstanding applications on their merits. The only application not so far dealt with is the plaintiff's application for judgment against the defendants in default of appearance which I think was filed in error. It is dismissed.

### **Costs**

[75] The plaintiff sought that the costs of his application to amend his Claim and Statement of Claim be reserved to the trial judge. To some extent the need to amend came about because of the changes to the identity of the trustee of the Jadvek Berthelsen Family Trust. But significantly the plaintiff has brought the defendants to court several times in his repeated efforts to properly plead his cause of action. I see no reason why the defendants should be burdened with costs of several such attendances. And while the defendants opposed the order without advancing any rational ground, the plaintiff needed to bring the application irrespective of the attitude of the defendants. I think that justice will be done if there is no order as to costs.

[76] While the plaintiff succeeded in avoiding having his Claim and Statement of Claim struck out, as the defendants sought, in my judgment there should be no order as to costs in respect of that application as well. Until the present pleading was delivered the defendants had reasonable arguments and were on stronger ground. Again the defendants were brought to court many times for the plaintiff to avoid at least some of his pleading being struck out.

[77] I do not perceive that the defendants have incurred any costs, they being self represented.



[78] Any costs incurred by the plaintiff in respect of the substitution of the fifth defendant are reserved to the trial judge.

[79] The defendants should pay:

- (a) the costs of Mrs Moore in respect of the application to join her as a party, in respect of the application to strike out the counterclaim, and in respect of the application to remove the caveat;
- (b) the costs of the plaintiff in respect of the applications for an injunction and for an order under r 389A.