
JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA
IN CIVIL

LOCATION : PERTH

CITATION : RODNEY CULLETON -v- INGHAMS ENTERPRISE
PTY LTD [2019] WADC 79

CORAM : GETHING DCJ

HEARD : 10 MAY 2019

DELIVERED : 14 JUNE 2019

FILE NO/S : CIV 3961 of 2017

BETWEEN : RODNEY CULLETON
Plaintiff

AND

INGHAMS ENTERPRISE PTY LTD
Defendant

Catchwords:

Practice and procedure - Defendant's application for summary judgment - Turns on own facts

Legislation:

Rules of the Supreme Court 1971 (WA), O 16

Result:

Plaintiff's claim dismissed

Representation:

Counsel:

Plaintiff : In person
Defendant : Mr P D C Robinson

Solicitors:

Plaintiff : Not applicable
Defendant : Williams & Hughes

Case(s) referred to in decision(s):

Agar v Hyde [2000] HCA 41; (2000) 201 CLR 552
Alcoa of Australia Ltd v Apache Energy Ltd [2012] WASC 209
Anderson v Effexseven (1998) 10 ANZ Ins Cas 61-424
Ansearch Ltd v Wavtech Pty Ltd [2006] WASC 184
Australian Can Co Pty Ltd v Levin & Co Pty Ltd [1947] VLR 332
Bailey v New South Wales Medical Defence Union Ltd [1995] HCA 28; (1995)
184 CLR 399
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27;
(2006) 226 CLR 256
Bechara v Sotrip Pty Ltd [2011] NSWSC 252
Briggs v Glenthams Pty Ltd (1992) 8 WAR 339
Burton v The President of the Shire of Bairnsdale [1908] HCA 57; (1908) 7 CLR
76
Citi Nominees Pty Ltd v Fenny [2006] WASC 97
Dey v Victorian Railway Commissioners [1949] HCA 1; (1949) 78 CLR 62
Duckworth v Water Corporation [No 2] [2015] WASC 411
Eng Mee Yong v Letchumanan [1980] AC 331
Fancourt v Mercantile Credits Ltd [1983] HCA 25; (1983) 154 CLR 87
Forsayth NL v Northern Gold NL Forsayth NL v Northern Gold NL (Unreported,
WASCA, Library No 940012, 20 January 1994)
Foss v Harbottle (1843) 2 Hare 461; 67 ER 189
Glew v Frank Jasper Pty Ltd [2010] WASCA 87
Gould v Vaggelas [1984] HCA 68; (1984) 157 CLR 215
Great City Pty Ltd v Kemayan Management Services (Australia) Pty Ltd [1999]
WASC 70

Hunt v Knabe [No 2] (1992) 8 WAR 96
Ibrahim v The Honourable Justice Carolyn Martin [2012] WASC 338
Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd [2015] FCA 1453
Johnson v Hallam [2015] WASC 149
Kezic v St John of God Health Care Inc [2015] WASCA 220
Knights Capital Group Ltd v Bajada and Associates Pty Ltd [2016] WASC 69
Liebherr-Australia Pty Ltd v Bloomfield [2006] WASCA 128
Lois Nominees Pty Ltd v QBE Insurance (Australia) Ltd [2011] WASC 208
Lundie v Rowena Nominees Pty Ltd [2006] WASCA 106
Lycopodium Minerals Ltd v Datacom Systems (WA) [2017] WASC 80
MacTiernan, Re; Ex parte Coogee Coastal Action Coalition Incorporated [2005]
WASCA 109
Mischin v Tey [2015] WASC 146
Moleirinho v Talbot & Olivier Lawyers Pty Ltd [2014] WASCA 65
Neil v Nott [1994] HCA 23 [5]; (1994) 68 ALJR 509
Nobarani v Mariconte [2018] HCA 36
Re Attorney-General; Ex parte Skyring [1996] HCA 4; (1996) 70 ALJR 321
Re Interwest Hotels Pty Ltd (In Liq) (1993) 12 ACSR 78
RHG Mortgage Corporation Ltd v Schafer [2014] WASC 297
Salomon v A Salomon & Co Ltd [1897] AC 22
Smart v Prisoner Review Board (WA) [2012] WASC 48
SMEC Australia Pty Ltd v Valentine Falls Estate Pty Ltd [2011] WASCA 138
Spencer v Commonwealth of Australia [2010] HCA 28; (2010) 241 CLR 118
Sutton Investments Pty Ltd v Realistic Investments Pty Ltd [2017] WASCA 14
Tobin v Dodd [2004] WASCA 288
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Viva Energy Australia Pty Ltd v Contaminated Sites Committee [2018] WASC
89
Webster v Lampard [1993] HCA 57; (1993) 177 CLR 598
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534
WMC Resources Ltd v Roche Mining Pty Ltd [2004] WASC 76
Woodley v Woodley [2018] WASCA
Yara Australia Pty Ltd v Oswal [No 2] [2013] WASCA 187

GETHING DCJ:

1 On 30 October 2017 a writ of summons was filed in the name of
'Rodney Culleton' against Inghams Enterprises Pty Ltd trading as
Mitavite (the defendant). The endorsement on the writ was for damages
for breach of an exclusivity licence agreement 'the parties being Elite
Grains Pty Ltd and Australian Keg Co' and the defendant.

2 On 25 October 2018, a second writ of summons was filed,
purporting to amend the name of the plaintiff to 'Rodney Norman
Culleton as Trustee for the R and I Wool Buyers PTY LTD (ACN 069
701 819)'. In the amended writ of summons, the plaintiff claims
'repayment of \$750,000, together with interest ... calculated at 6% as at
the date of the writ, being money due and owing by the plaintiff to the
defendant pursuant to a licence agreement dated 22 September 2009'
(Licence Agreement). However, it is clear that this is misstated, and the
allegation is that it is the defendant who owes the plaintiff this money.

3 In an affidavit filed 13 November 2018, Mr Culleton deposes that
there is a typographical error in the name of the plaintiff and that the
correct description of the plaintiff is 'Rodney Norman Culleton as
Trustee for the R and I Woolbuyers Trust'.

4 No leave has been given to amend the name of the plaintiff in this
action as required by *Rules of the Supreme Court 1971 (WA) (RSC) O 21*
r 1(3)(a) and r 5. Accordingly, the court record, and the title page to this
judgment, reflects the position in the original writ. However, I have
proceeded on the basis that, if necessary, the writ would be amended to
make the plaintiff 'Rodney Norman Culleton as Trustee for the
R and I Woolbuyers Trust'. In this way, the present application is
determined on the basis most favourable to Mr Culleton. I will use the
term 'Trustee' to refer to Mr Culleton in his capacity as Trustee for the
R and I Woolbuyers Trust, in distinction to the position when he is acting
in his own right.

5 On 14 November 2018, the defendant entered a conditional
appearance.

6 On 5 December 2018, the defendant filed an application seeking an
order that the action be dismissed pursuant to *RSC O 16 r 1*
(Application). The Application was filed within the 21 day time period
required in the RSC.¹

¹ RSC O 16 r 1.

7 The defendant relies on three affidavits in support of the Application. The first is sworn by Christopher Gordon Price, a solicitor employed by the defendant's lawyers in Sydney, and is dated 4 December 2018.² The second and third are sworn by Daniel Tassone, a solicitor employed by the Perth agents for the defendant's lawyers, and are dated 22 January 2019 and 2 April 2019.³ The defendant also filed written submissions dated 22 January 2019.

8 The Trustee relies on three affidavits sworn by him, being those dated 13 November 2018, 2 January 2019, 7 February 2019.⁴ He also filed written submissions dated 22 January 2019.⁵

9 The Licence Agreement is annexed to the Price Affidavit.⁶ The parties to the Licence Agreement are the defendant, Elite Grains Pty Ltd and Australian Keg Company Pty Ltd. The Licence Agreement was executed by Mr Culleton in three places: for and on behalf of Elite Grains, for and on behalf of Australian Keg and under text stating 'Signed by Rodney Culleton'.⁷

10 Neither Elite Grains nor Australian Keg is a party to the action. In any event, Elite Grains was deregistered on 14 November 2013.⁸

11 On 23 December 2016 Mr Culleton was declared bankrupt by the Federal Court of Australia, and he remains an undischarged bankrupt.⁹ Mr Culleton is contesting the validity of this order.¹⁰ In oral submissions, Mr Culleton confirmed that he was not bringing the action in his own right, rather as the Trustee. If he had brought the action in his own right, the action would be stayed until such time as his trustee in bankruptcy made an election in writing to prosecute or discontinue to action.¹¹ Mr Culleton's trustee in bankruptcy consents to the action being dismissed with no order as to costs.¹²

² Which I will refer to as the 'Price Affidavit'.

³ Which I will refer to as the 'First Tassone Affidavit' and the 'Second Tassone Affidavit' respectively.

⁴ Which I will refer to as the 'First Culleton Affidavit', the 'Second Culleton Affidavit' and the 'Third Culleton Affidavit' respectively.

⁵ Which I will refer to as the 'Plaintiff's Submissions'.

⁶ Price Affidavit, CGP-02.

⁷ Price Affidavit, par 22.

⁸ Price Affidavit, par 4.

⁹ Price Affidavit, pars 6 to 7.

¹⁰ Plaintiff's submissions, par 18.

¹¹ *Bankruptcy Act 1966* (Cth) s 60(2).

¹² See generally: Price Affidavit, pars 6 – 13.

12 The Application was heard on 14 February 2019 before a deputy registrar. The deputy registrar ordered that the action be dismissed pursuant to RSC O 16 r 1, and that the plaintiff pay the defendant's costs of the proceedings (Decision). No transcript has been prepared from this hearing, nor did the deputy registrar provide written reasons.

13 By appeal notice filed 21 February 2019 the Trustee appealed from the Decision (Appeal). The appeal notice was filed within the 10 day time limit set in *District Court Rules 2005* (WA) (DCR) r 15(1). The appeal was heard by me on 10 May 2019.

Issues in dispute

14 By RSC O 16 r 1(1), the court may enter judgment for a defendant, among other reasons, 'if satisfied that the action is frivolous ... [or] that the defendant has a good defence on the merits'.

15 An application pursuant to RSC O 16 r 1 is to be supported by affidavit verifying the facts upon which the application is based.¹³ As the court has not directed to the contrary, the affidavit 'may contain statements of information or belief with the sources and grounds thereof'.¹⁴ The Price Affidavit, the First Tassone Affidavit and the Second Tassone Affidavit meet this requirement.

16 The plaintiff is also entitled to file an affidavit to show cause against the application.¹⁵ If the plaintiff does so:¹⁶

... the plaintiff may assume an evidentiary onus to show why summary judgment should not be given.. In other words, the plaintiff needs to show, on the evidence, that there exists a 'triable issue' ... In doing so, the affidavit must 'condescend upon particulars' - that is, it must set out facts which establish that it is reasonable to permit the plaintiff to pursue the action.

17 While the plaintiff may assume an evidentiary onus, the defendant retains the legal onus of demonstrating that the application for summary judgment ought to succeed.¹⁷

¹³ RSC O 16 r 1(2).

¹⁴ RSC O 16 r 1(3).

¹⁵ RSC O 16 r 2.

¹⁶ *Knights Capital Group Ltd v Bajada and Associates Pty Ltd* [2016] WASC 69 [43] (Pritchard J).

¹⁷ *Knights Capital* [42] – [44]; *Lois Nominees Pty Ltd v QBE Insurance (Australia) Ltd* [2011] WASC 208 [34] (Beech J); *WMC Resources Ltd v Roche Mining Pty Ltd* [2004] WASC 76 [35] (Newnes M); *Anderson v Effexseven* (1998) 10 ANZ Ins Cas 61-424, 74,757 (Parker J, with whom Owen J agreed); *Johnson v Hallam* [2015] WASC 149 [6] (Gething AM).

18 An application for summary judgment by a defendant is to be determined on the basis that the version of the facts put forward by the plaintiff, assuming that it is not inherently incredible, would ultimately be accepted at the trial of the action.¹⁸ However, the court is not bound to accept uncritically as raising a dispute of fact calling for further investigation every statement in an affidavit, however equivocal, lacking in precision or inconsistent with contemporary documents or other statements by the deponent.¹⁹ If after argument there remains real uncertainty as to the defendant's right to judgment without further investigation of the facts, summary judgment must be refused.²⁰

19 A claim will be frivolous as required by RSC O 16 r 1 if it is so clearly untenable that it cannot possibly succeed.²¹ Once it appears there is a real question, whether of fact or law, on which the rights of the parties depend, the action should not be dismissed as frivolous.²²

20 In looking at whether the defendant has a 'good defence on the merits' the question is whether, on the material before the court, it has been demonstrated that the plaintiff's action should not be permitted to proceed to trial because it is apparent that it must fail.²³ This may require extensive argument.²⁴

21 The issues arising for determination in the Appeal are set out in the submissions filed in relation to the Application, and were confirmed in oral argument.

22 The Trustee also sets out a number of grounds of appeal in the appeal notice. To the extent that these grounds go beyond the merits of the Application and address issues of procedural fairness in the hearing before the deputy registrar, it is not necessary for me to consider them. This is because the hearing of the Appeal is to be by way of a new hearing of the matter that was before the deputy registrar.²⁵ It involves a

¹⁸ *Johnson* [15]; *Webster v Lampard* [1993] HCA 57; (1993) 177 CLR 598, 608 (Mason CJ, Deane & Dawson JJ); *RHG Mortgage Corporation Ltd v Schafer* [2014] WASC 297 [28] (Chaney J).

¹⁹ *Johnson* [15]; *Ansearch Ltd v Wavtech Pty Ltd* [2006] WASC 184 [28] (Newnes M); *Eng Mee Yong v Letchumanan* [1980] AC 331, 341 (Reasons of the Court).

²⁰ *Johnson* [15]; *Ansearch* [28]; *Australian Can Co Pty Ltd v Levin & Co Pty Ltd* [1947] VLR 332, 335 (Herring CJ, Lowe & Fullagar JJ).

²¹ *Burton v The President of the Shire of Bairnsdale* [1908] HCA 57; (1908) 7 CLR 76, 92 (O'Connor J); *Anderson* (74,756) (Wallwork J); (74,757) (Owen J); *Alcoa of Australia Ltd v Apache Energy Ltd* [2012] WASC 209 [113] (Le Miere J); *Johnson* [37].

²² *Dey v Victorian Railway Commissioners* [1949] HCA 1; (1949) 78 CLR 62, 91 (Dixon J); *Anderson* (74,757).

²³ *Webster* (602); *Knights Capital* [40].

²⁴ *Knights Capital* [41]; *Alcoa* [113].

²⁵ DCR r 15(6).

complete de novo review.²⁶ I am to treat the Application as if it came before the court for the first time, save that the party appealing has the right as well as the obligation to open the appeal.²⁷ There is no requirement on the Trustee, as the party who lodged the appeal, to show that the deputy registrar made an error. So it is not relevant to the hearing of the appeal whether or not the deputy registrar made an error of law by way of a failure to afford the Trustee procedural fairness.

23 From the affidavits and submissions filed in relation to the Application, and having heard oral submissions, six issues arise for determination:

- Does the defendant have a good defence on the merits on the basis that the Trustee is not a party to the License Agreement?
- Did Mr Culleton execute the Licence Agreement as trustee of the Trust?
- Was Mr Culleton acting as an agent for an undisclosed principal when he executed the Licence Agreement?
- Does the defendant have a good defence on the merits on the basis that, even if the Trustee was a party to the License Agreement, no relevant breach of contract is pleaded?
- Was Mr Culleton the trustee of the Trust at the time at which the Licence Agreement was executed?
- What final orders should be made?

24 In dealing with these issues, I recognise that Mr Culleton, the Trustee, is a litigant in person. As such, he is entitled to some leniency in relation to compliance with the court rules.²⁸ I approach the documents in which he articulates his claim with some flexibility.²⁹ I need to be astute to ensure that, in a poorly expressed or unstructured document in which he sets out his case, there is no viable case which, with appropriate amendment or permissible assistance from the court,

²⁶ *Briggs v Glenthams Pty Ltd* (1992) 8 WAR 339, 349-350 (Malcolm CJ, with whom Pidgeon and Rowland JJ agreed); *Hunt v Knabe [No 2]* (1992) 8 WAR 96, 109-110 (judgment of the court); *Hazart Pty Ltd v Rademaker* (1993) 11 WAR 26, 28; *Liebherr-Australia Pty Ltd v Bloomfield* [2006] WASCA 128 [8]; *Kezic v St John of God Health Care Inc* [2015] WASCA 220 [42] (reasons of the court).

²⁷ *Hazart* (28).

²⁸ *Glew v Frank Jasper Pty Ltd* [2010] WASCA 87 [10] (reasons of the court).

²⁹ *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 536 - 537 (Kirby P), 543 (Hope JA, with whom Samuels JA agreed); *Smart v Prisoner Review Board (WA)* [2012] WASC 48 [10] (Pritchard J).

could be put into proper form.³⁰ A 'frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy'.³¹ In *Re Attorney-General; Ex parte Skyring*, Kirby J stated:³²

[I]t is always important for every Judge to keep an open mind in case a person who has been rejected by courts in the past may have, hidden amongst the verbiage of his or her arguments, a point which has not previously been seen and which may have merit ... Vigilance, and not impatience, is specially required where that person is not legally represented.

25 At the same time, I also need to ensure that any latitude given to Mr Culleton as a litigant in person does not deprive the defendant of its rights to procedural fairness and a fair hearing.³³

Does the defendant have a good defence on the merits on the basis that the Trustee is not a party to the Licence Agreement?

26 The defendant contends that it has a good defence on the merits to the claim as set out in the statement of claim based on the position that the Trustee is not a party to the License Agreement.

27 At the trial of the action, the onus will be on the Trustee to establish that he was a party to the Licence Agreement in that capacity.³⁴

28 On an application pursuant to RSC O 16, the plaintiff is bound by its pleaded case.³⁵ In *Forsyth NL v Northern Gold NL* Franklyn J stated:³⁶

It is for the plaintiff to determine what is his cause of action. The defendant then knows what is the case he has to meet. It is not for the Court, on an O 16 application, to identify or accept some other cause of action, not pleaded, which the evidence before it might arguably support and which, possibly for good reason, was not relied on by the plaintiff in his Statement of Claim and to then allow the Statement of Claim to remain on foot in reliance on a possible subsequent amendment.

³⁰ *Ibrahim v The Honourable Justice Carolyn Martin* [2012] WASC 338 [21] (Beech J); *Tobin v Dodd* [2004] WASCA 288 [15] (EM Heenan J, with whom Murray & Le Miere JJ agreed).

³¹ *Neil v Nott* [1994] HCA 23 [5]; (1994) 68 ALJR 509, 510; (1994) 121 ALR 148, 150 (Brennan, Deane, Toohey, Gaudron & McHugh JJ); *Ibrahim* [21]; *Glew* [10]; *Tobin* [14].

³² *Re Attorney-General; Ex parte Skyring* [1996] HCA 4; (1996) 70 ALJR 321, 323.

³³ *Nobarani v Mariconte* [2018] HCA 36 [47] (Kiefel CJ, Gageler, Nettle, Gordon & Edelman JJ); *Woodley v Woodley* [2018] WASCA 149 [76] (judgment of the court); *Moleirinho v Talbot & Olivier Lawyers Pty Ltd* [2014] WASCA 65 [51] (judgment of the court).

³⁴ *Great City Pty Ltd v Kemayan Management Services (Australia) Pty Ltd* [1999] WASC 70 [4] (White J).

³⁵ *Forsyth NL v Northern Gold NL Forsyth NL v Northern Gold NL* (Unreported, WASCA, Library No 940012, 20 January 1994) 7 (Franklyn J, with whom Wallwork J agreed); *Anderson* (74,757); *Johnson* [24].

³⁶ *Forsyth* (7) (Franklyn J).

29 The statement of claim sets out in some detail the background to the execution of the Licence Agreement.³⁷ The first reference to the Licence Agreement is in the particulars to par 29:

On the 22nd September 2009, an agreement was provided and executed on the 25th September of 2009. The agreement was between Inghams Enterprises Pty Ltd, Elite Grains Pty Ltd (now in liquidation) and Australian Keg Company Pty Ltd (Agreement). It was agreed that the concept needed the expertise of (Culleton) being the inventor and having industry experience. (Culleton) was engaged to further train the Defendant's staff and their distribution agents in the use, promotion and successful delivery of the Grain Keg. At all times the Defendant's staff and distribution agents were further educated in the patent protection, including all its rights vested in the Grain Keg Concept. The agreement was further embedded to pay (Culleton) over and above the Royalty/Consultancy payments the sum of a further \$10,000.00 per month which commenced on the 31st January 2011 to play a role in overseeing and servicing the customers.

30 The balance of the statement of claim details breaches of the Licence Agreement as well as an allegation that the defendant infringed certain intellectual property rights over a device known as a 'Grain Keg'. The relief sought reflects this dispute.

31 The only references to the plaintiff, that is, Rodney Norman Culleton as trustee for the R and I Wool Buyer Trust, are in pars 1, 2, 8 and 9:

1. The Plaintiff is a trust known as the R and I Wool Buyers Trust (Trust).
2. Rodney Norman Culleton was appointed as the trustee of the R and I Wool Buyers Trust on 16th May 2004 (Trustee).
- ...
8. At all material times, the Plaintiff was a trust nominated for the purpose of receiving dividends held on behalf of the beneficiaries from revenue by way of, but not limited, to derived distributions of 30% of the net sum before tax payable by Australian Keg Company Pty Ltd (Auskeg) upon request.
9. On or about 2008, Rodney Culleton in his performing roles as both Director and Trustee (Culleton) contacted the general manager of the Defendant, Mr Grahame Dillon (Dillon) to make arrangements to introduce the Grain Keg system by way of appointment.

³⁷ Statement of claim, pars 9 to 29.

32 A trust is not a separate legal entity. It cannot be a party to a contract. It is the trustee who must enter into the contract, who must do so as principal, and is personally liable on the contract.³⁸

33 The pleaded case, at its highest, is that the Trustee is an entity entitled to receive funds from Australian Keg, a party to the Licence Agreement. The source of that right appears to be as a shareholder given the reference in par 8 to dividends. One of the most fundamental characteristics of a corporation is that it is a separate legal entity from its shareholders.³⁹ As a general rule, the company is the proper plaintiff in proceedings to enforce its rights, and individual members or shareholders of the company have no right to sue in the name of the company.⁴⁰ None of the statutory or common law exceptions to this rule are pleaded, nor is any of them evident in the extensive factual material before the court.⁴¹ Applying these principles, Australian Keg is a separate legal entity from the Trustee as one of its shareholders. The fact that Australian Keg is a party to the Licence Agreement does not give the Trustee, even if it is a shareholder, standing to sue for a breach of the Licence Agreement.

34 The statement of claim does not contain any pleading to the effect that the Trustee is a party to the Licence Agreement. Nor is there any allegation to this effect in the writ or the amended writ. In the amended writ, the parties to the Licence Agreement are described as Elite Grains and Australian Keg.

35 The findings in [33] and [34] are a sufficient basis for the conclusion that the claim, as presently framed, is frivolous in the sense that it is so clearly untenable that it cannot possibly succeed, and that the defendant has a good defence on the merits to it.

Did Mr Culleton execute the Licence Agreement as trustee of the Trust?

36 Even if I was to depart from the well-established position in *Forsayth* and go beyond the pleaded case to consider whether I can identify 'some other cause of action, not pleaded, which the evidence

³⁸ *Yara Australia Pty Ltd v Oswal [No 2]* [2013] WASCA 187 [10] (McLure P).

³⁹ *Salomon v A Salomon & Co Ltd* [1897] AC 22, 27; *MacTiernan, Re; Ex parte Coogee Coastal Action Coalition Incorporated* [2005] WASCA 109 [5] (Wheeler JA); *Viva Energy Australia Pty Ltd v Contaminated Sites Committee* [2018] WASC 89 [231] (Smith AJ).

⁴⁰ *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, 202 (Wigram VC); *Bailey v New South Wales Medical Defence Union Ltd* [1995] HCA 28; (1995) 184 CLR 399, 435-436 (McHugh and Gummow JJ); *Gould v Vaggelas* [1984] HCA 68; (1984) 157 CLR 215, 245 (Wilson J).

⁴¹ See generally: Austin R P and Ramsay I M, *Ford's Principles of Corporations Law* (17th ed, 2018) [10.240, 10.300.6, 10.300.9];

before [the court] might arguably support', this would not assist Mr Culleton in his capacity as the Trustee.⁴² This is because there is no basis in the evidence before the court to support a conclusion that Mr Culleton executed the Licence Agreement as Trustee of the Trust.

37 Mr Culleton submits that when he executed the Licence Agreement he did so as Trustee, and that he was contracting in his capacity as Trustee, and not in his personal capacity.

38 The fact that the Licence Agreement does not expressly state that Mr Culleton executed it as the Trustee is 'of no particular significance'.⁴³ In *Duckworth v Water Corporation [No 2]* Mitchell J observed that 'a person who enters a contract as trustee is under no obligation to disclose that fact to the other contracting party'.⁴⁴ His Honour continued that 'there are many reasons why a trustee may choose not to do so, and the fact that there is no express reference to a person acting as trustee is generally of little or no significance'.⁴⁵ His Honour applied the approach adopted by Eames J in *Re Interwest Hotels Pty Ltd (in liq)* to determine the capacity in which the person acted, summarised as follows:⁴⁶

1. The document itself is the primary source from which the intention of the parties is to be ascertained and reference may be had to other sources only if the document is incapable of giving an unambiguous answer ...
2. Where a company is known to have acted in the past as trustee and all its assets are held on trust then clear words would be required to establish that the company was acting in its personal capacity (a result which would fly in the face of commercial logic) ... In the present case the trustee is an individual, but the same principle should apply where the trustee enters into contractual relations concerning the property which is held on trust.
3. Evidence which does not contradict anything in the contract is admissible, not to construe the contract, but to determine the factual question of the capacity in which a party entered into the contract. The evidence need not be confined temporally, or to evidence of oral statements made by the parties ...
4. The capacity in which a party entered into a contract is to be determined objectively ...

⁴² *Forsyth* (7).

⁴³ *Duckworth v Water Corporation [No 2]* [2015] WASC 411 [46] (Mitchell J).

⁴⁴ *Duckworth* [47], citing *Bechara v Sotrip Pty Ltd* [2011] NSWSC 252 [22] – [25] (Barrett J).

⁴⁵ *Duckworth* [47].

⁴⁶ *Duckworth* [48] (footnotes omitted); *Re Interwest Hotels Pty Ltd (In Liq)* (1993) 12 ACSR 78 [5], [7]-[9].

39 The central issue is whether a reasonable person in the position of
the parties would have believed that when Mr Culleton signed the
Licence Agreement he did so as the Trustee and not merely in his own
right.⁴⁷

40 The Trust is not mentioned in the License Agreement.

41 Mr Culleton is only referred to in clause 7. That clause is in the
following terms:

7. Rodney Culleton

7.1 Elite and AusKeg agree to procure the supply to Inghams of the
services of Rodney Culleton (Culleton) for the Term.

7.2 Culleton will provide the following services (Services):

7.2.1 promote, and assist Inghams in building the model for, and the
promotion of, Grain Kegs; and

7.2.3 train Inghams staff in the use and promotion of Grain Kegs.

7.3 In consideration for the services of Culleton, as described above,
Inghams will pay Auskeg and or Culleton a consultation fee
I royalty for the Term as outlined in Schedule 3, which will
remain payable for the minimum period of this contract unless the
Agreement is terminated pursuant to clause 5.2 by either party.
(Although royalty payments are expressed as amounts per week,
these payments will be accumulated and paid on a monthly basis).
These payments cover all costs associated with the business
arrangements including office expenses, accommodation, air
fares, phone and other expenses as incurred. In the event the
agreement is extended into other States pursuant to Clause 6 then
further fees will be negotiated to be payable to Culleton in the
event their services are used.

7.4 Culleton must each use his best endeavours to:

7.4.1 assist Inghams in performing the Services; and

7.4.2 to promote and successfully launch Mitavite products
including the Blended Rolled Product, and maximise the
prospects of success of these arrangements.

⁴⁷ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ).

42 The central obligation in cl 7 is on Elite Grains and Australian Keg, which are to procure the services of Mr Culleton. Clauses 7.2 and 7.4 each impose an obligation directly on Mr Culleton. However, these obligations are ones that can only be performed by Mr Culleton personally. It is in this context that Mr Culleton has executed the Licence Agreement.

43 Looking at the document itself, in my view a reasonable person in the position of the parties would believe that the reason why Mr Culleton executed the Licence Agreement was in order for him to record his agreement to perform the obligations in cl 7.2 and cl 7.4. A reasonable person would not believe that Mr Culleton was executing the Licence Agreement in his capacity as trustee of a trust which is not otherwise mentioned in the Licence Agreement. This conclusion is unambiguous. It is also reflected in the particulars to par 29 of the statement of claim, quoted above [29].

44 To the extent that it is permissible to look at evidence beyond the terms of the Licence Agreement, Mr Culleton has not placed before the court any evidence from which it would possible for the court to conclude, at trial, that he executed the Licence Agreement as trustee of the Trust. For example, there is no evidence to the effect that he ever declared the benefit of the Licence Agreement to be property of the Trust in a tax return. There is no evidence that Mr Culleton as trustee of the Trust was a party to any other agreement with the defendant in which his capacity as Trustee was expressly stated so as to give the defendant some background knowledge that in its dealings with the defendant Mr Culleton was contracting as trustee of the Trust.

45 It is for this reason I conclude that there is no evidence before the court from which a tenable basis can be discerned, and thus ultimately pleaded, that the Trustee has a cause of action against the defendant for breach of the Licence Agreement. Mr Culleton has not set out 'facts which establish that it is reasonable to permit the [him] to pursue the action' as trustee of the Trust.⁴⁸

⁴⁸ *Knights Capital* [43].

Was Mr Culleton acting as an agent for an undisclosed principal when he executed the Licence Agreement?

46 In the alternative, Mr Culleton asserts that he executed the Licence Agreement as agent for an undisclosed principal, being his capacity as the Trustee.

47 Again, following the decision in *Forsayth*, the only inquiry permitted is whether this assertion is present in the case pleaded in the statement of claim, or set out in the writ or amended writ.

48 As a matter of law, an undisclosed principal can sue on a contract made by an agent who has authority to enter into the contract on the principal's behalf.⁴⁹

49 However, neither the statement of claim nor the endorsement in the amended writ set out the basis on which it is said that Mr Culleton acted as agent for his capacity as the Trustee as an undisclosed principal. This conclusion is sufficient to justify the grant of summary judgment for the defendant against the Trustee as the current and only plaintiff in the action.

50 Again, even if I was to depart from the well-established position in *Forsayth* and go beyond the pleaded case to consider whether I can identify some other cause of action, not pleaded, which the evidence before the court might arguably support, this would not assist Mr Culleton. This is because there is no basis in the evidence before the court from which a tenable cause of action could be discerned that Mr Culleton executed the Licence Agreement as agent for an undisclosed principal, namely as Trustee. Mr Culleton does not depose to the existence of any agency agreement between himself in his own capacity and his capacity as trustee of the Trust. No document is annexed which could be taken as an agency agreement between Mr Culleton in his own capacity and his capacity as trustee of the Trust. Nor is there any other evidence, testimonial or document, to that effect. Additionally, as I have already observed, cl 7.2 and cl 7.4 of the Licence Agreement impose obligations on Mr Culleton which could only be performed by him personally. Clause 7 does not provide that the Trustee will procure Mr Culleton in his personal capacity to perform the obligation set out in that clause. This is not a case in which the actual identity of the

⁴⁹ *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2015] FCA 1453 [115-141] (Edelman J); *Lundie v Rowena Nominees Pty Ltd* [2006] WASCA 106 [78] – [83] (McLure JA); *Lycopodium Minerals Ltd v Datacom Systems (WA)* [2017] WASC 80 [10-11] (Master Sanderson); *Mischin v Tey* [2015] WASC 146 [29] (Le Miere J). *Citi Nominees Pty Ltd v Fenny* [2006] WASC 97 [40] – [45] (Master Newnes).

contracting party is a matter of indifference to the other contracting party.⁵⁰

Does the defendant have a good defence on the merits on the basis that, even if the Trustee was a party to the License Agreement, no relevant breach of contract is pleaded?

51 In the alternative, the defendant submits that even if the Trustee was a party to the License Agreement, no tenable cause of action which it can pursue is pleaded against the defendant. This is because the only claim available to Mr Culleton (whether in his own right or as Trustee) is for breach of cl 7.3. This is a claim against the defendant to recover the consultation fee or royalty calculated in accordance with sch 3 of the Licence Agreement.

52 The statement of claim does not set out any breach of cl 7.3. Rather, the breaches relate to the defendant improperly exploiting intellectual property relating to a device known as a 'Grain Keg'. By cl 1.4 of the Licence Agreement, Australian Keg is described as the 'inventor and holder of all intellectual property associated with the Grain Keg'. Nor is there any claim for a breach of cl 7.3 in the writ or amended writ.

53 The position that:

- (a) the only claim available to Mr Culleton (whether in his own right or as Trustee) is for breach of cl 7.3; and
- (b) the statement of claim does not set out any breach of cl 7.3,

is also a sufficient basis to conclude that the claim by the Trustee, as presently framed, is frivolous in the sense that it is so clearly untenable that it cannot possibly succeed, and that the defendant has a good defence to the claim.

54 Again, even if I was to depart from the position in *Forsayth* and go beyond the pleaded case, there is no basis in the evidence before the court to identify a claim by the Trustee for breach of cl 7.3 of the License Agreement which could be the subject of an amended pleading. The evidence, like the statement of claim, focuses on the defendant improperly exploiting intellectual property relating to the Grain Keg.

⁵⁰ *Jasmine Solar* [129].

Was Mr Culleton the trustee of the Trust at the time at which the Licence Agreement was executed?

55 The defendant contends that Mr Culleton was not validly appointed as trustee of the Trust.⁵¹ If he was not the trustee of the Trust at the time at which the Licence Agreement was entered into, there is no basis on which it can be said that his execution that agreement was in his capacity as Trustee.

56 Mr Culleton deposes that he became the trustee of the Trust on 16 May 2004.⁵² He annexes to the Second Culleton Affidavit a copy of a document entitled 'Deed of Change of Trustee' which purports to appoint him as the trustee of the Trust with effect from 16 May 2004.⁵³ He annexes an extract of the trust deed for the Trust (Trust Deed), including a clause by which he is appointed the appointor of the Trust.⁵⁴

57 The defendant is critical of Mr Culleton for not producing a complete copy of the Trust Deed, notwithstanding a request to do so. It submits that the Deed of Change of Trustee was not effective to appoint Mr Culleton as the replacement trustee.⁵⁵ This is because Mr Culleton is not a party to the Deed of Change of Trustee in his capacity as the appointor of the Trust. Counsel for the defendant drew my attention to *Property Law Act 1935* (WA) s 9(1)(a) which requires that a deed is to be signed by 'the party to be bound thereby'. It submits that the Deed of Change of Trustee did not properly appoint Mr Culleton as the trustee.

58 However, the Trust Deed, in cl 22, only requires the appointment to be 'by instrument in writing'. It does not require the appointment to be by deed. The issue becomes a dispute in the construction and effect of the Trust Deed and the Deed of Change of Trustee. I do not have a sufficiently high degree of certainty about the ultimate outcome of this issue if it went to trial to make it appropriate for summary judgment to be granted on this issue alone.⁵⁶

⁵¹ Defendant's submissions, pars 20 - 24.

⁵² Second Culleton Affidavit, par 3.

⁵³ Second Culleton Affidavit, annexure RNC1.

⁵⁴ Second Culleton Affidavit, annexure RNC2.

⁵⁵ Defendant's submissions, par 23.

⁵⁶ *Agar v Hyde* [2000] HCA 41; (2000) 201 CLR 552 [57] (Gaudron, McHugh, Gummow & Hayne JJ); *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 226 CLR 256 [46] (Gleeson CJ, Gummow, Hayne & Crennan JJ); *Spencer v Commonwealth of Australia* [2010] HCA 28; (2010) 241 CLR 118 [24] (French CJ & Gummow J), [54] - [57] (Hayne, Crennan, Kiefel & Bell JJ); *Sutton Investments Pty Ltd v Realistic Investments Pty Ltd* [2017] WASCA 14 [24] (judgment of the court); *SMEC*

What final orders should be made?

59 There is a further issue which counts in favour of granting summary judgment on the claim as currently formulated. This is that by cl 22 of the Trust Deed, the 'Trustee shall be disqualified from holding office if such Trustee being an individual shall ... become subject to any bankruptcy law'. As I have mentioned, Mr Culleton is currently an undischarged bankrupt. On the date on which he was placed into bankruptcy he became disqualified from being the trustee of the Trust. Even if the trustee of the Trust has standing to bring the action, Mr Culleton could not bring the action as trustee as he is no longer the current trustee of the Trust. That issue could, however, be remedied by appointment of a new trustee to the Trust.

60 The power to order summary judgment is discretionary, that is, the court 'may' order that judgment be entered for the defendant.⁵⁷ The power should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.⁵⁸ It is only in the clearest of cases, when there is a high degree of certainty about the ultimate outcome of the proceedings if it went to trial, that summary judgment ought properly be granted.⁵⁹

61 Even exercising the caution I am required to, I have the high degree of certainty required to conclude that, if the action went to trial, either on the current pleadings or pleadings amended to reflect the evidence before the court, it could not succeed. Mr Culleton as trustee of the Trust simply has no standing to bring any cause of action for breach of the Licence Agreement. The claim is frivolous in the sense of raising no arguable case and is one on which the defendant has a good defence on the merits. The defendant has discharged the onus of proof on it and is entitled to judgment pursuant to RSC O 16 r 1.

62 In coming to this conclusion, I am not making any finding as to whether or not any of Elite Grains, Australian Keg or Mr Culleton personally have a tenable cause of action against the defendant for breach of the Licence Agreement. All I am finding is that, on the pleadings and evidence before the court, Mr Culleton as trustee of the Trust does not have a tenable cause of action against the defendant for breach of the

Australia Pty Ltd v Valentine Falls Estate Pty Ltd [2011] WASCA 138 [20] (judgment of the Court); *Alcoa of Australia Ltd v Apache Energy Ltd* [2012] WASC 209 [113] (Le Miere J).

⁵⁷ RSC O 16 r 1(1).

⁵⁸ *Fancourt v Mercantile Credits Ltd* [1983] HCA 25; (1983) 154 CLR 87, 99 (Mason, Murphy, Wilson, Deane & Dawson JJ); *Sutton* [24]; *SMEC Australia* [20].

⁵⁹ *Sutton* [24]; *Agar* [57]; *Batistatos* [46]; *Spencer* [24], [54] - [57]; *SMEC Australia* [20]; *Alcoa* [113].

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Licence Agreement. That is sufficient to entitle the defendant to summary judgment.

63 I will hear from the parties as to costs. I will also hear from the parties as to whether the name of the plaintiff should be amended to reflect the position set at [4] above.

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

JM
Associate

14 JUNE 2019