

SUPREME COURT OF QUEENSLAND

CITATION: *Corbiere & Anor v Dulley & Ors (No 2)* [2017] QSC 83

PARTIES: **PAUL HERMAN HENRI CORBIERE AND ANDREW FRANCIS MONK as trustees for THE JEFFERSON LANE PROPERTY TRUST and as executors/trustees of THE WILL OF DUDLEY ERNEST SANDFORD DULLEY**
(plaintiffs)
v
BRUCE SANDFORD DULLEY
(first defendant)
YAS YO PTY LTD
(second defendant)
YASMIN LE BERYL DULLEY
(third defendant)
YOLANDE LE AURELIA DULLEY
(fourth defendant)
JACOB CHARLES SANDFORD DULLEY
(fifth defendant)

FILE NO/S: SC No 5581 of 2013

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 16 May 2017

DELIVERED AT: Brisbane

HEARING DATE: 6 December 2016; supplementary submissions on behalf of the applicant dated 7 December 2016; supplementary submissions on behalf of the first and second respondents dated 7 December 2016

JUDGE: Burns J

ORDER: **The orders of the court are:**

- 1. Judgment be entered in favour of the plaintiffs with respect to parts of the relief claimed by them in this proceeding, as follows:**
 - (a) It is declared that the net proceeds of sale of the property situated at 105 Jefferson Lane, Palm Beach in the State of Queensland, being the sum of \$3,562,993.02, was received by the first defendant for the use and benefit of the beneficiaries of the**

Jefferson Lane Property Trust established under the will of Dudley Ernest Sandford Dulley, deceased (“the Jefferson Lane Property Trust”);

- (b) It is declared that, at all times since the acquisition by the second defendant of the freehold title in and to Lot 4 on Strata Plan 21548 in the local government area of Clarence Valley (“the Yamba Property”), the second defendant has held that property on trust for the plaintiffs as trustees of the Jefferson Lane Property Trust;**
- (c) Pursuant to s 71 of the *Trustees Act 1925* (NSW) and s 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW), it is ordered that all title in and to the Yamba Property vests forthwith in the plaintiffs as trustees of the Jefferson Lane Property Trust;**
- (d) It is ordered that the second defendant:**
 - (i) Forthwith transfer its interest in the Yamba Property to the plaintiffs as trustees of the Jefferson Lane Property Trust;**
 - (ii) Forthwith deliver, at its own cost, to the plaintiffs a transfer in registrable form of the Yamba Property in favour of the plaintiffs as trustees of the Jefferson Lane Property Trust;**
 - (iii) Execute and deliver up to the plaintiffs such other documents as are necessary to effect the transfer of its interest in the Yamba Property to the plaintiffs as trustees of the Jefferson Lane Property Trust including, but not limited to, the original certificate or certificates of title (if any);**
 - (iv) Provide such further assistance as may reasonably be required to effect the registration of the transfer of its interest in the Yamba Property to the plaintiffs as trustees of the Jefferson Lane Property Trust including answering any requisitions on title;**
- (e) It is declared that, at all times since the acquisition by the third and fourth defendants of the freehold title in and to Lot 504 on deposited Plan 238451 in**

the local government area of Byron, parish of Billinudgel, county of Rous in the State of New South Wales (“the Ocean Shores Property”), the second defendant has held that property on trust for the plaintiffs as trustees of the Jefferson Lane Property Trust;

- (f) Pursuant to s 71 of the *Trustees Act 1925* (NSW) and s 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW), it is ordered that all title in and to the Ocean Shores Property vests forthwith in the plaintiffs as trustees of the Jefferson Lane Property Trust;
 - (g) It is ordered that the third and fourth defendants:
 - (v) Forthwith transfer the whole of their interest in the Ocean Shores Property to the plaintiffs as trustees of the Jefferson Lane Property Trust;
 - (vi) Forthwith deliver, at their own cost, to the plaintiffs a transfer in registrable form of the Ocean Shores Property in favour of the plaintiffs as trustees of the Jefferson Lane Property Trust;
 - (vii) Execute and deliver up to the plaintiffs such other documents as are necessary to effect the transfer of their interest in the Ocean Shores Property to the plaintiffs as trustees of the Jefferson Lane Property Trust including, but not limited to, the original certificate or certificates of title (if any);
 - (viii) Provide such further assistance as may reasonably be required to effect the registration of the transfer of their interest in the Ocean Shores Property to the plaintiffs as trustees of the Jefferson Lane Property Trust including answering any requisitions on title;
2. The plaintiffs have leave to amend the Second Amended Claim and Further Amended Statement of Claim to include a claim for an order that the third defendant pay the sum of \$21,851.70 to them as trustees of the estate of Dudley Ernest Sandford Dulley;

3. **Direct that this proceeding be placed on the Self-Represented Litigants' List;**
4. **The costs of and incidental to this application be reserved to the trial;**
5. **The application for summary judgment is otherwise dismissed;**
6. **Each party has liberty to apply on the giving of three clear days' notice to the other parties.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiff trustees applied for summary judgment with respect to part of the relief sought under their claim pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether there exists a real prospect that the defendants can successfully defend the part or parts of the claim in relation to which judgment is sought – whether there is a need for a trial of part or parts of the claim

Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW) s 4

Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) s 3

Trustee Act 1925 (NSW) s 71

Trusts Act 1973 (Qld) s 96, s 96(1)

Uniform Civil Procedure Rules 1999 (Qld), r 292

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, cited

ANZ Banking Group Ltd v Barry [1992] 2 Qd R 12, cited

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, followed
Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256; [2006] HCA 27, cited

Cassatone Nominees P/L v Queenslandwide House and Building Reports P/L & Ors [2008] QCA 102, cited

Corbiere & Anor v Dulley & Ors [2016] QSC 134, cited

Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, cited

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421; [1972] HCA 61, cited

LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105, cited

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42, cited

Miles v Bull [1969] 1 QB 258, cited

National Australia Bank Limited v Troiani and Anor [2002] QCA 196, cited

Queensland Pork Pty Ltd v Lott [2003] QCA 271, cited

Re Queensland Police Credit Union Ltd [2013] QSC 273, cited
Spencer v The Commonwealth (2010) 241 CLR 118; [2010]
 HCA 28, cited
Starr-Diamond v Talus Diamond (No 3) [2013] NSWSC 351,
 cited
Swain v Hillman [2001] 1 All ER 91, cited
Thesus Exploration N L v Foyster (1972) 126 CLR 507; [1972]
 HCA 41, cited
Uniting Church in Australia Property Trust (NSW) v Vincent
 [2009] NSWSC 375, cited
Westpac Banking Corporation v Hughes [2012] 1 Qd R 581;
[\[2011\] QCA 42](#), cited

COUNSEL: P Bickford for the applicants
 P Hackett for the first and second respondents
 The third respondent appeared on her own behalf
 The fourth respondent appeared on her own behalf
 D W Marks QC with M Ballans for the fifth respondent

SOLICITORS: Clayton Utz for the applicants
 Bruce Dulley Lawyers for the first and second respondents
 The third respondent appeared on her own behalf
 The fourth respondent appeared on her own behalf
 Jones Leach Lawyers for the fifth respondent

- [1] This application for summary judgment with respect to part of the relief sought in a claim is brought by the plaintiffs, Paul Corbiere and Andrew Monks, pursuant to r 292 of the *Uniform Civil Procedure Rules 1999* (Qld).
- [2] The plaintiffs are the executors and trustees of the last will of Dudley Ernest Sandford Dulley who died on 17 December 1991. In June 2013, they commenced this proceeding against the first to fourth defendants and, in May 2014, the fifth defendant was added as a party.
- [3] The first defendant, Bruce Dulley, is the son of the deceased. The second defendant, Yas Yo Pty Ltd, is a company in respect of which Bruce Dulley is the sole director and a 50% owner. The third, fourth and fifth defendants – Yasmin Dulley, Yolande Dulley and Jacob Dulley – are the adult children of Bruce Dulley and Louise Baker.
- [4] At the time of his death, the deceased was the registered proprietor of vacant beachfront land situated at Jefferson Lane, Palm Beach on the Gold Coast and a house property situated at Vista Avenue, Wellers Hill in Brisbane. Following his death, and in conformity with the directions contained in the will, the executors set up the Jefferson Lane Property Trust and the Vista Avenue Property Trust.
- [5] In late 2015, the executors brought an application for judicial advice and directions pursuant to s 96 of the *Trusts Act 1973* (Qld). The main question for the court was whether they should continue with this proceeding but there was also a subsidiary issue concerning the proper construction of the will. On 13 June 2016, judgment was handed down.¹ The

¹ *Corbiere & Anor v Dulley & Ors* [2016] QSC 134.

executors were advised that it was “in the interests of the estate, the Jefferson Lane Property Trust and the beneficiaries as a whole to continue to prosecute [this] proceeding”.² Directions were also given which had the effect of indemnifying the executors in respect of their past and future costs³ and rulings were made regarding the construction of the will.⁴

- [6] Since then, some progress has been made in the sense that there has been a narrowing of the areas of dispute between the parties. Nevertheless, save for the issues that will be settled by the outcome of this application, it seems inevitable that most of the issues that remain are unlikely to be resolved short of a trial.
- [7] Before considering the parts of the claim in relation to which summary judgment is sought, it is useful to make some observations about the jurisdiction to grant such relief.

Applicable principles

- [8] The test to be applied by the court on an application by a plaintiff for summary judgment is to be found in r 292(2) UCPR. It is in these terms:

“If the court is satisfied that –

(a) the defendant has no real prospect of successfully defending all or a part of the plaintiff’s claim; and

(b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff’s claim and may make any other order the court considers appropriate.”

- [9] It is of course well-established that the court must apply the words found in this rule, and is not to use other language to define the test.⁵ However, it is obvious from the language of r 292 UCPR that a clear case will be required before the court will be moved to summarily determine a proceeding (or part of a proceeding).⁶ The court will be concerned to establish two things: (1) whether there exists a real, as opposed to a fanciful, prospect that the defendant can successfully defend the claim or, as is the position here, the part of the claim in relation to which judgment is sought;⁷ and (2) whether there is a need for a trial of the claim or the part of the claim.⁸

² *Corbiere & Anor v Dullely & Ors* [2016] QSC 134 at [44].

³ *Ibid* [48].

⁴ *Ibid* [61] and [64].

⁵ *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at [17] per Williams JA (with whose reasons McMurdo P and Atkinson J agreed); *Spencer v The Commonwealth* (2010) 241 CLR 118 at 141, [58].

⁶ *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at [3] per McMurdo P; *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581 at 602, [74].

⁷ *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at [47] per Atkinson J, adopting the test laid down by Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 92.

⁸ In some cases, the triable issue will be a question of law even though the facts are not in dispute. The court may “take the view that the extent and complexity of the matters of law and of argument thereon” warrant a trial: *Thesus Exploration NL v Foyster* (1972) 126 CLR 507 at 514 per Barwick CJ. And see Gibbs J (at 515) and Stephen J (at 523). In other cases, it may be enough to successfully resist the entry of summary

- [10] It should also be kept in mind that r 292 is to be applied in the context of the overriding purpose of the UCPR, that is to say, to “facilitate the just and expeditious resolution” of the matter in dispute.⁹ There are obvious efficiencies – and benefits to the parties – that flow from the summary determination of claims (or parts of claims) where that is appropriate, but the power under r 292 is not one that should ever be exercised lightly.¹⁰ In that regard, the following observations by Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde* are instructive:
- “Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome.”¹¹
- [11] The legal burden of proof is on the applicant to establish a prima facie entitlement to judgment – that is to say, that the other party has no real prospect of succeeding on all (or part of the claim) and that there is no need for a trial of the claim (or part of the claim) – but, once that has been established, an evidentiary onus will usually be cast on the other party to upset that prima facie entitlement.¹² Nevertheless, although there may be a shift in the evidentiary onus,¹³ it should not be thought that there will be any shift in the legal burden of proof (which always remains with the applicant) or that the evidentiary onus on a respondent (once the applicant has established a prima facie entitlement to judgment) requires something in the way of complete proof of the responding party’s case at this stage of the proceeding.¹⁴ It will be enough to point to the existence of evidence which, if accepted, makes the prospect that the respondent will succeed at trial a real one. If, on the other hand there is no real prospect that the respondent will be successful in defending all or part of the claim, and there is no need for a trial, then the applicant will ordinarily be entitled to judgment.
- [12] The application for judicial advice proceeded on two written statements of fact to the court which had been prepared on behalf of the executor applicants.¹⁵ The court was required to assume the correctness of those facts for the purpose of deciding that

judgment to point to circumstances that ought to be investigated but cannot be investigated without the aid of the court’s interlocutory and trial processes, provided such circumstances (if established) would support a proper defence of the claim: *Miles v Bull* [1969] 1 QB 258 at 265 per Megarry J; *National Australia Bank Limited v Troiani and Anor* [2002] QCA 196 at [12] per Fryberg J (with whom McPherson JA agreed).

⁹ UCPR r 5.

¹⁰ *Spencer v The Commonwealth* (2010) 241 CLR 118 at 141, [60].

¹¹ (2000) 201 CLR 552 at 575-576, [57], which statement was referred to with approval by Gleeson CJ, Gummow, Hayne and Crennan JJ in *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at [46] and by French CJ and Gummow J in *Spencer* at [24] and followed by McMurdo P in *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at [3] and by White JA in *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105 at [29].

¹² *ANZ Banking Group Ltd v Barry* [1992] 2 Qd R 12 at 19 per Derrington J; *Queensland Pork Pty Ltd v Lott* [2003] QCA 271 at [41] per Jones J.

¹³ *LCR Mining Group* at [22] per White JA (with whom Margaret Wilson AJA and Ann Lyons J agreed).

¹⁴ Indeed, as Fraser JA observed in *Cassatone Nominees P/L v Queenslandwide House and Building Reports P/L & Ors* [2008] QCA 102 at [46], the observations of Jones J in *Queensland Pork* are to be understood in the context of the facts of that case, that is, the “applicant for judgment there adduced evidence that demanded an ‘irresistible’ or ‘unavoidable’ inference of fact in its favour yet the respondent, though shown to have the personal knowledge necessary to swear to a direct response, did not do so.”

¹⁵ *Trusts Act 1973* (Qld), s 96(1).

application.¹⁶ This application for summary judgment is, however, fundamentally different; the written statements of fact have no role to play. Instead, the application must be determined, if it can be, on the evidence advanced to the court on affidavit and which is admissible in proof of the various allegations. There is nonetheless one thing both applications have in common; it is not the function of the court when determining either application to decide disputed questions of fact.

Consideration

- [13] Informed by that statement of the applicable principles, I turn now to the parts of the relief claimed by the applicants that are the subject of this application.¹⁷ The background facts as well as the essential features of the pleadings are sufficiently summarised in my previous judgment.¹⁸

The net proceeds of sale of Jefferson Lane

- [14] The property owned by the deceased at the date of his death and situated at Jefferson Lane, Palm Beach was sold pursuant to a contract of sale entered into on 30 November 2007. The sale price was \$3,600,000. For that purpose, the trustees appointed Bruce Dulley, in his capacity as a solicitor and principal of the firm, *Bruce Dulley Family Lawyers*, to act on behalf of the Jefferson Lane Property Trust in relation to the sale. A deposit of \$100,000 was paid by the purchaser, with the balance purchase price after adjustments paid on the date of completion, that is, on 20 December 2007. The net proceeds of sale, being the sum of \$3,562,993.02, were then held in the trust account maintained by Mr Dulley’s firm.
- [15] The executors ask the court to declare that these net proceeds of sale were received by Mr Dulley for the use and benefit of the beneficiaries of the Jefferson Lane Property Trust. There cannot be much doubt about that, and those representing Mr Dulley do not dispute that such a declaration can, and should, be made. There is obvious utility in the grant of this relief and the declaration will accordingly be made.¹⁹
- [16] The executors also applied for these orders with respect to the net proceeds of sale:
- (a) an account of the moneys applied by Mr Dulley from the net proceeds of sale “other than in accordance with the requirements of the Jefferson Lane Property trust”;
 - (b) a declaration that the executors are “entitled to trace the [moneys] taken from the [net proceeds of sale] by or on behalf of” Mr Dulley;
 - (c) a declaration that Mr Dulley “holds any personal property or real property acquired by use of the [net proceeds of sale] or any part thereof on trust for” the executors;

¹⁶ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 95-96, [79]-[81].

¹⁷ That is, the relief claimed in the application for judgment filed on 10 November 2016.

¹⁸ *Corbiere & Anor v Dulley & Ors* [2016] QSC 134 at [5]-[18].

¹⁹ A declaratory order may be made, even when unopposed, where the “question is real” and not “abstract or theoretical” and where there is utility in doing so: *Re Queensland Police Credit Union Ltd* [2013] QSC 273 at [4]-[5] per McMurdo J, citing *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438 per Gibbs J and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

- (d) a declaration that “any profits derived or benefit gained by [Mr Dulley] from the use of the [net proceeds of sale] may be traced by” the executors;
- (e) an account of “any such profits derived or benefit gained arising from the use of” the net proceeds of sale;
- (f) a declaration that Mr Dulley “holds on trust for the [executors] such personal property or real property as may have been gained from the said use”.

[17] However, it was conceded by counsel for the executors on the hearing of the application that, before the making of any of the orders summarised in the preceding paragraph could be considered by the court, disputed facts will need to be determined.²⁰ That concession was correctly made and, for this reason, this portion of the overall relief is not amenable to summary determination.

The Yamba Property

[18] Part of the net proceeds of sale was used to purchase a property situated at Yamba, New South Wales in the name of the second defendant, Yas Yo Pty Ltd. The executors maintain that this was done without their knowledge or approval but that charge is denied by Bruce Dulley and Yas Yo Pty Ltd. Instead, it is countered that the purchase of the Yamba Property was either authorised by the executors or subsequently ratified by them.

[19] I have previously made a number of observations with respect to these competing cases.²¹ It is unnecessary to revisit those observations other than to hold that, on the affidavit material before the court,²² it is quite impossible for me to summarily determine these issues. To the point, it cannot be said that what is contended on behalf of Mr Dulley and Yas Yo Pty Ltd has no real prospect of success.

[20] That said, the executors still seek a declaration that the Yamba Property was at all times since its acquisition by Yas Yo Pty Ltd held by that company on trust for the executors as trustees of the Jefferson Lane Property Trust. In addition, a vesting order is sought pursuant to s 71 of the *Trustee Act 1925 (NSW)*²³ and s 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW)*²⁴ that all title to and in the Yamba Property immediately vests in the executors. In this regard, it is well established that the courts in all Australian states and territories have jurisdiction under an interacting legislative scheme to make orders in respect of land outside their geographical boundaries.²⁵ Neither the making of the declaration that is sought nor the making of the vesting order was opposed on the hearing of the application.²⁶ The proposition that the Yamba Property, from the moment when it was acquired, was held on a resulting trust by Yas Yo Pty Ltd for the executors in their capacity as trustees of the Jefferson Lane Property Trust is otherwise supported

²⁰ T. 1-4.

²¹ *Corbiere & Anor v Dulley & Ors* [2016] QSC 134 at [37]-[42].

²² Including, it is to be noted, a further affidavit sworn by Bruce Dulley and filed on 5 December 2016.

²³ Subsections (1), (2)(m) and/or (n) and/or (o).

²⁴ Subsection (3).

²⁵ And see s 3 of the *Jurisdiction of Courts (Foreign Land) Act 1989 (NSW)*. And see *Starr-Diamond v Talus Diamond (No 3)* [2013] NSWSC 351 at [6]-[7] per Slattery J.

²⁶ T. 1-6.

by the evidence. The legal conclusion is sound.²⁷ The declaration and order will accordingly be made.

- [21] The executors also seek what might be regarded as ancillary relief so far as the Yamba Property is concerned. Orders are sought to facilitate the transfer of Yas Yo Pty Ltd's interest to the executors as trustees of the Jefferson Lane Property Trust. Only one of those orders is opposed.²⁸ It is expressed in terms that, if made, would require Yas Yo Pty Ltd to "bear any and all costs associated with stamp duty, registration and other government charges fees or imposts, including any capital gains tax associated with giving effect to the said transfer". For the executors, it was submitted that such an order should be made because the declared position will be that the Yamba Property was at all times since its acquisition by Yas Yo Pty Ltd held by it on trust for the executors and, further, because the company will be ordered to transfer its interest in the property to the executors. That declaration and order will be made without any opposition and, as such, it was submitted by the executors, Yas Yo Pty Ltd has effectively agreed to regularise the title to the property in recognition of the proposition that the property was "only purchased because money was taken from the corpus of the trust without the authority of the trustees".²⁹ Elsewhere, it was submitted on behalf of the executors that the costs of "putting the property back where it belongs, in the hands of the trustees, must be borne by the person who created the situation" and that such a person "can't benefit from [its] own wrongdoing".³⁰ Although I accept the force of those submissions, the difficulty confronting the executors is that they depend on the proposition that the Yamba Property was purchased without their authority. That is a contentious fact on the affidavit material before me and one that I cannot resolve in a summary way. There is accordingly a triable issue with respect to the burden of any such costs. That is a something that will need to be resolved at the trial.
- [22] The balance of the orders sought to facilitate the transfer of the interest held by Yas Yo Pty Ltd in the Yamba Property to the executors as trustees of the Jefferson Lane Property Trust will be made. I am not however persuaded that an order requiring the executors to register the transfer and any associated instruments or documents is required; the executors can be relied on to do so because that is their duty.

The Ocean Shores Property

- [23] Like the Yamba Property, part of the net proceeds of sale of Jefferson Lane was used to purchase the property referred to in the material as the Ocean Shores Property. It was acquired, and then registered, in the names of Yasmin and Yolande Dullely. Again like the position that obtains with respect to the Yamba Property, the executors maintain that the Ocean Shores Property was acquired without their knowledge or approval but Bruce, Yasmin and Yolande Dullely contend that the acquisition was either authorised by the executors or subsequently ratified by them. For the reasons I have already expressed with respect to parts of the summary relief sought with respect to the Yamba Property, I cannot resolve those questions of fact at this stage of the proceeding.

²⁷ Corbiere & Anor v Dullely & Ors [2016] QSC 134 at [33]. And see *Uniting Church in Australia Property Trust (NSW) v Vincent* [2009] NSWSC 375 at [6] and [8] per Einstein J.

²⁸ T. 1-6.

²⁹ T. 1-8.

³⁰ T. 1-15.

- [24] An order is also sought by the executors that Bruce Dulley discharge a mortgage registered in his favour over the Ocean Shores Property. For Mr Dulley it is said that this has already been done and, for that reason, there is no need for such an order.³¹ I accept that is so.
- [25] Next, orders are sought against Yasmin and Yolande Dulley. In particular, the executors seek: (1) a declaration that Yasmin and Yolande hold the Ocean Shores Property on trust for the executors; (2) a vesting order pursuant to s 71 of the *Trustee Act* 1925 (NSW)³² and s 4 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (NSW)³³ that all title to and in the Ocean Shores Property immediately vests in the executors; and (3) orders to facilitate the transfer of their interest to the executors. None of that relief is opposed.³⁴ What is, however, opposed is an order requiring Yasmin and Yolande Dulley to “bear any and all costs associated with stamp duty, registration and other government charges fees or imposts, including any capital gains tax associated with giving effect to the ... transfer” of the Ocean Shores Property. In their case, the executors seek an order that the amount of any such costs be debited to their beneficiary accounts under the Jefferson Lane Property Trust. That is because, as each has sworn, they do not have the wherewithal to pay any such costs. Although Yasmin and Yolande Dulley did not voice particular opposition to such a course, neither was legally represented on the hearing of the application. If there is, as I have accepted in the case of the Yamba Property, a triable issue with respect to the burden of any costs that will be incurred in the transfer of that property to the executors, the same evidentiary issues must be seen to be present in the case of the Ocean Shores Property and, for that reason, a triable issue with respect to the burden of any transfer costs in the case of that property. I decline to order that they be borne by Yasmin and Yolande Dulley, whether by debiting their beneficiary accounts or otherwise. That is again a matter that will need to be resolved at trial.
- [26] That said, there cannot be any doubt that the Ocean Shores Property has been held on a resulting trust by Yasmin and Yolande Dulley for the executors in their capacity as trustees of the Jefferson Lane Property Trust. The same reasoning that applies to the Yamba Property applies with equal force to the Ocean Shores Property. Save for an order requiring Yasmin and Yolande Dulley to bear the costs associated with the transfer (which will not be made for the reasons just given), the declaration and orders sought by the executors will be made. As with the Yamba Property, I do not think it is necessary to order that the executors register the transfer and any associated instruments or documents because it is their clear duty to do so.

The claim for possession

- [27] The executors seek an order that, within 14 days of the date of judgment, Bruce Dulley, Yas Yo Pty Ltd, Yasmin Dulley and Yolande Dulley deliver up possession of the Yamba Property and the Ocean Shores Property. It is submitted that there is no proper basis to resist such an order because it is for the executors to “determine who, if anyone, can occupy those properties”.³⁵ The grant of such an order is opposed by Bruce, Yasmin and

³¹ Counsel for the executors accepted that a discharge had in fact been received: T. 1-33.

³² Subsections (1), (2)(m) and/or (n) and/or (o).

³³ Subsection (3).

³⁴ T. 1-8 and 1-9.

³⁵ T. 1-17.

Yolande Dulley as well as Yas Yo Pty Ltd but is supported by Jacob Dulley.³⁶ It is contended on behalf of Bruce, Yasmin and Yolande Dulley and Yas Yo Pty Ltd that both properties are used by the “extended Dulley family”, that Bruce Dulley pays all of the outgoings with respect to them, that there is no need for the executors to sell either property prior to the trial and that they are, in any event, subject to the life interest granted to Bruce Dulley over Jefferson Lane by the will.

- [28] Most of what was submitted on behalf of Bruce, Yasmin and Yolande Dulley and Yas Yo Pty Ltd might be described as “balance of convenience” submissions, and cannot stand in the way of possession being ordered in favour of the executors if that is their clearly established legal right. The remaining argument – that the properties are subject to a life interest in favour of Bruce Dulley – has more substance.
- [29] Under the will, Bruce Dulley were given a life interest in Jefferson Lane as well as Vista Avenue. The argument advanced on his behalf was that the use of the net sale proceeds from the sale of Jefferson Lane to acquire the Yamba Property and the Ocean Shores Property was authorised or later ratified by the executors. Thus, it was contended, Bruce Dulley is entitled to the same life interest in those subsequently acquired properties as he was in Jefferson Lane. As I have stated already a number of times, whether the properties were acquired with the prior approval of the executors is something that will need to be established one way or another at the trial. In their respective affidavits, the executors have flatly rejected any such notion, but I cannot conclude that Bruce Dulley (or the other interested defendants) has no real prospect of establishing that he was authorised to use the net sale proceeds to acquire the properties. If that is accepted at trial, then whether the properties were held on trust for the executors but subject to a life interest in favour of Bruce Dulley will, amongst other things, depend on the findings that will need to be made as to the intention of the parties.

Amendment of the Claim and Statement of Claim

- [30] The executors seek leave to amend the Claim and Statement of Claim to include a claim against Yasmin Dulley for recovery of a sum of money (\$21,851.70) that was the proceeds of an insurance policy taken out over the life of the deceased. Whilst it was pleaded that this sum was paid by Bruce Dulley to Yasmin Dulley, a claim for its payment back to the executors was not included in the prayer for relief. That was an oversight. In the circumstances, it cannot be said that the addition of this claim will come as any surprise or that Yasmin has been prejudiced in any way. Leave to amend will be granted.

Costs

- [31] On the hearing of the application, the executors accepted that it was premature to make any order about the costs of the proceeding but, nonetheless, an order was sought that Bruce, Yasmin and Yolande Dulley as well as Yas Yo Pty Ltd pay the costs which the executors have incurred in pursuing this application for summary judgment.³⁷ The executors have not been wholly successful on the application. The position may however turn out to be different after a trial. It is appropriate that the costs of and incidental to the application be reserved to the trial, and that is the order which shall be made.

³⁶ T. 1-19.

³⁷ T. 1-5.

- [32] On 16 June 2016, I made various orders to reflect the outcome of the application brought by the executors pursuant to s 96 of the *Trusts Act 1973* (Qld). These included an order providing for the executors to be indemnified out of the assets of the Jefferson Lane Property Trust in respect of the costs they had incurred to that point in time as well as the further costs to be incurred by them in the prosecution of their claim (paragraph 4) and an order that the costs incurred by Jacob Dulley of and incidental to that application as well as the costs incurred and to be incurred by him in the principal proceeding be paid out of the capital of the Jefferson Lane Property Trust pursuant to s 62 of the *Trusts Act 1973* (paragraph 5). Those orders are not in any way intended to be affected by the order I propose to make by which the costs of and incidental to this application are reserved to the trial.

Disposition

- [33] Subject to hearing the parties on the form of the orders I propose to make, they shall be as I have indicated in these reasons. The application will otherwise stand dismissed.