

*Gerke v Marton* [2013] NTSC 26

PARTIES: CHRISTINE GERKE

v

ANDREW MARTON

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: 17 of 2013 (21308959)

DELIVERED: 31 MAY 2013

HEARING DATES: 20 MAY 2013

JUDGMENT OF: MASTER LUPPINO

**CATCHWORDS:**

PRACTICE AND PROCEDURE – Stay of proceedings – Concurrent proceedings in different jurisdictions – Application for summary dismissal or stay – Whether proceedings are an abuse of process – Principles relevant to whether summary dismissal should be ordered – Principles relevant to grant of a temporary stay – Potential incompatible determinations – Summary dismissal refused – Stay granted.

*Family Law Act 1975* (Cth) ss 90AE, 90AG, 90SL, 90SM, 90SS, 90TA

*William v Spautz* (1991) 174 CLR 509

*Henry v Henry* (1996) 185 CLR 571

*MG Lines Pty Ltd v Navi* (2013) NTSC 20

*Sterling Pharmaceutical Pty Ltd v The Boots Company (Australia) Pty Ltd*  
(1992) 34 SCR 287

**REPRESENTATION:**

*Counsel:*

Plaintiff:	Self Represented
Defendant:	Ms Truman

*Solicitors:*

Plaintiff:	Self Represented
Defendant:	DS Family Law

Judgment category classification:	B
Judgment ID Number:	LUP1304
Number of pages:	13

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Gerke v Marton* [2013] NTSC 26  
No. 17 of 2013 (21308959)

BETWEEN:

**Christine Gerke**  
Plaintiff

AND:

**Andrew Marton**  
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 31 May 2013)

- [1] This is an application by the Defendant for summary dismissal of the Plaintiff's claim as an abuse of process. In the alternative the Defendant seeks a stay of the Plaintiff's claim pending the determination of proceedings currently before the Federal Circuit Court.
- [2] Although it is not entirely clear from the Statement of Claim, when read together with an affidavit of the Plaintiff filed contemporaneously with the Statement of Claim, it is apparent that the Plaintiff alleges the Defendant has breached his fiduciary duty while he was trustee of the trust known as the Terra Fortunata Unit Trust (the 'Unit Trust') and that the Unit Trust has suffered a loss as a result. The Statement of Claim seeks declarations and

relief in respect of the alleged breaches of fiduciary duty. The relief sought is the removal of the Defendant as the trustee, orders in the nature of an account and compensation for loss. The Plaintiff sues in a representative capacity namely, as the beneficiary (query whether she is also the trustee), of a family trust which is the holder of all of the units in the Unit Trust. For the proposes of argument at least I will consider the Statement of Claim together with the contemporaneously filed affidavit although clearly that situation could not be permitted to continue if these proceedings were to survive this application.

- [3] The Plaintiff and the Defendant are former de facto partners who separated following a relationship of many years. The allegation of abuse of process by the Defendant is based on the existence of proceedings commenced on 22 May 2012 in the Federal Magistrates Court (now known as the Federal Circuit Court). The application in those proceedings sought, as a final order, *‘... a just and equitable property settlement in terms as the Court deems appropriate’*. Various interim orders were also sought and made.
- [4] One of the interim orders related to a purported termination, on 24 April 2012, of the Unit Trust by resolution of the unit holder of that trust. On 29 May 2012 the Federal Magistrates Court ordered the Plaintiff *‘...to cause a special resolution to be passed withdrawing or otherwise cancelling any previous special resolution passed in 2012 under the Terra Fortunata Unit Trust.’*

- [5] The Plaintiff apparently complied with that order. I have doubts that the resolution to terminate the trust can be cancelled as simply as the Federal Magistrates Court order provides but it is not necessary for me to consider that.
- [6] Central to the proceedings, both in this Court and in the Federal Circuit Court, is the Unit Trust and there are contentious facts concerning its creation, its assets and its dealings and operations. Even though most of the Plaintiff's affidavits, as well as parts of the Defendant's affidavit, were struck out as irrelevant or argumentative, it is clear that most of the evidence is disputed. One of the core allegations on which the Plaintiff's claim is based is disputed namely, whether the Defendant was the trustee of the Unit Trust at the relevant time. The Statement of Claim pleads that the Defendant was the trustee at the time of the issue of the Writ but the Defendant's evidence suggests that he retired as a trustee on 11 December 2009. At the very least there is evidence, which cannot conceivably be disputed, that there was another trustee in office from that date albeit whether that other trustee was in addition to, or in substitution for, the Defendant is not clear.
- [7] The initiating process filed in the Federal Magistrates Court as well as the pertinent orders made in that court to date, were in evidence before me but not the Plaintiff's response nor any of the affidavits filed in that court. That complicates the task of determining the extent of the overlap between the two proceedings. The initiating application in the Federal Magistrates Court

is of limited utility in that respect as the procedures of that court do not require pleadings. Only the specified orders sought provide any guidance as to the extent of the issues in respect of the matter before that court but that amounts only to the equivalent of the prayer for relief in a common law court.

- [8] Although the Plaintiff concedes that there are some common features in the two proceedings she argues that there is no overlap, or at least there is no overlap sufficient to justify the orders that the Defendant seeks. The Plaintiff argues in essence that the proceedings in this Court seek redress for breaches of fiduciary duties and associated remedies, matters which she submits the Federal Circuit Court lacks the jurisdiction to deal with and therefore there is no abuse of process.
- [9] Ms Truman, for the Defendant pointed out the powers of the Federal Circuit Court under the *Family Law Act 1975* (Cth) (“the Act”), specifically power to make orders in relation to de facto property settlements and ancillary powers to make orders binding non-parties and trustees.
- [10] The sections of the Act, with irrelevant parts redacted, provide as follows:-

**90AE            Court may make an order under section 79 binding a third party**

- (1) In proceedings under section 79, the court may make any of the following orders:
- (a) an order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor;

- (b) an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor;
  - (c) an order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made;
  - (d) an order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.
- (2) In proceedings under section 79, the court may make any other order that:
- (a) directs a third party to do a thing in relation to the property of a party to the marriage; or
  - (b) alters the rights, liabilities or property interests of a third party in relation to the marriage.
- (3)-(4) *Omitted.*

## **90AG Orders and injunctions binding on trustees**

If an order or injunction binds a person in the capacity of trustee in relation to property, then the order or injunction is also binding (by force of this section) on any person who subsequently becomes the trustee.

## **90SL Declaration of interests in property**

- (1) In proceedings between the parties to a de facto relationship:
- (a) after the breakdown of the de facto relationship; and
  - (b) with respect to existing title or rights in respect of property;
- the court may declare the title or rights, if any, that a party has in respect of the property.
- (2) *Omitted.*

**90SM            Alteration of property interests**

(1)            In property settlement proceedings after the breakdown of a de facto relationship, the court may make such order as it considers appropriate:

- (a)            in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them – altering the interests of the parties to the de facto relationship in the property; or
- (b)            in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the de facto relationship – altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

- (c)            an order for a settlement of property in substitution for any interest in the property; and
- (d)            and order requiring:
  - (i)            either both of the parties to the de facto relationship; or
  - (ii)           the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the de facto relationship or a child of the de facto relationship, such settlement or transfer of property as the court determines.

(2)-(20) *Omitted.*

**90SS            General powers of court**

(1)            The court, in exercising its powers under this Division, may do any or all of the following:

(a)-(d) *Omitted*

- (e)            order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out



effectively or to provide security for the due performance of an order;

(f) appoint or remove trustees;

(g)-(h) *Omitted*

(i) impose terms and conditions;

(j) *Omitted*

(k) make any other order, or grant any other injunction, (whether or not of the same nature as those mentioned in the preceding paragraphs of this section) which it thinks it is necessary to make to do justice;

(l) *Omitted.*

(2)-(4) *Omitted.*

#### *Injunctions*

(5) Without limiting paragraph (1)(k), the court may:

(a) grant:

(i) an interlocutory injunction; or

(ii) an injunction in aid of the enforcement of a decree;

in any case in which it appears to the court to be just or convenient to do so; and

(b) grant an injunction either unconditionally or upon such terms and conditions as the court considers appropriate.

(6)-(11) *Omitted.*

[11] Essentially section 90SL confers power on the court to declare rights and make orders in respect of property between persons in a de facto relationship. Section 90SM confers the related powers in respect of the alteration of those property interests. Section 90SS sets out the general

powers of the court. I was not referred to any authorities dealing with the scope of these provisions but I note that the power in section 90SS(e) is very wide. There are no limits on the court's power in the respect of the nature or type of deed that the court can order to be executed or of the terms of the deed. Read broadly that means persons could be ordered to execute a deed which could have the effect for instance, of a resettling a trust, removing or appointing trustees,<sup>1</sup> or removing or appointing appointors and other office holders, liquidating a trust or varying the terms of a trust. Likewise the power to order an alteration of property interests appears unlimited. Presumably a party's interest in a trust is also subject to this power and therefore in conjunction with the power to order alteration of property interests, that court could then alter the otherwise fixed entitlements of persons to distribution on a liquidation of trust assets.

[12] The power in section 90SS(f) is particularly relevant given that one of the orders the Plaintiff seeks in this Court is for the removal of the trustee. Sections 90AE and 90AG empower the Federal Circuit Court to bind third parties including successors of trustees.<sup>2</sup>

[13] I was not directed to any provision of the Act which gives the Federal Circuit Court any specific power to make declarations as to breaches of fiduciary duty, such as is sought in the proceedings in this Court. However, and assuming no such power exists, on my reading of the powers of the

---

<sup>1</sup> See also section 90SS(f) which confers the specific power in respect of trustees.

<sup>2</sup> Section 90TA of the Act extends the operation of section 90AE and 90AG to persons in a de facto relationship.

Federal Circuit Court the orders that court could make might effectively render any declaration of a breach of fiduciary duty superfluous.

[14] Against that background Ms Truman argues that the Plaintiff has a collateral purpose in commencing the proceedings in this Court namely, to thwart the property alteration powers of the Federal Circuit Court under the Act. She submits that is contrary to the interests of justice and accordingly is an abuse of process. If I were to be satisfied as to the former then the latter would naturally follow.

[15] I was referred to *Williams v Spautz*<sup>3</sup> where the High Court held that proceedings brought for an improper purpose can be stayed as an abuse of process. Moreover, the Court said that:-

1. the power exists notwithstanding that a prima facie case can be established;
2. an order for a stay can be made even if a fair trial could occur in any case, i.e. the power is not based on the likelihood of an unfair trial;
3. the improper purpose need not be the sole purpose;
4. an abuse of process occurs when the only substantial intention of the claim is to obtain an advantage or to create a burden on

---

<sup>3</sup> (1991) 174 CLR 509

the opponent which, in either case, operates collaterally to the issues in the proceedings.

[16] The Plaintiff, unsurprisingly, denies any collateral purpose. To establish that Ms Truman in part relied on the absence of any reference to the other proceedings in the Plaintiff's Statement of Claim. I do not consider it appropriate to conclude such a collateral purpose from that omission as that is not a material fact for the purpose of the Plaintiff's cause and therefore a pleading to that effect is not permitted.

[17] Ms Truman also asserted that the relief the Plaintiff seeks in these proceedings would amount to a breach of the interim injunction ordered in the Federal Magistrates Court and she submitted that the proceedings in this Court are commenced with the collateral purpose of circumventing that interim injunction. The interim injunction referred to restrains both parties *'...from selling or otherwise disposing of any assets of the parties including assets owned directly or indirectly by either party and assets in which either party has a beneficial right'*. Having since compared that order with the Plaintiff's Statement of Claim and in particular the prayer for relief,<sup>4</sup> I think that submission must be rejected.

[18] The Plaintiff argued that the powers conferred on the Federal Circuit Court cannot redress any breach of fiduciary duty. The breach alleged, if proved, is a serious one in the context of trustees and fiduciary duties namely, that

---

<sup>4</sup> See para 2 above.

the Defendant as trustee has unjustly enriched himself to the detriment of the beneficiaries and that he has acted where his interests conflict with those of the beneficiaries. Notwithstanding that the orders of the Federal Circuit Court might render that determination superfluous, the Statement of Claim is sufficient to reveal that, with appropriate amendments, the Plaintiff may be entitled to equitable relief in respect of which the Federal Circuit Court lacks jurisdiction. I am satisfied that if the allegations are established there is a potential liability on the Defendant which could survive the intervention of orders of the Federal Circuit Court. The Plaintiff has the right to ventilate that in a court which has the necessary jurisdiction. I think that is sufficient to negate the alleged collateral purpose.

- [19] The issue of a stay pending determination of the proceedings in the Federal Circuit Court is another matter. It is *prima facie* vexatious and oppressive, and therefore an abuse of process, to commence proceedings in a court if an action is already pending in another court: *Henry v Henry*.<sup>5</sup> In that case the High Court set out some of the factors relevant to determining when such a stay should be granted. That case largely dealt with international aspects, none of which readily translate to the current proceedings. Recently in this Court the relevant principles were discussed in *MG Lines Pty Ltd v Navi*.<sup>6</sup> In that case Kelly J, relying on *Sterling Pharmaceutical Pty Ltd v The Boots*

---

<sup>5</sup> (1996) 185 CLR 571 at 591

<sup>6</sup> 2013 NTSC 20

*Company (Australia) Pty Ltd*<sup>7</sup> summarised the relevant principles as follows:-

Considerations to be taken into account in determining whether to stay one set of proceedings pending the outcome of another include, relevantly:

- (a) which proceeding was commenced first;
- (b) how far advanced the proceedings are in each court;
- (c) whether work already done in preparation on one set of proceedings might be wasted;
- (d) whether the determination of one proceeding is likely to have a material effect on the other;
- (e) the undesirability of permitting multiplicity of proceedings in relation to similar issues; and
- (f) the undesirability of there being contradictory determinations in two different proceedings.<sup>8</sup>

[20] Which proceedings commenced first is relevant but that can sometimes be simply a matter of timing. The proceedings in the Federal Circuit Court are further advanced than the proceedings in this Court as evidenced by the proximate trial date. The undesirability of multiplicity of proceedings is always a consideration and in this respect the evidence of the nature of the disputes in each proceeding satisfies me that there is sufficient overlap for this principle to apply. By far the most significant factor is the possibility of contradictory findings. As I said earlier, the factual disputes are common to both proceedings such that the possibility of contradictory findings between different courts is a real risk.

---

<sup>7</sup> (1992) 34 SCR 287

<sup>8</sup> *MG Lines Pty Ltd v Navi* 2013 NTSC 20 at para 23

[21] The factor that the determination of the Federal Circuit Court proceedings might affect the Supreme Court proceedings is also relevant. It is telling that the converse is not necessarily the case if the Federal Circuit Court proceedings were to be stayed. Upon determination of the Supreme Court proceedings, and even if this Court were to find breaches of fiduciary duty, that would not impact upon the powers of the Federal Circuit Court to nonetheless make orders irrespective of any finding of breach of fiduciary duty.

[22] For these reasons I refuse the Defendant's application for a summary dismissal of the proceedings but I order that these proceedings be stayed until determination of the proceedings in the Federal Circuit Court.

[23] I will hear the parties before making orders in final terms as well as in respect of any ancillary matters.