Federal Court of Australia

Deputy Commissioner of Taxation v Kocic (No 2) [2024] FCA 372

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| File number(s): |  |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 16 April 2024 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – where leave sought to file an amended originating application pursuant to r 8.21 of the *Federal Court Rules 2011* (Cth) (FCR) – where leave sought to file a statement of claim – where joinder of parties sought pursuant to r 9.05 of the FCR – where amended originating application, accompanying statement of claim and joinder are in aid of the relief sought pursuant to s 37A of the *Conveyancing Act 1919* (NSW) (Conveyancing Act) – whether amendment to pleadings is based on the same facts or substantially the same facts as those already pleaded – whether this Court has jurisdiction in respect to the claim sought to be brought pursuant to s 37A of the Conveyancing Act |
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| Legislation: | *Corporations Act 2001* (Cth) s 175*Federal Court of Australia Act 1976* (Cth) s 37M*Judiciary Act 1903*(Cth) s 39B*Federal Court Rules 2011* (Cth) rr 1.32-1.35, 8.21, 9.05*Conveyancing Act 1919* (NSW) s 37A |
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| Cases cited: | *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*[2001] HCA 1; (2001) 204 CLR 559 *Bryant (Liquidator) v L.V. Dohnt & Co Pty Ltd, in the Matter of Gunns Limited (In Liq) (Receivers and Managers Appointed)* [2018] FCA 238 *Carter, in the matter of Spec FS NSW Pty Ltd (In Liquidation)* [2013] FCA 1027; (2013) 225 FCR 79 *Commissioner of Taxation v Oswal (No 6)* [2016] FCA 762; (2016) 339 ALR 560*Commissioner of Taxation v Oswal* [2012] FCA 1507*CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53; (2004) 224 CLR 98 *Darcy v Medtel Pty Ltd (No 3)* [2004] FCA 807 *DCJ21 v Medical Board of Australia* [2021] FCA 1037 *Deputy Commissioner of Taxation v Ghaly* [2016] FCA 707 *Deputy Commissioner of Taxation v Kocic* [2023] FCA 1353*Draney v Barry* [1999] QCA 491; [2002] 1 Qd R 145 *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 *Fina Research SA v Halliburton Energy Services Inc* [2002] FCA 1281*Krakowski v Eurolynx Properties Limited* [1995] HCA 68; (1995) 183 CLR 563*Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636; [2015] 1 WLR 291 *Mansfield (Liquidator) v Fortrust International Pty Ltd, in the matter of Palladium Investments International Pty Ltd (in liq)* [2023] FCA 350 *Marcolongo v Chen* [2011] HCA 3; (2011) 242 CLR 546 *McGraw-Hill Financial, Inc v Clurname Pty Ltd* [2017] FCAFC 211; (2017) 123 ACSR 467*Rana v Google* [2017] FCAFC 156; (2017) 254 FCR 1 *Resort Lifestyle Developments Pty Ltd v NGI Savannah Living Communities Pty Ltd* [2022] QSC 194; (2022) 12 QR 67 *Rizeq v Western Australia* [2017] HCA 23; (2017) 262 CLR 1 *Royal v El Ali* [2016] FCA 782 *Singh v Super City Home Loans Pty Ltd* [2011] FCA 646  |
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| National Practice Area: |  |
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| Number of paragraphs: | 39 |
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| Date of hearing: | 6 February 2024  |
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| Counsel for the Applicant  | Mr White SC and Ms Gaussen  |
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| Solicitor for the Applicant  | The Australian Government Solicitor  |
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| Counsel for the Respondents | Mr McGovern SC and Mr Russoniello |
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| Solicitor for the Respondents  | McEvoy Legal |

ORDERS

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|  | NSD 1201 of 2021 |
|   |
| BETWEEN: | DEPUTY COMMISSIONER OF TAXATIONApplicant |
| AND: | NEDZAD KOCICFirst RespondentALMIRA KOCICSecond RespondentSENAD KOCIC (and others named in the Schedule)Third Respondent |

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| order made by: | ABRAHAM J |
| DATE OF ORDER: | 16 April 2024 |

THE COURT ORDERS THAT:

1. Leave to file the statement of claim in its current form is refused.
2. The applicant is granted leave to replead the statement of claim (before the application to amend its pleadings and associated applications are determined).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ABRAHAM J:

1. By interlocutory application dated 22 November 2023, the Deputy Commissioner of Taxation (the Commissioner, the applicant) seeks joinder of listed persons and entities pursuant to r 9.05 of the *Federal Court Rules 2011* (Cth) (FCR); leave to file an amended originating application pursuant to r 8.21 of the FCR; and leave to file a statement of claim (the Amendment and Joinder Application). The respondents oppose the grant of leave on various bases, including lack of jurisdiction, futility as the case (in their submission) has no merit, and deficiencies in the pleadings.
2. Although I do not accept the respondents’ assertions, I nonetheless consider there are aspects of the statement of claim which are deficient but could be readily rectified. That being so I do not grant leave to file the statement of claim in its current form, but give the applicant leave to address the concerns raised and to file an amended statement of claim. The amended originating application needs no further amendment.
3. The background to this application is that the Commissioner commenced proceedings in this Court on 18 November 2021 seeking the recovery of taxation related debts. The Commissioner then made an application for a freezing order, in circumstances where there was a real risk of dissipation which would frustrate recovery. Freezing Orders were made on that date against each of the respondents. The Commissioner has since executed settlement deeds with the third to sixth respondents. Freezing Orders remain in place for, and proceedings remain on foot as against, the first, seventh and eighth respondents, although a settlement has been reached with the second respondent. The Commissioner also has the benefit of a summary judgment in this Court, in the amount of $18,026,881.25, against the first respondent: *Deputy Commissioner of Taxation v Kocic* [2023] FCA 1353.
4. There are currently applications before me by both the applicant and the respondents to amend aspects of the Freezing Orders. These applications, although heard on a different day to the Amendment and Joinder Application (for reasons not presently relevant), are intertwined. The amendments to the pleadings have a capacity to impact the applications in relation to the Freezing Orders. Consequently, it is appropriate to give brief reasons in relation to the amendment of the pleadings and to defer consideration of the variation of the Freezing Orders until after an amended statement of claim has been filed.

## The Amendment and Joinder Application

1. At the hearing of the interlocutory application, the orders relevantly sought were as follows:
2. Pursuant to r 9.05 of the FCR:
	1. Suada Deversivic be re-joined to the proceedings as the sixth respondent.
	2. Arabian Owl Pty Ltd (ACN 151 186 560) be joined to the proceedings as the ninth respondent.
	3. Trans Group Holdings Pty Ltd (ACN 137 580 548) be joined to the proceedings as the tenth respondent.
	4. Alaina Kahila be joined to the proceedings as the eleventh respondent.
	5. Daniel Osmond be joined to the proceedings as the twelfth respondent.
	6. Austil Corp Pty Ltd (ACN 096 087 900) be joined to the proceedings as the thirteenth respondent.
3. Pursuant to r 8.21 of the FCR, leave be granted to the applicant to file an amended originating application in the form of Annexure DM-01 to the affidavit of David Morris, affirmed 22 November 2023 (Morris Affidavit).
4. Leave be granted to the applicant to file a statement of claim in the form of Annexure DM-02 to the Morris Affidavit.
5. In the proposed amended originating application, the applicant seeks, inter alia:
6. a declaration that the assets held in the name of the eighth respondent are beneficially held by the first respondent (the First Declaration);
7. a declaration that the first respondent has been, and continues to be, the beneficial owner of the ninth respondent, Arabian Owl Pty Ltd (ACN 151 186 560) (previously known as ZWF Pty Ltd (ZWF)), from on or about 1 November 2011 (the Second Declaration); and
8. a declaration that the transfers of funds from ZWF for the purchase of several commercial properties held in the name of the eighth respondent (the Commercial Properties) are void pursuant to s 37A of the *Conveyancing Act 1919* (NSW) (Conveyancing Act) (the Third Declaration).
9. The proposed amended originating application, accompanying statement of claim and joinder are in aid of the relief sought pursuant to s 37A of the Conveyancing Act concerning alienation of property with intent to defraud creditors.
10. Section 37A of the Conveyancing Act provides that:

**37A Voluntary alienation to defraud creditors voidable**

(1) Save as provided in this section, every alienation of property … with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.

1. In *Marcolongo v Chen* [2011] HCA 3; (2011) 242 CLR 546 the High Court held that it is not necessary to prove actual intent of the relevant person’s state of mind and that intent can be inferred from the evidence as a question of fact. In *Commissioner of Taxation v Oswal (No 6)* [2016] FCA 762; (2016) 339 ALR 560, the Court identified (at [66]) that the relevant intent may be inferred where the natural and probable consequence of the disposition is the defeat or delay of creditors; and the alienation is voluntary, in favour of a family member and made in proximity to one or more events indicating financial stress.

### Relevant legal principles

1. Rules 8.21 and 9.05 of the FCR provide the relevant statutory framework for amendment generally and the joinder of parties, respectively.
2. Rule 8.21 of the FCR provides:

**8.21 Amendment generally**

(1) An applicant may apply to the Court for leave to amend an originating application for any reason, including:

…

(b) to avoid the multiplicity of proceedings; or

…

(g) to add or substitute a new claim for relief, or a new foundation in law for a claim for relief, that arises:

(i) out of the same facts or substantially the same facts as those already pleaded to support an existing claim for relief by the applicant; or

(ii) in whole or in part, out of facts or matters that have occurred or arisen since the start of the proceeding.

1. The FCR must be construed as a whole. Rule 8.21 is to be construed in light of rr 1.32 to 1.35 which allow the Court to enable the overarching purpose of the “civil practice and procedure provisions”; being the facilitation of the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: see s 37M of the *Federal Court of Australia Act 1976* (Cth) (FCA Act); *McGraw-Hill Financial, Inc v Clurname Pty Ltd* [2017] FCAFC 211; (2017) 123 ACSR 467 at [23]-[26].
2. The onus is on the party seeking leave to amend an originating application to persuade the Court that such leave should be given: *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 at [17].
3. Rule 8.21(g)(i) “requires the court to focus on the facts currently pleaded to determine whether the new claim for relief (or new legal foundation for a claim) arises out of the same, or substantially the same facts”: *Darcy v Medtel Pty Ltd (No 3)* [2004] FCA 807 at [30] cited in *Carter, in the matter of Spec FS NSW Pty Ltd (In Liquidation)* [2013] FCA 1027; (2013) 225 FCR 79 at [38]. The expression “substantially the same facts” does not mean “the same facts” and the need to prove additional facts to support the new cause of action does not preclude the exercise of the Court’s discretion under r 8.21(g)(i). If the additional facts to support the new cause of action arise out of substantially the same story as that which supports the original cause of action, the fact that there is a changed focus with elicitation of additional details should not, of itself, prevent a finding that the new cause of action arises out of substantially the same facts: *Draney v Barry* [1999] QCA 491; [2002] 1 Qd R 145 at [57] cited with approval in *Bryant (Liquidator) v L.V. Dohnt & Co Pty Ltd, in the Matter of Gunns Limited (In Liq) (Receivers and Managers Appointed)* [2018] FCA 238 at [71].
4. Rule 9.05 of the FCR provides:

**9.05 Joinder of parties by Court order**

(1) A party may apply to the Court for an order that a person be joined as a party to the proceeding if the person:

(a) ought to have been joined as a party to the proceeding; or

(b) is a person:

(i) whose cooperation might be required to enforce a judgment; or

(ii) whose joinder is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined; or

(iii) who should be joined as a party in order to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings.

…

(4) An application under subrule (1) need not be served on any person who was not served with a copy of the originating application.

…

1. Where an applicant seeks to join additional respondents, it must satisfy the Court that it has an arguable claim against the proposed additional respondents, and that there is a good reason for joining them to the proceeding: *Singh v Super City Home Loans Pty Ltd* [2011] FCA 646 at [108]. The Court also has the power to make an order rejoining a party who has been removed: see for example *Fina Research SA v Halliburton Energy Services Inc* [2002] FCA 1281.

### Evidence

1. In support of the Amendment and Joinder Application, the Commissioner relied on the Morris Affidavit, including the accompanying documents annexed to that affidavit.
2. The respondents relied on the affidavit of Kevin Cheng affirmed 27 November 2023 (Cheng Affidavit), together with accompanying exhibit KC-2. The respondents also relied upon paragraphs 68 to 69 of the affidavit of Craig Morelande dated 18 November 2021 (Morelande Affidavit) and a copy of a stamped deed of trust for the Trans Holdings Unit Trust dated 22 June 2009.

### Submissions

1. The Commissioner submitted that the proposed amendments to the originating application fall within r 8.21(1)(g)(i) of the FCR. The originating application in its initial form arose from facts including an unpaid tax debt to the Commissioner and concern as to the dissipation of assets. Declaratory relief was sought as to beneficial ownership of the various properties. The Commissioner submitted that the same facts ground the proposed amended originating application as the availability of the cause of action pursuant to s 37A of the Conveyancing Act became apparent on the basis of information obtained through the subpoena and notice to produce process in these proceedings.
2. The Commissioner contended that it is appropriate that the amended claim pursuant to s 37A of the Conveyancing Act proceed in this Court (as opposed to the Supreme Court of New South Wales) because it has a substantial connection with the extant pleadings, and will therefore avoid multiplicity of pleadings, referring to *Mansfield (Liquidator) v Fortrust International Pty Ltd, in the matter of Palladium Investments International Pty Ltd (in liq)* [2023] FCA 350 at [10]. The Commissioner submitted that the proposed s 37A claim forms part of the single controversy between the Commissioner and respondents because: (a) the Commissioner has the benefit of a summary judgment against the first respondent; (b) by prayer 2 of the existing originating application, the Commissioner seeks judgment against the second respondent in relation to taxation liabilities; (c) by prayers 7 and 8 of the existing originating application, the Commissioner seeks declarations as to the beneficial ownership of the assets which are held in the name of the seventh and eighth respondents; (d) the Commissioner sought those declarations in aide of recovery of taxation liabilities; and (e) consistent with those declarations, the Commissioner now seeks recovery of those taxation liabilities pursuant to s 37A of the Conveyancing Act.
3. In respect to the joinder of parties, the Commissioner submitted that he has a clearly arguable claim pursuant to s 37A of the Conveyancing Act on the basis of the pleaded matters in the proposed statement of claim. It was submitted that it is necessary to join each of the below-listed parties to ensure that each issue in dispute in the proceeding can be heard and finally determined, to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings:
4. ZWF (proposed ninth respondent) – the Commissioner seeks a declaration that the first respondent was the beneficial owner of ZWF in about the period 1 November 2011 to 11 July 2023. Relief is sought to the effect that transfers of funds from ZWF are void pursuant to s 37A of the Conveyancing Act.
5. Suada Dervisevic (proposed sixth respondent) – Ms Dervisevic is recorded as the sole director and secretary of ZWF from about 1 November 2011 until about 23 November 2021. Ms Dervisevic is recorded as the sole shareholder of ZWF from about 1 November 2011 until about 1 July 2016. The Commissioner submitted that a declaration that the first respondent was the beneficial owner of ZWF has the potential to impact Ms Dervisevic’s rights.
6. Trans Group Holdings Pty Ltd (proposed tenth respondent, Trans Group) – the Commissioner alleges that the sale by Trans Group of its shareholding in Austil Corp Pty Ltd (AusSteel, proposed thirteenth respondent) on 22 November 2021 was an alienation of property by the first respondent which was made with intent to defraud creditors within the meaning of s 37A of the Conveyancing Act. The Commissioner seeks various forms of relief against Trans Group.
7. Alaina Kahila (proposed eleventh respondent) – Ms Kahila is presently the sole director, secretary and sole shareholder of Trans Group. The proposed relief sought by the Commissioner includes a declaration and corresponding order that the transfer of shares in Trans Group to Ms Kahila is void.
8. Mark Osmond (proposed twelfth respondent) – Mr Osmond is presently the sole director, secretary and sole shareholder of AusSteel. The proposed relief includes a declaration and corresponding order that the transfer of shares in AusSteel to Mr Osmond is void.
9. AusSteel (proposed thirteenth respondent) – the proposed relief sought by the Commissioner includes a declaration and corresponding order that the shares in AusSteel vest forthwith as to their legal and beneficial ownership in Trans Group.
10. The respondents submitted that leave should not be granted for the applicant to file and serve the proposed amended originating application and statement of claim because the relief sought and the claims made therein are unlikely to succeed or are likely to be struck out, respectively: referring to *DCJ21 v Medical Board of Australia* [2021] FCA 1037 at [52]. The respondents also submitted that the Court should refuse to join additional respondents to these proceedings as there is no arguable claim against the proposed additional respondents.
11. It was submitted that this Court has no jurisdiction to entertain the claims sought to be brought pursuant to s 37A of the Conveyancing Act because those proposed claims are non-federal claims not forming part of the single controversy between the Commissioner and the respondents. That said, the respondents referred to *Commissioner of Taxation v Oswal* [2012] FCA 1507 (*Oswal*), a decision where this Court accepted after argument that it had jurisdiction in circumstances such as these.
12. The respondents also submitted that the proposed statement of claim fails to plead the material facts necessary to support a claim under s 37A of the Conveyancing Act, and that an allegation of fraud such as involved here requires great precision and full particularity in terms of the facts that are relied upon to establish the fraud: citing *Krakowski v Eurolynx Properties Limited* [1995] HCA 68; (1995) 183 CLR 563. The purported deficiencies in the statement of claim were outlined during argument, the detail of which is unnecessary to repeat here.
13. In addition, as to the First Declaration, the respondent submitted that in the proposed statement of claim, the Commissioner merely states that Koch Commercial is the trustee of the Koch Commercial Unit Trust and that the unitholders are Koch71 Pty Ltd (Koch71) as trustee for the NK Property Trust and Koch77 Pty Ltd (Koch77) as trustee for the SK Property Trust, who each hold 50 units. The respondents submitted that unitholders are not “owners” of the assets held by a unit trust where the unitholders only have an interest in the assets of the trust as a whole: citing *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53; (2004) 224 CLR 98 (*CPT Custodian*); and that relevantly, clause 12 of the Koch Commercial Unit Trust states that “[n]o unit is entitled to any particular asset or part of any particular asset of the trust”.
14. As to the Second Declaration, the respondent submitted that since a company’s assets do not belong beneficially to their shareholders: citing *Resort Lifestyle Developments Pty Ltd v NGI Savannah Living Communities Pty Ltd* [2022] QSC 194; (2022) 12 QR 67 at [53] and *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636; [2015] 1 WLR 291 at [50]-[51], the assets of ZWF including the funds in its bank accounts do not belong to the first respondent (even if the first respondent was the beneficial owner of ZWF, which is denied). Moreover, Trans Group was merely the corporate trustee of the Trans Holdings Unit Trust, the trust deed for which does not appear to grant the unitholders any ownership interest in any particular asset of the unit trust. The respondents also submitted that it is unclear how the first respondent could be the beneficial owner of ZWF from 1 November 2011 (the date from which the Second Declaration would retrospectively apply), during the period where Ms Dervisevic was the sole shareholder of ZWF.
15. In respect to the Third Declaration, the respondents submitted that there is no pleading or allegation that ZWF (as opposed to the first respondent) alienated its property with intent to defraud creditors within the meaning of s 37A of the Conveyancing Act and that neither the respondents, the Commissioner nor the Commonwealth of Australia were creditors of ZWF. Moreover, the respondent submitted that the Third Declaration regards the purported transfer of funds from ZWF for the purchase of certain properties when Ms Dervisevic was the sole shareholder and director of ZWF, such that there is no basis to support the proposed pleading that the first respondent caused ZWF to make the purported transfers to fund the acquisition of those properties.
16. In response, the Commissioner submitted that it is appropriate the matter proceed in this Court, and that contrary to the respondents’ submission, the claims form part of the single controversy between the Commissioner and the respondents. The Commissioner referred to *Deputy Commissioner of Taxation v Ghaly* [2016] FCA 707 as an example where this has occurred in relation to a claim under s 37A. He submitted that there are no relevant deficiencies in the statement of claim.
17. The Commissioner also submitted that it is not appropriate to challenge the First Declaration in the context of an application to amend the originating application, and that contentions as to beneficial ownership are matters which should properly be pleaded by way of a defence and be the subject of evidence. The Commissioner also submitted that the respondents’ criticisms of the Second and Third Declarations are misconceived, because a claim pursuant to s 37A of the Conveyancing Act does not require that the alienated property be the property of the respondent: *Royal v El Ali* [2016] FCA 782 (*El Ali*) at [202]; and there is a sufficient basis to make out a reasonable cause of action as to the first respondent’s beneficial ownership and control of ZWF. That is because there is a close relationship between Ms Dervisevic and the first respondent (they are siblings); Ms Dervisevic disposed of her 100% shareholding in ZWF to AusSteel for nominal consideration ($1.00) on 1 July 2016; and as at 1 July 2016, AusSteel was wholly owned by Trans Group, of which the first respondent was the sole director, secretary and shareholder. In respect of the Third Declaration, the Commissioner also submitted that the respondents’ submission that the Commissioner must be a creditor of ZWF to make out a s 37A claim is wrong: citing *El Ali* at [202].

### Consideration

1. There are two aspects to this application; amendment to the pleadings and joinder of parties. That said, in practical terms, the real issue is whether the amendments to the pleadings sought ought to be allowed because if that occurs, the parties sought to be joined should in fact be joined. Neither party took issue with that proposition.
2. I accept the applicant’s submission as to the circumstances in which this application is made, being that documents produced on subpoena in these proceedings gave rise to what he submits is an additional arguable claim, being the claim under s 37A of the Conveyancing Act. Indeed, the evidence led in support was not challenged.
3. It is necessary to address jurisdiction at the outset. The Court has jurisdiction to determine the matters sought to be included in the amended pleadings. The respondents’ submission directed to the s 37A claim was that the proposed amendments “[are] seeking to set up entirely fresh proceedings relating to voidable transactions and, [they] say, it’s completely severable from the debt owed to the Commissioner”. I do not agree. The originating application already pleads a case that the first respondent is the beneficial owner of the seventh respondent. The amendment to the pleadings alters one aspect of the claims seeking declarations of beneficial ownership by nominating the first respondent as the beneficial owner of the eighth respondent (previously pleaded that the first respondent was the beneficial owner of the second and fourth respondent) and adds a pleading that he is the beneficial owner of the ninth respondent. It is difficult to understand how those amendments could be challenged. There can be no dispute that the pleadings sought to be amended here are within federal jurisdiction. The amendments which add the s 37A claim to the pleadings are in the alternative to the declarations as to the beneficial ownership case. They seek, inter alia, a declaration as to the transfer of funds. The amendments to the originating application also seek an order pursuant to s 175 of the *Corporations Act 2001* (Cth) (Corporations Act), in respect to the thirteenth and tenth respondents, to correct the share record to reflect the conclusions sought as to the outcome of the s 37A claim. The originating application seeks judgment against various taxpayers in respect to taxation liabilities, with declarations being sought in respect to various respondents as to beneficial ownership as an aid to the recovery of the judgment debt. The s 37A claim is intertwined. So too is the order sought pursuant to s 175 of the Corporations Act, in the amended application. The amendments in respect to s 37A involve a common substratum of facts. It is part of the one “matter”.
4. The originating application seeks, inter alia, injunctive and declaratory relief. [Section 39B(1A)(a)](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ja1903112/s39b.html) of the *Judiciary Act 1903*(Cth) (Judiciary Act) gives this Court jurisdiction in any matter in which “the Commonwealth” is seeking an injunction or declaration. The Deputy Commissioner of Taxation falls within the expression “the Commonwealth” in s 39B(1A)(a) of the Judiciary Act: see, for example, *Oswal* at [12]. Once a matter is within federal jurisdiction, the entire matter is within federal jurisdiction: *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*[2001] HCA 1; (2001) 204 CLR 559 at [[7]](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2001/1.html#para7); *Rana v Google* [2017] FCAFC 156; (2017) 254 FCR 1 at [20]; and see *Rizeq v Western Australia* [2017] HCA 23; (2017) 262 CLR 1 at [55]. This matter is within federal jurisdiction.
5. I do not accept the respondents’ submission that the s 37A clam is severable and ought to be heard in the Supreme Court of New South Wales. Such submission fails to recognise the claims are obviously intertwined. It would be highly inefficient for two courts to be required to address related issues involving the same evidence.
6. I also accept the applicant’s submission that it is not appropriate on this application to consider the substantive matters which the respondents contend render this case futile. The substantive matters raised include arguments based on *CPT Custodian,* which involve, inter alia, consideration of the trust deed (tendered by the respondents) and its construction. The submissions based on *CPT Custodian* are dependent on the terms of the trust. Suffice to say at this stage that the issue does not appear to be as simple or clear cut as portrayed by the respondents. It is premature to resolve these issues at the stage of proceeding which is an application to amend the pleadings. I note also that provenance or authenticity of the trust deed is not before the Court. These are matters of evidence and submissions to be considered at a substantive hearing. Further, contrary to the respondents’ submission, it cannot be said that the matters relied on by the applicant could not sustain a case of beneficial ownership such that the claims should be struck out or leave to amend ought not to be granted. Whether the claims are established will be a matter for the substantive hearing. Similarly, I do not accept the respondents’ submission that the s 37A case is flawed such that leave ought not be granted to amend the pleadings.
7. The submissions advanced by the respondents also allege deficiencies in the statement of claim. The Commissioner’s case in respect to the amendment is evident from the statement of claim as drafted, as well as his submissions. The claim is advanced on two bases: that the first respondent is the beneficial owner of the seventh, eighth and ninth respondents (being Koch71, Koch Commercial and ZWF respectively, with declarations sought in prayers 7, 8 and 8A of the amended originating application); or alternatively, that the first respondent alienated property within the meaning of s 37A of the Conveyancing Act (which the applicant contends does not require proof of beneficial ownership).
8. From the Commissioner’s submissions, the case advanced is based on inferences to be drawn from the matters pleaded in the statement of claim. So much also appears evident from the statement of claim. That said, the bases of the claims are not always brought together in the statement of claim. For example, there is no reference in the statement of claim to the beneficial ownership claims at prayers 7 and 8 of the amended originating application (relating to the claim that the first respondent is the beneficial owner of Koch71 and Koch Commercial). Nor is there reference to the pleaded matters relied on as material to establishing those claims. This is to be contrasted to the claim of beneficial ownership at prayer 8A of the amended originating application (relating to ZWF). Given the stage of the proceeding, it is appropriate that the bases on which the case is advanced be expressly pleaded. I note that the bases for these claims were articulated during the hearing of the interlocutory application.
9. Further, as the s 37A claim is plainly an alternative claim to that of beneficial ownership, that ought to be expressed. I note there was an error in [42] of the proposed statement of claim raised during the hearing of the interlocutory application which should also be corrected.

## Conclusion

1. Accordingly, I do not grant leave to file the proposed statement of claim in its current form. I grant leave to replead and provide a further amended statement of claim. I will then consider those pleadings (alongside the amended originating application and application as to joinder of parties), before addressing the Freezing Orders.

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| I certify that the preceding thirty-eight (39) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 16 April 2024

SCHEDULE OF PARTIES

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|  |  |
| Respondents |  |
| Fourth Respondent: | ELVIRA KOCIC |
| Seventh Respondent: | KOCH71 PTY LTD ACN 155 181 712 |
| Eighth Respondent: | KOCH COMMERCIAL PTY LTD ACN 604 679 576 |