CITATION:	*Sparks NT Pty Ltd & Anor v Angkerle Aboriginal Corporation* [2024] NTSC 41
PARTIES:	SPARKS NT PTY LTD and PRATT, Leonard Joseph v ANGKERLE ABORIGINAL CORPORATION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2024-00365-SC
DELIVERED:	17 May 2024
HEARING DATE:	17 April 2024
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

Practice and Procedure – Summary judgment – Test to be applied on applications for summary judgment – Applicable principles – Relevance of a party's pleaded case – Procedural and evidentiary requirements.

Equity – Specific performance – Applicable principles – Specific performance is ordered where damages will not be an adequate remedy – Whether an inability to pay damages can render damages an inadequate remedy – Whether the occurrence of reputational damage can render

damages an inadequate remedy – Specific performance may not be ordered where supervision of performance by the Courts will be necessary.

Federal Court of Australia Act 1976 (Cth), s 31A
Australian Consumer Law 2010 (Cth), s 18
Supreme Court Rules 1987 (NT) rr 22.01, 43.03(2)

Dey v Victorian Railways Commissioner (1949) 78 CLR 62; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Masters v Cameron* (1951) 91 CLR 353; *McCasker v Omad (NT) Pty Ltd* [2023] NTSC 1; *O'Brien v Bank of Western Australia* [2013] NSWCA 71; *Olive & Anor v Oceanview Developments Pty Limited & Ors* [2023] NTSC 38; *Outback Civil Pty Ltd v Francis* [2011] NTCA 3; *Proud v Arkell* [2019] NTSC 35; *Robertson v Northern Territory of Australia* [2023] NTSC 91; *Spencer v Commonwealth* (2010) 241 CLR 118; *Sportsbet Pty Ltd v Moraitis* [2010] NTSC 24; *White Industries Aust Ltd v FCT* (2007) 160 FCR 298

Meagher Heydon & Leeming, *Equity Doctrines & Remedies*, LexisNexis Butterworths, 4th ed, 2002

REPRESENTATION:

Counsel:

Plaintiffs:	C Ford
Defendant:	S Heidenreich

Solicitors:

Plaintiffs:	De Silva Hebron
Defendant:	Povey Stirk

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sparks NT Pty Ltd & Anor v Angkerle Aboriginal Corporation [2024] NTSC 41

No. 2024-00365-SC

BETWEEN:

SPARKS NT PTY LTD
First Plaintiff

AND:

LEONARD JOSEPH PRATT
Second Plaintiff

AND:

ANGKERLE ABORIGINAL CORPORATION
Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 17 May 2024)

[1] The Plaintiffs' Statement of Claim in the substantive proceedings alleges that the First Plaintiff (Sparks) entered into a contract with the Defendant (AAC) for the establishment of a solar and battery power generation system to service AAC's community at Standley Chasm. AAC's Defence, mostly by bare denials and bare non-admissions, disputes that an agreement was entered into and also pleads that it was terminated, which is intrinsically inconsistent.

[2] The relief sought by Sparks in the Statement of Claim is by way of injunctions, declarations and specific performance. In the alternative to specific performance, Sparks claims damages for breach of contract and for misleading and deceptive conduct contrary to section 18 of the *Australian Consumer Law 2010* (Cth). The Second Plaintiff (Mr Pratt) also separately seeks damages for defamation, although that cause of action is not clearly pleaded.

[3] In the current application Sparks seeks orders for summary judgment by way of specific performance of the alleged contract, including the payment of a progress payment. The Plaintiffs had also filed a separate summons seeking interim injunctions but that was not pursued at the hearing. No separate relief is sought by Mr Pratt on the current application.

[4] The evidence relied upon on the application was firstly, by the Plaintiffs, the affidavit of Mr Pratt made 15 March 2024 (Pratt Affidavit),[1] and two affidavits of the Plaintiffs' solicitor, Fiona Hashim made 12 and 16 April 2024 respectively. The only evidence relied on by AAC consists of the affidavit of its General Manager, Ms Nova Pomare made 2 April 2024 (Pomare Affidavit).

[5] The current dispute followed the engagement of Sparks to repair AAC's then existing power generation system. During the course of that engagement it became clear that the system could not be repaired. Mr Pratt and Ms Pomare

1 That was subsequently re-made in identical terms on 2 May 2024.

then entered into discussions and correspondence for Sparks to design and construct a completely new system. It was known at some point during the course of those discussions that funding for the new system was to be obtained by way of a grant from the Indigenous Land and Sea Corporation (ILSC) and the agreement was to be subject to the grant of that funding.

[6] Following on from the initial discussions, Sparks provided AAC with a quotation to supply and install the new system. The contract price was $1,535,573.30 plus GST. AAC accepted the quote. The Plaintiffs' submit that a concluded agreement was then reached but on 14 November 2023 Ms Pomare sent Sparks a written form of contract signed on behalf of AAC in respect of the works for the new system.

[7] Mr Pratt deposed that on 22 November 2023, Ms Pomare told him that AAC had received the ILSC funding into its bank account. Ms Pomare disputes that. Mr Pratt further deposed that Ms Pomare informed him that a purchase order would then issue to Sparks for the first progress payment in accordance with the terms agreed upon. The written agreement had not then been completed but the quotation, and the form of the written agreement, provided that the first progress payment was for 40% of the contract sum. The purchase order referred to that progress payment as due on "Award of Contract".

[8] On 23 November 2023, AAC issued that purchase order to Sparks for the sum of $675,652.52 inclusive of GST which was stated to be 40% of the

contract price. Following that, on 24 November 2023 Sparks issued an invoice to AAC for that same amount. That invoice remains unpaid.

[9] Soon after Sparks issued purchase orders to its suppliers for the materials and equipment required for the project. One was for the supply and construction of steel fabrication for the new system at a cost slightly in excess of $467,000. Another was for batteries for the system, which had previously been provisionally ordered by Sparks, in the sum of $380,000. Those purchase orders form the basis of the reliance required for the purposes of the estoppel claim and the claim under the *Australian Consumer Law*.

[10] Correspondence passing between the solicitors for the parties to negotiate the express terms of the written agreement then followed. On 23 January 2024, and before Sparks executed the written agreement, AAC's solicitor emailed Sparks' solicitors attaching the minutes of a Board meeting of AAC held on 18 January 2024. At that meeting a resolution was passed to terminate the agreement with Sparks and a notice terminating the agreement pursuant to clause 20 of that agreement was also then given.

[11] Sparks' application for summary judgment is made pursuant to Rule 22.01(1) of the *Supreme Court Rules 1987* (NT) (SCR). Relevantly that provides:

22.01 Summary judgment

(1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is prosecuting the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.

(2) Omitted

(3) For this rule, a defence of a proceeding or part of a proceeding need not be hopeless or bound to fail for it to have no reasonable prospect of success.

(4)-(5) Omitted

[12] As is evident from that Rule, an application for summary judgment may be confined to part only of a proceeding. The Plaintiffs' summons only seeks relief for specific performance of the agreement and not for any other equitable remedy,[2] nor for any contractual or statutory remedies, nor in respect of defamation in the case of Mr Pratt. Absent an amendment to the summons, the Plaintiffs are only entitled to the relief as claimed.

[13] As has been noted in a number of previous cases, most recently by me in *Robertson v Northern Territory of Australia*,[3] the principles in relation to summary judgment are settled.[4] As is the case in the current matter, it is rare for there to be conflicting views concerning the principles. Nonetheless, I briefly restate the principles as far as that is necessary for context purposes.

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2 In their submissions, the Plaintiffs argued that estoppel was an available cause of action based on the same representations as for ACL s 18;

3 [2023] NTSC 91.

4 The principles are summarised in detail in *Proud v Arkell* [2019] NTSC 35 at paras 10-14.

[14] The test for summary determination under Rule 22.01 of the SCR is the "no reasonable prospect of success" test.[5] Applying that to the current case, and noting that the Plaintiffs have opted to confine the current application to relief only in respect of a discrete part of the proceedings, the Plaintiffs need to show that AAC has no reasonable prospect of successfully defending the claim for specific performance of the agreement. In turn, as is evident from what follows, that means that the Plaintiffs will necessarily fail on the application if AAC has reasonable prospects of success on the question of whether there was a concluded agreement, or that AAC could terminate it, or that the Plaintiffs will not otherwise be favoured with orders for specific performance.

[15] *Spencer v Commonwealth*[6] (*Spencer*) dealt with section 31A(2) of the *Federal Court Act 1976* (Cth), which is a like provision to Rule 22.01 of the SCR. The case sets out various principles that apply on a summary judgment application. Some of those principles are of general application and not limited to cases applying the "no reasonable prospects of success" test.

[16] I commence with the principle that the real issue is whether there is an underlying defence, not simply whether one is pleaded.[7] In *Spencer*, the Court cited, with approval, *White Industries Aust Ltd v FCT*[8] where Lindgren

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5 See *McCasker v Omad (NT) Pty Ltd* [2023] NTSC 1; *Olive & Anor v Oceanview Developments Pty Limited & Ors* [2023] NTSC 38; *Robertson v Northern Territory of Australia* [2023] NTSC 91.

6 (2010) 241 CLR 118.

7 *Spencer v Commonwealth* (2010) 241 CLR 118 at para 23.

8 (2007) 160 FCR 298 at 309.

J said that section 31A(2) of the *Federal Court Act* does not empower a court to give summary judgment based on pleadings alone as "*..the existence of a reasonable cause of action and the pleading of a reasonable cause of action remain distinct concepts*..".[9]

[17] Secondly, the critical question is whether there is more than a "fanciful" prospect of success. Once it appears that there is a real question to be determined, summary disposition is not appropriate.[10] Where there are factual issues in dispute, summary determination should not be awarded simply because the court has formed the view that the party defending the application is unlikely to succeed on the factual issue.[11] Where the ultimate outcome of the matter turns on the resolution of some disputed issue of fact, it is essential that great care is exercised to ensure that a party is not deprived of the opportunity for a trial of the case.[12]

[18] Thirdly, a case must be very clear before it is determined summarily.[13] Summary determination requires a high degree of certainty about the ultimate outcome in the event that the proceeding is allowed to go to trial.[14] The test for summary judgment involves an assessment of the ultimate

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9 *White Industries Aust Ltd v FCT* (2007) 160 FCR 298 at 309.

10 *Dey v Victorian Railways Commissioner* (1949) 78 CLR 62 at 91, cited in *Spencer v Commonwealth* (2010) 241 CLR 118 at para 54.

11 *Spencer v Commonwealth* (2010) 241 CLR 118 per French CJ and Gummow J at para 25; see also *Outback Civil Pty Ltd v Francis* [2011] NTCA 3.

12 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130, cited in *Proud v Arkell* [2019] NTSC 35 at para 10.

13 *Dey v Victorian Railways Commissioner* (1949) 78 CLR 62 at 91, cited with approval in *Spencer v Commonwealth* (2010) 241 CLR 118 at para 54.

14 *Proud v Arkell* [2019] NTSC 35 at para 11, citing *Agar v Hyde* (2000) 201 CLR 552 at para 57.

outcome of the litigation, not just an assessment of the prospect of its success.[15]

[19] Lastly, the power to summarily terminate proceedings must be exercised with caution.[16]

[20] Notwithstanding that there was the usual consensus between the parties as to the principles relative to the test for summary judgment, there was disagreement concerning procedural matters, specifically the relevance of AAC's pleaded case and the extent of any onus on AAC when defending a summary judgment application.

[21] Dealing first with the pleadings, the Plaintiffs complained that AAC's Defence consisted mainly of bare denials and non-admissions and argued that the absence of a positive defence limited what AAC could advance in opposition to the current application. Relying on *Spencer,* AAC submitted that it is not prevented from putting evidence on the current application inconsistent with the bare denials or non-admissions in its Defence. AAC submitted that the Plaintiffs' argument had the effect of reversing the onus by requiring the Defendant to disestablish the Plaintiffs' case. Although I did not understand the Plaintiffs' submission to be to that effect, in any case I can indicate that I accept AAC's proposition that the onus of making the case for summary determination rests with the applicant, the Plaintiffs in this case.

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15 *Spencer v Commonwealth* (2010) 241 CLR 118 at para 54.

16 *Spencer v Commonwealth* (2010) 241 CLR 118 at para 55.

[22] Consistent with *Spencer* as discussed at paragraph 16 above, I agree that the pleadings alone are not determinative on a summary judgment application and do not limit the case that AAC can present on the current application.

[23] AAC also submitted that it did not bear any onus in defending a summary judgment application. That claim needs to be considered in light of *Sportsbet Pty Ltd v Moraitis*[17] (*Sportsbet*). In that case Southwood J discussed the procedural and evidentiary requirements in summary judgment applications, albeit when dealing with the former Rule 22.01.[18] Of those requirements, those relevant to the current matter, in summary form, are[19]:-

(1) Unless the party seeking summary judgment makes a proper affidavit the party defending the application is not required to answer the application;

(2) The court will give the applicant judgment unless the defending party shows cause against the application;

(3) The Court will normally require an affidavit by or on behalf of the defending party which deals specifically with the facts relied upon by the applicant on its application and which sets out all of the evidence relied on in defence of the applicant's claim; and

(4) The defending party must point to some material that provides an arguable response to the claim and should show that there is a real case to be investigated, either on the facts or in law.

[24] The test which applied at the time of the decision in *Sportsbet* required a plaintiff to establish that the defendant had no defence to the plaintiff's

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17 *Sportsbet Pty Ltd v Moraitis* [2010] NTSC 24.

18 However, see para 25 below; that decision was cited with approval and without qualification in *Proud v Arkell* [2019] NTSC 35, a case where the current Rule 22.01 applied.

19 *Sportsbet Pty Ltd v Moraitis* [2010] NTSC 24 at para 12.

claim. As was observed in *Spencer*,[20] and noted in later cases,[21] that set a higher bar than the current test.

[25] The procedural principles also have general application and are not limited to cases where the "no reasonable prospects of success" test applies.[22] The principles in *Sportsbet* were cited with approval and without qualification, following the amendment to Rule 22.01, in *Proud v Arkell*.[23] The only qualification which I respectfully suggest is in relation to the second principle. I read that as placing an onus on the defending party after the applicant has established a *prima facie* entitlement to summary judgment, particularly as that principle was predicated on an applicant having first demonstrated that the defending party did not have a defence to the claim, as was the test at that time. Reading it otherwise would have the effect of reversing the onus.

[26] For the reasons that follow, in my view AAC has not satisfied the procedural and evidentiary requirements in respect of the question of whether there was a concluded agreement but those requirements have been at least partly satisfied in respect of the question whether AAC has reasonable prospects of successfully opposing an order for specific performance.

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20 (2010) 241 CLR 118 at paras 50–60.

21 Most recently, *McCasker v Omad (NT) Pty Ltd* [2023] NTSC 1; *Olive & Anor v Oceanview Developments Pty Limited & Ors* [2023] NTSC 38; *Robertson v Northern Territory of Australia* [2023] NTSC 91.

22 *O'Brien v Bank of Western Australia* [2013] NSWCA 71 at para 3.

23 [2019] NTSC 35.

[27] I turn now to consider the application of the no reasonable prospects test, and as I will be answering that in favour of AAC in respect of specific performance for the reasons that follow, I will deal first with specific performance.

[28] Specific performance is an equitable discretionary remedy whereby the Court orders a defaulting party to perform its obligations under a contract. Numerous principles regarding the doctrine have been developed over the years.[24] Of those, the principles which have some application to the current case are firstly, that the Court will not enforce an agreement which is invalid, not binding or open to termination. That is relevant in the current case in the context of the allegation by AAC that there was no concluded agreement and that AAC either terminated, the agreement, or was entitled to terminate it. Although it is not entirely clear on its wording, clause 20 of that document seems to permit either party to terminate without cause by notice and after expiry of a specified period of time. Although I expect that the parties would then have some residual entitlements, that would then likely render relief by way of specific performance inappropriate even if a concluded agreement was established.

[29] Secondly, specific performance will only be ordered where damages are an inadequate remedy. The classic instance of the operation of the principle is in contracts for the sale and purchase of land or of some unique article of

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24 See generally Meagher Heydon & Leeming, *Equity Doctrines & Remedies*, LexisNexis Butterworths, 4th ed, 2002 at 651-701.

personalty where the uniqueness means that it will not be possible to purchase an alternative on the open market. A test to determine the adequacy of damages, in terms of the issues in the current case, is whether damages would place the affected party in as good a position as the receipt of the contract price.

[30] In respect of this question, the pleadings allege that damages will be inadequate due firstly, to reputational damage to Sparks in the eyes of ILSC and of two of Sparks' suppliers. Secondly, by reason that AAC "*..would have inadequate funds to pay Sparks' damages*". The Pratt Affidavit on the other hand suggests that the reputational damage will be suffered by Mr Pratt, not Sparks, and in the eyes of Mr Pratt's family. The reference to family contextually appears to include the members of the Standley Chasm community.

[31] It is difficult to see how there can be any reputational damage to Sparks in the eyes of ILSC on the evidence before me. It is also difficult to see how an order for specific performance, as opposed to damages, might redress any possible reputational damage to Sparks in the eyes of ILSC. It is also difficult to see why damages will not be an adequate remedy. It is very unclear as to whether anything flows from any possible reputational damage in the eyes of ILSC, absent evidence that there is likely to be an ongoing relationship between the Plaintiffs and ILSC, if only damages are awarded.

[32] On the other hand, if the reputational damage is suffered by Mr Pratt and in the eyes of the Standley Chasm community, it is unclear how specific

performance, as opposed to damages, would remedy that. I think that is a neutral factor as I think Mr Pratt's standing and reputation amongst the members of Standley Chasm community will be impacted regardless by reason of the current litigation.

[33] I accept the possibility of reputational damage to Sparks in the eyes of its suppliers, but it has not been demonstrated how specific performance, as opposed to damages, will alleviate that. The claims of reputational damage of either Sparks or of Mr Pratt is confusing, but importantly it has not been shown how specific performance, as opposed to damages, would prevent or alleviate that.

[34] To test whether damages would be an inadequate remedy, disregarding for the moment the question of reputational damage or insolvency, in the current case the granting of specific performance would impose mutual obligations on Sparks in that it would be required to perform its part of the contract. On conclusion of the project, and with Sparks having properly performed all of its obligations under the contract, what Sparks would effectively gain, net of the cost of materials, labour and operating costs, is the profit component of the contract.

[35] On the other hand, if damages only were obtainable, I think the measure of damages, in very raw and broad terms, would represent the profit Sparks would make on the contract. That the net result from Sparks' point of view is broadly the same is I think indicative that damages would be an adequate remedy.

[36] Sparks also argues inadequacy of damages based on the possible insolvency of AAC. The authorities vary as to whether regard can be had to possible insolvency for the purposes of determining the adequacy of damages.[25] Leaving that aside for the moment, in my view Sparks is in no different position than any other plaintiff who sues a defendant who may not be able to satisfy a judgment. An order for specific performance will not materially change that as the evidence tends to show that AAC would not be able to fund the project if specific performance was ordered. Therefore any insolvency of AAC is neutral as, if AAC was likely to be unable to pay damages if ordered, it would similarly be unable to pay the contract sum if specific performance were ordered.

[37] Thirdly, specific performance will not be ordered where the Court would be required to supervise the performance of the parties' obligations, as would be the case in AAC's submission if the parties were forced into a contractual relationship for the ongoing performance of works. The classic example of this principle is a contract of personal service. Building contracts generally are recognised as being of the type of contract not amenable to specific performance by reason that the Court would be required to constantly supervise performance. Although the current contract seems to involve comparatively straightforward construction work, and although the extent of supervision would understandably be less, nonetheless this remains a relevant consideration.

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25 Meagher Heydon & Leeming, *Equity Doctrines & Remedies*, LexisNexis Butterworths, 4th ed, 2002 at 657-658.

[38] Overall, in my view, at least in respect of whether damages are an adequate remedy and, to a lesser extent that supervision of the performance of the contract by the Court would be required, there is a real question as to whether specific performance would be ordered. Further, as I say above, specific performance would also likely be denied based on the clause 20 as the parties appear to be entitled to terminate the agreement without cause. Accordingly, I conclude that AAC has at least reasonable prospects of successfully opposing an order for specific performance. As aforesaid, that being the only order sought on the application for summary judgment that means that the Plaintiffs' application must be dismissed.

[39] As a result, it is not strictly necessary for me to decide the remaining question on the application, I will briefly do so in case it becomes relevant. The remaining question is the application of the test to the question of whether there was a concluded agreement and ancillary questions.

[40] The Plaintiffs argue that the arrangement between the parties was a concluded agreement within the first or second of the *Masters v Cameron*[26] classifications namely, that a binding agreement had been made and all that remained was for the terms to be embodied into a formal contract. The evidence of the grant of funding by ILSC bears that out. Although there is a statement by Ms Pomare that ILSC required the written contract between AAC and Sparks,[27] that was not admissible.[28]

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26 (1951) 91 CLR 353.

27 Pomare Affidavit at para 66.

[41] The letter from ILSC dated 30 October 2023 referred to approval "..*for in principle funding*..". There was also a reference to a funding contract to be provided. Although the letter said that the funding contract would contain the terms and conditions of the funding, referring I think to terms and conditions as between ILSC and AAC, that letter was silent as to whether a written contract with Sparks was required. There was no other evidence on the application concerning whether ILSC required a written contract between Sparks and AAC.

[42] Also contraindicative of whether a written agreement was required is that there is no evidence of the need for any additional terms over and above what had already been agreed between Sparks and AAC. That again is consistent with the view that there was already a concluded agreement and that a written contract was a mere formality, which supports the Plaintiffs' submission of a first or second *Masters v Cameron* class of contract.

[43] In any case, as submitted by the Plaintiffs, the existence of a concluded agreement is to be determined on objective factors, not subjective intentions or beliefs of the parties.[29]

[44] The objective factors relied on as establishing the existence of a concluded agreement, in summary form, are the preliminary discussions, the in principle funding letter, Ms Pomare's confirmation of the in principle approval of funding, the issue by AAC on 23 November 2023 of the

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28 It was impermissible hearsay as the formalities to permit hearsay evidence on an interlocutory application, per Rule 43.03(2) of the SCR, were not satisfied.

29 Relying on *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640.

purchase order to Sparks and the receipt and apparent acceptance by AAC of Sparks' invoice dated 24 November 2023 based on that purchase order.

[45] That purchase order was for 40% of the contract sum and specifically referred to the "Award of Contract", referring to when Sparks was entitled to the first progress payment. The Plaintiffs argue that AAC's act of providing a signed written offer to Sparks establishes that the contract had been thereby awarded, notably relying on the use of the word "award" of contract, not the "execution" of the contract, in the purchase order. An entitlement to a payment under a contract can only exist where there is a concluded agreement.

[46] Relevantly, as the parties agree that any agreement between Sparks and AAC was to be subject to the funding from ILSC,[30] in any case the question as to whether the condition was satisfied remains in issue. In my view, the condition was satisfied when ILSC provided its letter to AAC advising of the "in principle" funding without stipulating any conditions.

[47] Further, the advice by Ms Pomare to Mr Pratt,[31] to the effect that (on her version), the funding had been approved, or (on Mr Pratt's version), that the funding had actually been received by AAC, in either case also evidences satisfaction of that condition. Although I do not think that anything turns on it, were it necessary for me to resolve that dispute of facts, I would prefer the evidence of Ms Pomare. A significant amount was involved in the

30 Pomare Affidavit at para 60 and Pratt Affidavit at para 8.

31 Pomare Affidavit at para 65.

project such that Ms Pomare is unlikely to be mistaken. There is no reason for her to say that the funds had been received if they had not and it is clearly the case that funds had not then been received, or ever were received.[32]

[48] The notice of termination based on a term of the written agreement was, on the Plaintiffs' case, confirmation that a concluded agreement had been reached and that AAC considered that a concluded agreement had been reached. The Plaintiffs argued that if there was no concluded agreement, the written agreement provided to Sparks by Ms Pomare would merely be an offer and all AAC needed to do was to withdraw the offer.

[49] AAC argued that the purported termination pursuant to the written agreement was effected primarily as it was considered necessary by reason that the terms of the agreement provided that it could be executed in counterparts.[33] Therefore AAC says, it had to formally terminate it in the way that it did to circumvent the possibility that Sparks could simply sign a counterpart resulting in a concluded agreement. That however does not address why the withdrawal of the offer would not have provided AAC with at least equivalent protection.

[50] Although I accept that Sparks signing a counterpart while the offer was on foot would result in a concluded agreement, that does not mean that the appropriate way to terminate the relationship was the giving of notice of

32 Pomare Affidavit at para 66.

33 Pomare Affidavit at para 82.

termination rather than by withdrawing the offer. Until there was a binding agreement no party had any rights, specifically AAC had no right of termination under clause 20. The clause simply had no application at the time. Furthermore, there was no advantage to AAC in terminating the agreement as opposed to withdrawing its offer as both required notification to Sparks. Indeed, noting the requirements of clause 20, withdrawing the offer I think was a much simpler and likely quicker process for terminating the relationship.

[51] AAC purporting to give a notice of termination pursuant to a term of that agreement despite arguing that there was no concluded agreement is anomalous and discredits AAC. Although such a position might be advanced if there was evidence that the notice was given out of ignorance, that cannot apply in the current case as AAC's solicitor was present at the meeting where the Board of AAC resolved to give that notice. That I think also explains the formality of the resolution and the notice. All things considered, I am unable to accept any suggestion that the Board of AAC did not believe that they were taking a step pursuant to a concluded agreement.

[52] Further, clause 20 of the written document provided for a number of circumstances whereby AAC could terminate by notice. The circumstances emphasised by AAC in bold text in its notice was Sparks committing a serious breach of its obligations or seriously damaging the reputation of AAC. However, the preamble to the notice recites the full range of circumstances justifying termination. In addition to those already referred

to, that includes Sparks committing an act of dishonesty or fraud, or being charged with a criminal offence, or wilfully neglecting its obligations. The last seems inconsistent with the circumstance of the commission of a serious breach of its obligations. In any case, no clear evidence supporting the circumstances relied on, or of a breach, has been provided.

[53] The ground for termination specifically provided for in the notice was the conduct of Sparks in contacting ILSC without approval (presumably referring to the approval of AAC). That specific ground is curious. Although the evidence[34] confirms that an employee of Sparks contacted ILSC direct by email on 11 December 2023, and although ILSC provided a detailed response on 12 December 2023 which concluded with a request to ensure all future correspondence went through AAC, that hardly amounts to an appropriate reason to terminate. Moreover, other correspondence[35] evidences email communications on a number of occasions commencing from as early as 4 September 2023, between ILSC and AAC into which Sparks' personnel were copied. All things being duly considered, the suggestion that Sparks' personnel contacting ILSC direct by the email of 11 December 2023 justifies termination having regard to the ground specified in clause 20 of the written agreement lacks credibility.

[54] Moreover, there is no evidence that any negative impacts flowed from the contact by Sparks complained of. If any negative impacts exist, that is also a

34 Annexure NLP20 to the Pomare Affidavit.

35 Annexure NLP20 to the Pomare Affidavit.

failure to meet the evidentiary onus on AAC as the Pomare Affidavit does not depose to anything explaining why contact by personnel of Sparks with ILSC justified a termination of the contract.

[55] There is also inconsistency between the grounds in the notice and the evidence of Ms Pomare[36] where she states that AAC terminated the agreement for a number of reasons, including that it was an agreement in counterparts, that the project could not proceed without ILSC funding and because Sparks could not commence work on the project until after the commencement of the 2024 tourism season, further discredits AAC in my view. The second of those reasons requires clarification by evidence from AAC as it does not make sense. That is because it was known at all relevant times that AAC could not proceed with the proposal without ILSC funding. It was not a sudden revelation at the time that the notice of termination was given and Ms Pomare citing that as a reason for the giving of notice, additionally because that reason was not stipulated in the actual notice, lacks credibility.

[56] Likewise, if the evidentiary obligations on AAC in respect of the third reason had been complied with, some valid basis for termination might have been apparent. The reason I say might have been apparent is that a termination in any case may not have provided AAC with a pre-tourist season solution to their power generation problems, absent supporting

36 Pomare Affidavit at para 82.

evidence to that effect. However, no evidence in compliance with the evidentiary onus has been identified.

[57] For the foregoing reasons I would have concluded that AAC had no reasonable prospects of success on the question of whether there was a concluded agreement.

[58] I order that the Plaintiffs' application for summary judgment be dismissed. I will hear the parties as to costs and ancillary matters. I will also hear the parties as to the Plaintiffs' application for injunctions.
