PARTIES:	ARTSHEEN PTY LTD PLUMBEACH PTY LTD GEMBROOK PTY LTD DAKIN NOMINEES PTY LTD CHALKFARM PTY LTD NEW BROOME PTY LTD ACADIA BAY PTY LTD BEVERLEY ANN KINNEY v PASPALEY PEARLS PTY LTD and PASPALEY PEARLING CO PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	222 of 1997 (9721885)
DELIVERED:	23 October 1997
HEARING DATES:	20 and 22 October 1997
JUDGMENT OF:	Kearney J

REPRESENTATION:
Counsel:

Plaintiffs:	K.J. Martin Q.C.
Defendants:	A. Wyvill

Solicitors:

Plaintiffs:	De Silva Hebron
Defendants:	Cridlands

Judgment category classification:	B
Judgment ID Number:	kea97036
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kea97036

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

No. 222 of 1997 (9721885)

BETWEEN:

ARTSHEEN PTY LTD
PLUMBEACH PTY LTD
GEMBROOK PTY LTD
DAKIN NOMINEES PTY LTD
CHALKFARM PTY LTD
NEW BROOME PTY LTD
ACADIA BAY PTY LTD
BEVERLEY ANN KINNEY
Plaintiffs

AND:

PASPALEY PEARLS PTY LTD
PASPALEY PEARLING CO PTY LTD
Defendants

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 23 October 1997)

I rule finally today on the plaintiffs' application of 30 September 1997 (doc no.2). It is convenient to set out to some degree the history of the application, argued on 1, 3 and 6 October.

The ruling on 13 October

On 13 October 1997 I dealt with this application for an order that the defendants 'deliver the 1997 shell to the plaintiffs forthwith'. I indicated that I considered that the plaintiffs should be granted relief by way of an interlocutory mandatory injunction requiring the defendants to deliver the 1997 shell to the plaintiffs' pearl farm at Deep Water Point. I considered that provided that, at least, suitable conditions were imposed as to the costs of that delivery by the defendants, and conditions relating to the continuing care of the shell until the harvest of pearls therefrom in 1999, the defendants would be 'adequately compensated' by the plaintiffs' usual undertaking as to damages, in the event that the plaintiffs eventually succeeded in the major litigation between them in proceedings no.215 of 1997.

I said that I proposed to afford the parties an opportunity of formulating, if they could, appropriate conditions to be incorporated in the grant of the injunction. The parties informed me that they had already been having discussions; by consent, further proceedings were then adjourned to 20 October.

The hearing on 20 October

On 20 October the parties informed me that they had agreed on most of the conditions to be incorporated in the grant of the injunction. At that time, the conditions they had agreed on were set out in pars(a)-(d) and (f)-(h) of a draft order annexed to Mr Hebron's affidavit of 20 October (doc no. 16), with a slight amendment to par(d). This left outstanding between them, at that

time, the precise terms of proposed condition (e) in that draft order, and a further undertaking which the plaintiffs sought. I turn to these matters.

> Proposed condition (e) in doc no. 16 reads as follows:
>
> "Blue Seas [the collective expression for the plaintiffs] undertakes not to offer for sale, sell, mortgage, charge, deal with, dispose of or create any third party interest in the 1997 Shell which is due for harvest in 1999 *without first giving 30 days' written notice to Paspaley of Blue Seas' intention to do so*." (emphasis added)

I heard submissions in relation to proposed condition (e). The 'sticking point' between the parties was whether the words emphasized should remain; the defendants contended that they should be excised.

It was in the course of his submissions in relation to (e) that Mr Martin QC, of senior counsel for the plaintiffs, drew to my attention the existence of a Deed dated 27 June 1996, headed "Bill of Sale and Equitable Charge over Business", made between the Commonwealth Bank of Australia (the Bank) of the one part and the plaintiffs together with Lord McAlpine, then collectively carrying on a partnership business as Blue Seas Pearling Company, of the other part. Speaking generally, the Deed is in the form which banks commonly require their customers to enter into, by way of security for financial accommodation extended to them by the bank. In this instance the Deed was to secure accommodation to the partners by the Bank to the extent of $1,550,000. Amongst the usual multitudinous provisions in the Deed, the

customers "as beneficial owner" transferred to the Bank "the chattels now owned" by them, as described in the Schedule to the Deed, and also chattels which they acquired in substitution for those in the Schedule, or brought "upon the place … where the chattels described" in the Schedule were situated, or which were "acquired for use or intended use in any business" then or later carried on by the customers. Under the Deed the customers charged in favour of the Bank their "business and all and singular the other property and assets present and future" of the customers "used in connection" with that business. As I say, the usual multitudinous provisions to be found in documents of this nature. Amongst the chattels described in the Schedule to the Deed were "stock-in-the-sea", and the customers' "exclusive pearling licence for 28,022 pearl oysters in Zones "2" and "3"."

Mr Martin submitted that this Deed was irrelevant to the question of the granting of the injunction sought by the plaintiffs, because as soon as the 1997 shell had been caught and tagged (which had already occurred), the Deed applied to that shell, and any later *delivery* of that shell from the sea bed dump to the plaintiffs' pearl farm did not affect that legal position in any way. Delivery was a legal irrelevance.

Mr Wyvill of counsel for the plaintiffs did not take such a sanguine view of the significance, or lack thereof, of the Deed, of the existence of which, he said, the defendants had had no knowledge until "a minute before Court" on

20 October. He was concerned that *delivery* by the defendants of the 1997 shell into the possession of the plaintiffs, pursuant to the Court order foreshadowed on 13 October, would bring that shell within the scope of the Deed, and vest in the Bank rights in the shell in priority to those of the defendants. He noted the defendants' position in the litigation was that this 1997 shell was 'joint venture' property, and was presently in the defendants' possession. If the shell became subject to the Deed by the act of delivery to the plaintiffs, the defendants would suffer "serious, immediate, potentially irredeemable, prejudice".

Various suggestions were then discussed in Court as to how the existence and significance of the Deed could be provided for, in relation to the injunction foreshadowed on 13 October. The defendants suggested that the plaintiffs approach the Bank and secure its concurrence to the proposition that the defendants' rights in the 1997 shell, whatever they were, rank in priority to those of the Bank under the Deed, if the shell were delivered to Deep Water Point pearl farm. I note that eventually the plaintiffs put this proposition to the Bank; not surprisingly, the Bank refused it. Mr Wyvill noted that in fact Lord McAlpine no longer had any interest in Blue Seas Pearling Company, and so the Deed of 27 June 1996 was "out of date"; I note that in due course it was shown that Lord McAlpine's retirement had been provided for, and the Deed now related only to the plaintiffs. Further, Mr Wyvill said that he was now

informed that the amount of the Bank accommodation of $1,550,000 secured by the Deed had since been increased to $3.15 million.

Obviously, there were matters of moment arising from the existence of the Deed of 27 June 1996; in due course the proceedings were adjourned to 22 October, to enable those matters to be looked into.

Meanwhile, on 20 October I heard various submissions in relation to the terms of proposed condition (e) on p3. The thrust of Mr Wyvill's submissions was that the words emphasized on p3 should be deleted, because the Court's proposed interlocutory injunction should also ensure that the defendant's position was protected until trial; this meant that the plaintiffs should simply undertake not to charge etc. the shell. That is, the onus should be on the plaintiffs to approach the Court if they wished to seek any indulgence by way of permission to charge the shell. Mr Martin observed that the words in dispute really involved the question of who had the onus of approaching the Court. Eventually I ruled that proposed condition (e) should stand as a condition of the injunction, with the words emphasized on p3 included therein.

The 'further undertaking' mentioned at p3 which Mr Wyvill next sought was that:

> "Blue Seas undertakes that until further order it shall not harvest any cultured pearls from the pearl shell the subject of this order."

Mr Martin opposed the imposition of this condition, on the principled basis that undertakings in general should only be required of a party where circumstances demanded that they be given; here it was clear, as a matter of reality, that there could be no harvest of the pearls from this shell until 1999, and therefore the condition should not be imposed. Eventually, I ruled that the undertaking sought should be included as a condition of the injunction, on the basis that it was "wholly appropriate and consistent with the factual background" to the litigation.

At that stage on 20 October there remained whatever questions arose from the recent disclosure by the plaintiffs of the existence of the Deed of 27 June 1996. I observed that hitherto both parties had clearly tacitly proceeded on the basis that their respective financial standing was good, and hence not a factor when it came to the giving and taking of undertakings. Mr Martin observed that there was not a scintilla of evidence which suggested anything to the contrary, as regards the plaintiffs. He proposed the insertion of a condition on the injunction that the acquiring by the plaintiffs of possession of the shell pursuant to the Court's order, be treated as not derogating from any interests in the shell asserted by the defendants; that is to say, to the extent that the defendants had rights in the shell, the *delivery* of possession of that shell to the plaintiffs pursuant to the Court's order would not prejudice those rights.

After an adjournment, later on 20 October Mr Martin put on record five undertakings into which the plaintiffs were prepared to enter, in order to resolve issues which arose from the existence of the Deed of 27 June 1996. The plaintiffs would not increase their borrowings beyond the present overdraft limit of $3.15 million; would use their best endeavours to obtain from the Bank recognition of the priority of the defendants' interests, if any, in the 1997 shell; would pay out the entirety of the partnership's then indebtedness to the Bank from the proceeds of sale of the recent harvest of the 1995 shell, which it would receive from the defendants in three instalments in January - March 1998; would then reduce the partnership's overdraft limit with the Bank by $1million, to $2.15 million; and would draw against that reduced overdraft limit only for the purposes of normal partnership operations.

These undertakings were not acceptable to Mr Wyvill who observed that matters arising from the existence of the Deed now constituted the sole remaining issue between the parties, as regards the injunction. He sought an adjournment to 22 October. He wished to see whether the Bank would agree to the proposal that it defer its rights to those of the defendants, in the 1997 shell. Further he considered that the Deed now put into issue the finding on 13 October that damages would be an adequate remedy for the defendants, if ultimately they succeeded at trial. This was because the adequacy and value of the plaintiffs' undertakings were now put in question by the Deed. The

defendants now wanted to find out more about the plaintiffs' financial position, so that they could be assured that the plaintiffs could pay any damages ultimately awarded to the defendants. In that connection, Mr Wyvill referred to various provisions of the Deed, and how they could affect whatever rights the defendants asserted in the 1997 shell, of a proprietary or possessory nature; the Deed could operate as an immediate legal assignment of the shell, once it was delivered by the defendants into the possession of the plaintiffs.

I was informed for the first time that the 30,000 shell at the sea-bed dump were no longer tagged (as they had been earlier, and thus identified as Blue Seas shell), but constituted simply an undifferentiated part of some 200,000 shell which lay there. Mr Wyvill said that all of this operated shell was, for all intents and purposes, identical.

Mr Martin opposed any adjournment on the basis that the legal position under the Deed was clear: the charge 'bit' when the 1997 shell was tagged, and any subsequent delivery by the defendants of that shell to the plaintiffs was therefore legally irrelevant. He referred to various financial accounts, to show that there could be no reasonable concern about the sound financial standing of the plaintiffs, in light of the 5 undertakings he had earlier placed on record (p8).

Eventually, I directed that the hearing be adjourned to 22 October.

The hearing on 22 October

It was made clear on 22 October that the Bank would not concede priority to the defendants, as regards their respective rights in the 1997 shell; see the Bank's letter of 21 October, annexure RC9 to Mr Chapman's affidavit of 21 October (doc no.17).

Mr Chapman's affidavit deals with the financial standing of the plaintiffs, and annexes certain financial information. There is no need for me to go to it in detail. Lord McAlpine was released from the Deed of 27 June 1996; see annexure RC3 of 31 December 1996. In May 1997, the limit of the plaintiff's overdraft with the Bank was increased to $3.15 million. I note that for the year ending 31 December 1996 the partnership made a gross profit of $8.3 million, with a net profit of $3.3 million after paying the defendants their management fee of $3.056 million. In that year the partnership's net surplus of assets over liabilities was $5.3 million. I note that the pearling licence, an intangible asset, was then valued at $665,060; that value was later greatly increased to $11,517,665 as at 1 January 1997 to reflect what Mr Martin described as its "true value". I have also examined annexures RC5, a special purpose financial report to 30 June 1997, and RC7, a financial forecast for the years to 31 December 1999.

Mr Wyvill stated that the defendants still had concerns about the plaintiffs' financial standing. In part, these concerns flowed from the lack of information about the financial standing of each of the individual plaintiffs, including any outstanding commitments any of them might have - for example, commitments into which they may have entered so as to enable them to buy out Lord McAlpine's interest in Blue Seas for some $10,000,000.

It is sufficient to say that I am satisfied that the plaintiffs are in a sound financial position; I accept the assertion by Mr Chapman at par17 of his affidavit of 21 October 1997 that the plaintiffs' undertaking as to damages is an "undertaking of financial substance".

Document 18 is a draft order which accords with the earlier draft order of 20 October 1997, with three additions (ii), (iii) and (iv) to the original par(e); these broadly reflect those undertakings offered by the plaintiffs on 20 October (p8) which are still relevant.

Mr Wyvill sought to revisit the order made on 20 October as regards par(e) (now par(e)(i) in doc no.18). He advanced the same arguments as he had before, urging however that the financial position of the partnership could now be seen to be different. He sought that the reference to the 30 days period in pars(e)(i) and (ii) be deleted. I have considered the submissions; I consider that pars(e)(i) and (ii) should remain as set out in doc no.18.

Mr Wyvill also sought to add to par(e)(iv) the words “and only to a limit of $2.15 million after March 1998”, to ensure that par(e)(iii) had ‘teeth’.

Mr Martin opposed this application.

On reflection it appears to me that Mr Wyvill’s proposed amendment to par(e)(iv) is reasonable in the circumstances, and ought to be made. I so order.

Orders

The orders now made will be in terms of orders nos. 1, 2 and 3 in doc 18, subject to the undertakings (a)-(i) set out in that document, as varied by the orders made today.

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