

United Petroleum Pty Ltd v Ure Management Services Pty Ltd [2007] NTSC 15

PARTIES: UNITED PETROLEUM PTY LTD
(ACN 085 779 255)

v

URE MANAGEMENT SERVICES PTY LTD
(ACN 48 768 344 916)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: 5/2007 (20701396)

DELIVERED: 16 February 2007

HEARING DATE: 7 February 2007

JUDGMENT OF: THOMAS J

REPRESENTATION:

Counsel:

Appellant: J Reeves QC
Respondent: P Barr QC

Solicitors:

Appellant: Cridlands
Respondent: Ward Keller

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

United Petroleum Pty Ltd v Ure Management Services Pty Ltd [2007] NTSC 15
No. 5/2007 (20701396)

BETWEEN:

UNITED PETROLEUM PTY LTD
(ACN 085 779 255)
Appellant

AND:

URE MANAGEMENT SERVICES PTY LTD
(ACN 48 768 344 916)
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 16 February 2007)

[1] This is an application by the plaintiff for an interlocutory injunction seeking the following orders:

- (1) The defendant by its servants or agents be restrained until further order from selling or otherwise disposing of, or entering into negotiations with third parties to sell or dispose of, or encumbering any of the assets of the business conducted by the defendant in the name of BP Palms other than in the ordinary course of trade;
- (2) Such further or other orders as the Court sees fit.

- [2] The dispute is about the BP Palms service station business on the Stuart Highway at Berrimah, which is owned by the defendant.
- [3] The plaintiff has issued an Amended Statement of Claim dated 18 January 2007. The plaintiff maintains that the defendant had agreed to sell the BP Palms service station business to the plaintiff. The plaintiff further maintains this was an unconditional binding agreement entered into between the parties on 22 December 2006, that the purchase price was subsequently varied by consent on 28 December 2006 to form an amended (varied) binding agreement.
- [4] On 5 January 2007, the defendant entered into a contract to sell the business to a third party.
- [5] On 30 January 2007, the defendant filed a defence to the Amended Statement of Claim. This defence raises a number of defences including a denial that the negotiations between the parties led to an unconditional binding agreement between them.
- [6] The plaintiff's Amended Statement of Claim against the defendant seeks specific performance of what the plaintiff claims is the varied binding agreement between the plaintiff and the defendant.
- [7] The defendant denies the plaintiff is entitled to such relief as it is the defendant's case that there was no binding agreement between them.

[8] At the hearing of the application on summons for interlocutory injunction, the plaintiff seeks to restrain the defendant from disposing of the property to a third party and to maintain the status quo.

[9] This application for interlocutory injunction is opposed by the defendant.

[10] The hearing of the plaintiff's application for interlocutory relief was supported by a number of affidavits and other written material. The plaintiff relied on the following:

- Amended Statement of Claim dated 18 January 2007.
- Defence to Amended Statement of Claim dated 30 January 2007.
- Summons for interlocutory relief dated 16 January 2007.
- Affidavit of Avi Silver sworn 24 January 2007.
- Affidavit of John Dounis sworn 25 January 2007.
- Affidavit of Avi Silver sworn 6 February 2007.
- Affidavit of John Dounis sworn 6 February 2007.

[11] The defendant relied upon the following affidavit material:

- Affidavit of Kevin Bishop sworn 29 January 2007.
- Affidavit of Ashley Heath sworn 31 January 2007.
- Affidavit of Jacqueline Emma Nicholls sworn 31 January 2007.
- Affidavit of Kevin Stephens sworn 31 January 2007.
- Affidavit of Lyn Ure sworn 31 January 2007.

[12] Mr Reeves QC, on behalf of the plaintiff outlined the matters that the plaintiff has to establish in seeking the interlocutory injunction.

[13] This Court was referred to the decision of Mildren J in *Betapave Pty Ltd v The Shell Company of Australia Limited* (first defendant) and *McMahon Services Australia Pty Ltd* (second defendant) [2004] NTSC 55 delivered 12 October 2004. I adopt with respect the text as set out in paragraphs [18] and [19] of that decision:

“[18] In *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153, Mason ACJ summarised the principles governing the grant or refusal of interlocutory injunctions in both private law and public law litigation. His Honour said:

In order to secure such an injunction the plaintiff must show (1) that there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (2) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (3) that the balance of convenience favours the granting of an injunction.

(See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199 at 218.)

[19] There is a great deal of discussion in the authorities as to what is meant by “a serious question to be tried” or “a prima facie case”. I do not intend to add to that discussion, but merely point out the views of Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies* 4th ed, para 21-340 to para 21-390. There seems to be support for the opinion that what is meant by these expressions is that the plaintiff must show a strong possibility of ultimate success - “something more than an outside chance, but not necessarily as strong as an odds on prospect”: see Meagher, Gummow and Lehane *supra*, at para 21-370.”

[14] It is the submission of Mr Reeves QC on behalf of the plaintiff, that there are serious questions of fact and law to be tried. The two questions are:

- (1) Whether there was a concluded agreement on 22 December 2006.
- (2) Whether there was an agreement to vary the purchase price on 28 December 2006 which resulted in a concluded agreement between the parties.

[15] In *Masters & Anor v Cameron* (1954) 91 CLR 353 the High Court considered the question of whether there is a contract. In this instance they held that the document under consideration did not constitute a binding contract between the parties and stated as follows (p 360):

“The first question in the appeal is whether, as *Wolff J.* considered, this document on its true construction constitutes a binding contract between the respondent and the appellants, or only a record of terms upon which the signatories were agreed as a basis for the negotiation of a contract. Plainly enough they were agreed that there should be a sale and purchase, and the parties, the property, the price, and the date for possession were all clearly settled between them. All the essentials of a contract are there; but whether there is a contract depends entirely upon the meaning and effect of the final sentence in that portion of the document which the appellant signed.

Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.”

[16] The Court went on to conclude that in each of the first two cases there is a binding contract and subsequently considered the third class of case (p 361):

“Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own: *Governor & c. of the Poor of Kingston-upon-Hull v. Petch* (1854) 10 Exch 610 (156 ER 583). The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document, as in *Summer-greene v. Parker* (1950) 80 CLR 304 or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed. ...”

[17] Mr Reeves QC submits on behalf of the plaintiff that the matter before this Court does not fall within the third category (class of case) as set out in *Masters & Anor v Cameron* (supra).

[18] It is the contention on behalf of the plaintiff that there are disputed matters of law and fact to be argued at a subsequent trial. Mr Reeves QC submits that the plaintiff’s claim cannot be said to be hopeless or “less than an outside chance” such as to justify rejecting the interlocutory injunction application. Counsel for the plaintiff then drew the Court’s attention to certain paragraphs in the various affidavits.

[19] There is a great deal of evidence which is not in dispute. I have set this out as follows:

- (a) In paragraph 9 of his affidavit sworn 24 January 2007, Avi Silver states as follows:

“The plaintiff is a retailer of fuel and fuel products with presently 190 outlets across Australia and 5 in the Northern Territory. The plaintiff is anxious to expand its operations in the Northern Territory and to acquire more sites. The BP Palms outlet is important to the plaintiff in view of its position and turnover. It is situated in front of a large caravan park and the exposure to the United logo has a high advertising and image value. It is also the last large service station in Darwin which is independently owned.”

- (b) Mr John Dounis is the National Real Estate and Development Manager for the plaintiff company. In his affidavit sworn 25 January 2007, he states that in late November early December 2006, he was contacted by Mr Bishop who is a licensed real estate agent engaged by the defendant to act as their agent on the sale of BP Palms service station, Berrimah, Northern Territory. Following this contact, Mr Dounis became aware that the BP Palms petrol station in Darwin, known as “BP Palms” conducted at Stuart Highway Berrimah was for sale.
- (c) Mr Dounis deposed to the desirability of this location from the plaintiff’s perspective and the plaintiff’s reasons for wanting to acquire this particular service station.
- (d) Between late November and early December, Mr Bishop on behalf of the defendant, provided marketing information such as details of the site, detailed financial information including turnover and profit figures over three years, a copy of the defendant’s lease and the defendant’s agreement with BP Australia Pty Limited for the supply

of trading stock referred to as the BP Supply Agreement. Mr Bishop also gave an indication of the stock levels held in storage and a list of equipment used in the business. A series of e-mails between Mr Dounis and Mr Bishop are attached to the affidavit of Mr Dounis. The information in these e-mails is essentially replicated in the affidavit of Mr Bishop sworn 29 January 2007 and the affidavit of Mr Heath sworn 31 January 2007.

- (e) Annexure G, an e-mail dated 22 December 2006, to the affidavit of Mr Dounis, omitting formal parts reads as follows:

“Hello John

I have just had Richard confirm that \$750K plus SAV is acceptable

Their Lawyer should be sending you a confirmation of acceptance

I fly in to Darwin on 27 about Midday and will be there until Friday lunch when I fly out

Talk soon

Regards

Kevin”.

- (f) There then followed a letter by e-mail dated 22 December 2006 from Ward Keller which is Annexure H to the affidavit of Mr Dounis, again omitting formal parts, reads as follows:

“Dear Mr Dounis

We act for Ure Management Services Pty Ltd in relation to the above matter.

We confirm that we have instructions from Ure Management Services Pty Ltd to accept United Petroleum's offer to purchase the BP Palms Service Station business for \$750,000 (excluding GST - going concern exemption should apply) plus stock.

We will now make arrangements to finalise the contract of sale as a matter of urgency with a view to effecting an early exchange of contract and payment of deposit.

Yours sincerely

Ashley Heath

Ward Keller".

- (g) Mr Dounis replied to this letter by e-mail dated 22 December 2006.

Annexure I to his affidavit which reads as follows:

"Dear Ashley,

Thank you for your confirmation of acceptance of our offer.

I confirm that the Purchaser in this instance is as follows:

United Petroleum Pty Ltd
260 King Street Melbourne Victoria 3000.
ACN 085 779 255 ABN 52 995 832 068

Kindly prepare the contract of sale for the business to reflect the above.

I thank you for your assistance in this matter.

Regards,

John Dounis".

- (h) Annexure K to Mr Dounis' affidavit is the proposed text of the contract, including draft special conditions which Mr Dounis received on 26 December 2006. This document included under Special Condition 9 a condition relating to the BP Branded Privately Owned Sites Agreement, referred to as the Site Agreement, which

included a provision that the contract was subject to and conditional upon the assignment of this agreement from the vendor to the purchaser including the release of the vendor from all obligations and a further provision that the purchaser would keep the vendor indemnified in relation to such Site Agreement.

- (i) A draft contract from Mr Bishop including special conditions that referred to the BP Branded Privately Owned Sites Agreement was forwarded by Mr Bishop to Mr Dounis on 21 December 2006 and is Annexure KB7 to the affidavit of Mr Bishop sworn 29 January 2007.
- (j) In an e-mail dated 27 December 2006 from Mr Heath to Mr Bishop, Annexure L to the affidavit of Mr Dounis, are suggested amendments to the contract.
- (k) On or shortly before 27 December 2006, Mr Dounis became aware that the rental for the site was \$400,000 per annum not the \$350,000 per annum as had previously been advised by Mr Bishop. Accordingly, he withdrew the offer of \$750,000 and made a revised offer of \$650,000. This revised offer is in an e-mail dated 27 December 2006 is Annexure M to the affidavit of Mr Dounis.
- (l) Annexure N to the affidavit of Mr Dounis is an e-mail from Mr Dounis to Mr Heath of Ward Keller, solicitor for the defendant, with a copy to Mr Bishop. In this e-mail dated 28 December 2006 and forwarded at 10.22 am, Mr Dounis confirms a discussion with

Mr Bishop on the morning of 28 December 2006 in which Mr Bishop accepted the revised offer of \$650,000 on behalf of the defendant.

Mr Dounis sought confirmation of some other aspects of the agreement.

- (m) There were some exchange of e-mails between the parties relating to Special Condition 8 of the contract which related to the Environmental Site Assessment.
- (n) Annexure Q to the affidavit of Mr Dounis is an e-mail from Mr Dounis to Mr Heath, solicitor for the defendant, with a copy to Mr Bishop setting out revision to certain conditions of the contract which the plaintiff stated they required. This e-mail dated 28 December 2006 was forwarded at 4.57 pm which I note is after the time the plaintiff asserts a binding agreement had been entered into. This e-mail suggests that the clause in the contract concerning the BP Branded Privately Owned Sites Agreement should be deleted.
- (o) Annexure R to the affidavit of Mr Dounis is an e-mail from Mr Bishop to Mr Dounis enclosing a contract for signing. This e-mail was sent at 2.34 pm on 29 December 2006.
- (p) Annexure S to the affidavit of Mr Dounis is a copy of the contract forwarded by Mr Bishop to Mr Dounis. It contains a number of special conditions including Clause 8 which relates to the vendor's right to terminate the contract if they are unable to obtain a release

from all guarantees under the BP Branded Privately Owned Sites Agreement.

- (q) On 29 December 2006 at 4.46 pm, Mr Dounis forwarded an e-mail to Kevin Bishop, Annexure T to the affidavit of Mr Dounis, which omitting formal parts, states as follows:

“Kevin,

As discussed, it is our advice that your client can terminate the B.P. Supply Agreement under Conditions A13.3(d) and A13.3(ii).

Accordingly, this company is not prepared to enter into a conditional contract for the purchase of the business.

Therefore, I submit that your client consider the deletion of Conditions 8.1, 8.2 and 8.3 of the Contract Business Sale.

Alternatively as advised this company is prepared to accept the liability associated with the Supply Agreement and indemnify your client from any losses and or litigation subject to a reduction in the Contract Business Sale Price of \$100,000.00 (One Hundred Thousand Dollars) to reflect a purchase price of \$550,000 (Five Hundred and Fifty Thousand Dollars).

I await your advice.

Regards

John Dounis”.

- (r) Annexure U to the same affidavit is a further e-mail from Mr Dounis to Mr Bishop which was forwarded at 12.19 pm on 3 January 2007. In this e-mail, Mr Dounis confirmed further telephone discussions with Mr Bishop that morning suggesting further or alternative

conditions to the contract, including a further reduction in the purchase price.

- (s) Annexure V, to the affidavit of Mr Dounis, appears to be the same e-mail as Annexure U.
- (t) Annexure W, to the affidavit of Mr Dounis, is an e-mail from Mr Dounis to Mr Bishop forwarded at 12.52 pm on 4 January 2007. This refers to revised proposals in the contract and asks for an amended contract which Mr Dounis states will be executed the same day and the deposit paid into Mr Bishop's trust account.
- (u) Annexure X, to the affidavit of Mr Dounis, is a further e-mail dated 4 January 2007 from Mr Dounis to Mr Bishop dispatched at 6.27 pm indicating Mr Dounis was going on three weeks leave the following day and that he was anxious to receive the revised Contract Business Sale so that the matter could be resolved before he went on leave.
- (v) Annexure Y is an e-mail from Kevin Stephens of Ward Keller, solicitors for the defendant, to Mr Dounis dated 4 January 2007 forwarded at 6.56 pm which states as follows:

“Dear John

I have drafted a revised special condition 8 in response to the revised offer from United Petroleum. I attach all the special conditions (in word format), which, if acceptable needs to be accompanied by:

- (a) the Schedule to the General Conditions;
- (b) the General Conditions; and
- (c) Annexure A, setting you the plant and equipment.

I do not have instructions from my client to finalise the Contract on these terms at this stage, therefore the proposed revisions do not constitute an offer.

What I do need to have an idea of is, given the indemnity to be offered by United Petroleum, that United Petroleum Pty Ltd is a company of substance that can back its indemnity, and is not a shell of a subsidiary.

Regards

Kevin Stephens”.

- (w) Annexure Z to the affidavit of John Dounis is an e-mail forwarded by Mr Dounis to Mr Stephens at 7.20 pm on 4 January 2007 attaching a letter of recommendation from the ANZ Bank and concluding with the words:

“I look forward to receiving your revised Special Conditions in accordance with our discussions.”

- (x) On 5 January 2007, the defendant contracted to sell its service station business to a third party - affidavit of Jacqueline Emma Nicholls sworn 31 January 2007 deposes to this fact and annexes a copy of such contract.

[20] I am aware from the affidavit evidence before the Court, that there is some conflict on the evidence as to what was said in various conversations between the representatives for the parties and or what the respective parties meant by the term “unconditional”. Mr Reeves QC submits that these

matters will have to be resolved at trial. Mr Reeves QC also acknowledged that there would probably be amendments to the Amended Statement of Claim to overcome the criticisms made by Mr Barr QC on behalf of the defendant as to the deficiencies of the pleadings with respect to the offer and acceptance.

[21] However, on the plaintiff's own case, I am not able to find the plaintiff has established "more than an outside chance" that a contract had been concluded on either 22 or 28 December 2006.

[22] I base this conclusion on the affidavits of Mr Dounis and the supporting documentation, without taking account of the contradictions to either Mr Dounis' or Mr Silver's version of telephone conversations.

[23] I have considered both the contemporaneous documents included in the affidavit of Mr Dounis and the conduct of the parties following the dates when the plaintiff asserts a binding contract was established.

[24] In *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540, Gleeson CJ stated at 548:

"... In a case where a court is required to make a judgment concerning the intention of the parties in relation to what might broadly be described as a *Masters v Cameron* ((1954) 91 CLR 353) dispute, it will normally be of importance that the court have an understanding of the commercial context in which the dispute arises, and a most significant feature of that context will relate to the subject which the parties regard, or would ordinarily be expected to regard, as matters to be covered by their contract. ..."

[25] In *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, Heydon JA stated at paragraph 25:

“The second relevant principle is that post-contractual conduct is admissible on the question of whether a contract was formed: *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68 at 77; *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 668, 669, 672; *B Seppelt & Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9,147 at 9,149, 9,154–9,156; *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9,251 at 9,255.”

[26] In the defence to the Amended Statement of Claim the defendant pleads at paragraph 4.2 as follows:

“Further as to the allegations contained in paragraphs 3 and 4 of the Amended Statement of Claim, the Defendant refers to and relies on the conduct of the Plaintiff and the Defendant after the date/time of the alleged agreement, including the conduct pleaded hereunder, and says such conduct was inconsistent with the existence of the binding agreement now alleged by the Plaintiff:-”

[27] The defence then sets out some of the communications made on behalf of the plaintiff on which the defendant seeks to rely. The majority of those communications have already been referred to in the course of these reasons for decision.

[28] I agree with the submission made by Mr Barr QC on behalf of the defendant that the crucial issue is whether or not there was a contract.

[29] The communications between the parties establish that the defendant had a concern which had been raised with the representative for the plaintiff that the BP Site Agreement may mean the defendant had an ongoing liability

following the sale of BP Palms and that they were anxious to have that matter resolved before concluding a contract.

[30] Both Mr Silver and Mr Dounis expressed in their affidavits an intention to have an unconditional contract and that they were not concerned about the BP Site Agreement. However, the plaintiff was alerted in a draft contract forwarded on 21 December 2006 which proposed contract was further refined in subsequent communications, that the BP Site Agreement was an issue for the defendant. The parties were clearly not ad idem on this matter.

[31] There is evidence in the affidavits and correspondence that forms the plaintiff's case that there were continuing negotiations between the parties after 28 December 2006.

[32] The evidence in the affidavit of John Dounis sworn 25 January 2007 and supporting annexures is that up to and including 4 January 2007 the parties were still in negotiation as to the terms of the contract for sale. This included a further offer by the plaintiff on 3 January 2007 with respect to a reduced purchase price.

[33] It is Mr Barr QC's argument on behalf of the defendant, that even on the plaintiff's own evidence they cannot establish a binding agreement. I agree with this submission.

[34] The plaintiff's claim that there was a binding agreement between the parties does not establish "something more than an outside chance". It is so weak that I am not able to find there is a serious issue to be tried.

[35] This means that I am not required to consider the balance of convenience. However, it may be appropriate to make some comment on that issue. I accept the plaintiff is most anxious to obtain this particular property which has some unique features as referred to in the plaintiff's affidavit evidence. In particular, paragraph 9 in the affidavit of Avi Silver sworn 24 January 2007 and set out in paragraph [19](a) of the reasons for judgment.

[36] I accept that the loss of this property to the plaintiff cannot be completely compensated for by an award of damages.

[37] The defendant relies upon an affidavit of Mrs Lyn Ure sworn 31 January 2007. In this affidavit, Mrs Ure deposes to the fact that she is a Director of the defendant company as is her husband, Ronald William Ure.

[38] Mrs Ure further deposes that her husband, Ronald Ure, is currently an inpatient at a psychiatric hospital in Brisbane. This admission has followed a heart attack Mr Ure sustained in November 2005 and the subsequent quintuplet bypass operation. Mr Ure is disabled to the point where he cannot attend to the affairs of the defendant. Mrs Ure states that the only business operated by her family is the BP Palms service station and that because of her husband's illness and the necessity for them to be in Brisbane, they have not been able to effectively manage the business. They arranged for

Mr Richard Farquar to sell the business on their behalf. Mrs Ure states that she and her husband have three children aged 16 to 19 and the family's financial circumstances have become very strained since her husband's illness.

[39] Mr Reeves QC on behalf of the plaintiff, submits that the affidavit of Mrs Ure does not address any hardship the defendant would suffer if this matter goes to trial and does not found a claim in damages.

[40] I do not accept this submission. It is implicit in the affidavit that because the directors of the defendant company can no longer manage the business and because of the ill health of one of the directors, they are in difficult financial circumstance which will be relieved on sale of BP Palms. It is also implicit in the affidavit that protracting the sale of BP Palms service station will cause hardship to the directors of the defendant company. Although I have previously made orders that this be treated as an urgent matter to be dealt with as expeditiously as possible, it may well be weeks if not months before the trial can be heard. In the meantime, the granting of an interlocutory injunction would preclude the defendant from proceeding with the sale to a third party and exacerbate their existing hardship.

[41] I consider the balance of convenience favours the defendant.

[42] I refuse the application for an interlocutory injunction.

[43] These are the written reasons for the oral decision I delivered on
16 February 2007.

[44] Leave is granted to the parties to apply on the question of costs.
