SUPREME COURT OF QUEENSLAND

CITATION:	*Bluepoint Property Pty Ltd & Anor v Zuri Properties Pty Ltd* [2018] QSC 86
PARTIES:	**BLUEPOINT PROPERTY PTY LTD ACN 160 455 578** (first plaintiff/first applicant) **BLUEPOINT HENDRA PTY LTD ACN 622 756 389 AS TRUSTEE FOR THE WHITCOMBE HENDRA TRUST, DORE HENDRA TRUST AND LINDSAY HENDRA TRUST** (second plaintiff/second applicant) **v** **ZURI PROPERTIES PTY LTD ACN 615 214 910 AS TRUSTEE FOR THE HENDRA ARTERIAL UNIT TRUST** (defendant/respondent)
FILE NO/S:	No 12390 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	19 April 2018, *ex tempore*
DELIVERED AT:	Brisbane
HEARING DATE:	6 April 2018
JUDGE:	Davis J
ORDER:	**Apart from the orders made on 6 April 2018, application dismissed.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – INJUNCTIONS TO PRESERVE STATUS QUO OR PROPERTY PENDING DETERMINATION OF RIGHTS – OTHER CASES – where the plaintiffs apply for interlocutory relief to preserve status quo – whether the injunction should be ordered EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE GENERALLY – where the plaintiffs apply for interlocutory relief to preserve status quo EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – SERIOUS QUESTION TO BE TRIED – GENERALLY – where the plaintiffs' application for interlocutory relief is opposed – whether there is a serious question to be tried in the

substantive matter

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, applied
Koppamurra Wines Pty Ltd v Mildara Blass Ltd (1998) 41 IPR 154, distinguished
Rapid Metal Developments (Australia) Proprietary Limited v Anderson Formrite Proprietary Limited & Anor [2005] WASC 255, cited

COUNSEL: D Cooper QC and C L Francis for the plaintiffs
J W Peden QC and L Sheptooha for the defendant and Boardwalk Marine Investments Pty Ltd

SOLICITORS: Steindls Lawyers for the plaintiffs
Nicholsons for the defendant and Boardwalk Marine Investments Pty Ltd

[1] **HIS HONOUR:** On 6 April 2018 I heard the Plaintiffs' application. Upon the giving of the usual undertakings as to damages by the Plaintiffs and various undertakings by the Defendant designed to maintain the status quo for a short period, I made an order joining Boardwalk Marine Investments Proprietary Limited as a Defendant to the proceedings. Such a course was not opposed by the Defendant. I further gave leave to the Plaintiffs to file and serve further material on the issue of the value of the Plaintiffs' undertaking as to damages. I reserved the costs of the application and reserved judgment. There were subsequent emails with my Associate, and arrangements were made for further submissions to be filed on the question of the Plaintiffs' undertakings as to damages.

[2] Pursuant to the leave given, an affidavit of the Plaintiffs' solicitor, Mr Matthew John Jones, was sworn and filed. Both parties delivered submissions in relation to that further evidence.

[3] The dispute arises out of an agreement between the First Plaintiff and the Defendant concerning land at Hendra in Brisbane's inner northern suburbs. The Defendant owns the property, which is Lot 20 on Survey Plan 236557. The Defendant proposes to subdivide the land and in the process create Lot 1 as an individual lot, which I will refer to as Proposed Lot 1. The dimensions and shape of Proposed Lot 1 have changed as different proposals for the development of the parcel have been considered. It is Proposed Lot 1 that is the subject of the Plaintiffs' claim.

[4] The further amended statement of claim alleges various pre-contractual events, including the making of an offer by the First Plaintiff in a document entitled "Acquisition Proposal", the acceptance of that proposal and the sending of an email by the Defendant's solicitors to the Plaintiffs' solicitors. The agreement, the subject of the dispute, is a deed entered into on 5 January 2017, which I will call the "Option Deed".

[5] The Plaintiffs allege that the Acquisition Proposal and the email mentioned above formed part of the contract with, of course, the Option Deed. Perhaps unsurprisingly, the Defendant, while admitting that it entered into the Option Deed denies that either the Acquisition Proposal or the email have contractual force, and says that the Option Deed is the entire agreement between the parties. That dispute need not be resolved in order to determine the present applications.

[6] The Option Deed provided to the First Plaintiff an option to purchase Proposed Lot 1 either by itself or by its nominee. In due course, the Second Plaintiff, as nominee of the First Plaintiff, purported to exercise the option given in favour of the First Plaintiff. If that was a valid exercise of the option, then the Defendant as seller and the Second Plaintiff as buyer would execute a form of contract attached to the Option Deed;. that contract is referred to as the Settlement Contract. For the sake of convenience, although it is not strictly accurate to do so, I do not intend to distinguish between the First Plaintiff and the Second Plaintiff and where either the First Plaintiff or the Second Plaintiff has done something or has some right I will simply refer to the Plaintiffs.

[7] The parties intended to develop the site as a service station then to be leased to the petroleum company, Caltex. The Plaintiffs submit that they have subsisting rights under the Option Deed. The Defendant submits that the Plaintiffs' right under the Option Deed was, critically, to exercise the option to purchase, and that option must have been, by the terms of the deed, exercised by 5 pm on 17 October 2017. The Defendant says that the Plaintiffs did not do so.

[8] It seems to be common ground that over the time that both the Plaintiffs and the Defendant considered themselves bound by the Option Deed, they worked towards the development of Proposed Lot 1 as a service station site for Caltex.

[9] The Plaintiffs, by their application, seek orders in very specific terms, but which can be broadly described as follows:

1. Interlocutory injunctions preventing the Defendant, until trial, from creating or parting with any interest in Proposed Lot 1; and ancillary to that relief, to deliver to the Plaintiffs documents relevant to the creation of any interest. I will refer to this as the first category of relief.

2. Interlocutory injunctions preventing the Defendant from developing Proposed Lot 1, including restraining the Defendant from having further communication with proposed tenants for Proposed Lot 1, including Caltex and 7-Eleven. I will refer to this as the second category of relief.

3. Orders requiring the delivery up of documents, produced by the Plaintiffs through their consultants and others, relevant to the proposed development of the site as a service station. These are called in the material "the relevant documents". The alleged basis for this claim for relief is that the relevant documents are confidential to the Plaintiffs and were created or delivered to the Defendant only for a very specific purpose, which can be described sufficiently as their joint development of the site. The application seeks final relief in this respect by way of an order that the documents be delivered up to the Plaintiffs or, alternatively, interlocutory relief restraining the use of the relevant documents and information until trial. This I will call the third category of relief.

4. An order joining Boardwalk Marine Investments Proprietary Limited as a Defendant in the proceedings. It is alleged that Boardwalk has acquired some interest or will acquire some interest in Proposed Lot 1 from the Defendant, and is proposing to have dealings with Caltex. As already mentioned, the joinder of Boardwalk was not contentious by the time I heard the application on 6 April 2018, and I have already made an order making Boardwalk a Defendant in the proceedings. This, though, I will call the fourth category of relief.

5. Orders restraining Boardwalk in terms consistent with the injunction sought against the Defendant, namely, not to develop Proposed Lot 1, not to acquire an

interest in Proposed Lot 1, not to use the relevant documents, delivery up of the relevant documents, not to use confidential information, not to communicate with potential tenants including Caltex and 7-Eleven. I'll refer to this as the fifth category of relief. Mr Peden QC with Mr Sheptooha appeared for the Defendant and for Boardwalk and were content for me to hear the applicant against Boardwalk, even though Boardwalk was not strictly a party until I made an order joining it.

[10] The first category of relief, the second category of relief and the fifth category of relief all, one way or another, seek to prevent the Defendant and Boardwalk from dealing with Proposed Lot 1. I will deal with the issues raised by those three categories of relief together.

[11] As these categories of relief are all interlocutory, the guiding principles are as stated in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57. In that case, Chief Justice Gleeson and Justice Crennan at paragraph 19 said:

> "…in all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction. These are the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed. We agree with the explanation of these organising principles in the reasons of Gummow and Hayne JJ, and their reiteration that the doctrine of the Court established in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [(1968) 118 CLR 618] should be followed."

[12] In the same case, Justices Gummow and Hayne, at paragraph 65 said as follows:

> "The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued:
>
> > "The first is whether 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 ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed

> by the injury which the defendant would suffer if an injunction were granted."
>
> By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal:
>
> > "How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.""

[13] So, importantly, the Plaintiffs must show:

1. A prima facie case, which might also be described as a serious question to be tried;

2. That the balance of convenience favours the giving of relief; and

3. Importantly, it is not the law that an interlocutory injunction is only given where the Plaintiffs' success at trial is considered to be more than likely than not. The Plaintiffs' case must be sufficiently strong to justify the preservation of the status quo until final rights can be determined: *Australian Broadcasting Corporation v O'Neill* at paragraph 65.

[14] I will turn now to whether the Plaintiffs have shown a serious question to be tried in relation to the first, second and fifth categories of relief as I have defined them. In essence, that boils down to one question. Have the Plaintiffs demonstrated a prima facie case that the Option Deed is still on foot? If so, they may have rights under it which might lead to them securing Proposed Lot 1 for their benefit. If not, they simply have no claim to the land.

[15] The Option Deed, as already observed, was executed by the Defendant as the seller and the First Plaintiff as the buyer. The Option Deed creates various rights. In particular, there is both a call option and a put option. By the call option, the Plaintiffs as buyer

may elect to enter into a contract for the purchase by, in this case, the Second Plaintiff as nominee of the First Plaintiff of Proposed Lot 1. By the put option, the Defendant has a right to elect to enter into a contract to the sell the property to the Plaintiffs.

[16] The Option Deed was made conditional on the Plaintiffs performing due diligence. Clause 2 of the option deed provides as follows:

> "**2 Conditions Precedent**
>
> 2.1 Due Diligence
>
> (a) This deed is subject to and conditional on the Buyer being satisfied in its absolute discretion with its Due Diligence Investigations on or before the Due Diligence Date.
>
> (b) On or before 5pm on the Due Diligence Date, the Buyer must by notice in writing to the Seller advise the Seller whether the Buyer:
>
> (1) is satisfied with its Due Diligence Investigations;
>
> (2) is not satisfied with its Due Diligence Investigations; or
>
> (3) waives the benefit of this clause 2.1.
>
> (c) If the Buyer gives a notice to the Seller pursuant to clauses 2.1(b)(1) or (3), then this clause 2.1 will be deemed to be satisfied.
>
> (d) If the Buyer:
>
> (1) gives a notice to the Seller pursuant too clause 2.1(b)(2); or
>
> (2) does not give a notice pursuant to clause 2.1(b),
>
> by 5pm on the Due Diligence Date, then this clause 2.1 will be deemed to be not satisfied and this deed will be deemed to be terminated from 5pm on the earlier of:
>
> A. the date the Buyer gives a notice to the Seller pursuant to clause 2.1(b)(2); and
>
> B. the Due Diligence Date.
>
> (e) This clause 2.1 is for the benefit of the Buyer and only the Buyer may waive it.
>
> (f) For the purpose of clarity, if the Buyer gives notice that it is satisfied with its Due Diligence Investigations then both

the Initial Security Deposit and the Second Security Deposit will be released to the Seller.

2.2 Termination of this deed

If this deed is terminated under clause 2.1(d) then:

(a) no party shall have any other Claim against another party arising under or in respect of this deedl and

(b) each party retains the rights it has against the other in respect of any:

(1) breach of this deed occurring before termination; or

(2) obligations otherwise agreed under this deed to remain in full force and effect after termination of this deed.

(c) the Seller will immediately consent to the Stakeholder refunding the Initial Security Deposit and Second Security Deposit to the Buyer without deduction.

2.3 Instrument of Easement

(a) The Seller will prepare the Instrument of Easement and submit a draft to the Buyer within forty five (45) days from the date of this deed.

(b) The Buyer, acting reasonably, will have fourteen (14) days to make any requests for amendments to that instrument.

(c) For the avoidance of doubt the agreed terms of the Instrument of Easement will form part of the Due Diligence Investigations."

[17] The term "Due Diligence Date" is defined as "120 days from 22 December 2016".

[18] In essence, clause 2 provides that the Option Deed is conditional upon the Plaintiffs performing due diligence and advising of satisfaction of due diligence by the due diligence date, failing which the Option Deed is at an end.

[19] Clause 4 provides that the seller, namely, the Defendant, must prepare and lodge a development application. The term "development application" is defined as:

> "Subdivision Application required to be lodged by the seller with the local authority to create a separate Certificate of Title for the land."

[20] The "land" is what I have called Proposed Lot 1. Clause 4 is as follows:

"**4 Development Approval**

(a) The Seller will at its own cost prepare and lodge the Development Application and the Seller will use reasonable endeavours to have the Development Application processed and approved.

(b) If the Seller gives a notice to the Buyer that the Development Approval has taken effect pursuant to SPA then the Buyer will pay the Second Security Deposit within two (2) business days receiving of the notice referred to in this clause.

(c) In the event that the Seller has acted diligently and due to Local Authority delays beyond the control of the Seller, the Development Approval has not issued and taken effect pursuant to SPA by the Development Approval Date then the Buyer may elect to extend that Development Approval Date by a further period of up to three (3) months for the Seller to obtain a satisfactory Development Approval or terminate this Deed by giving written notice to the Seller in which event the provisions of clauses 2.2(a) and 2.2(B) apply.

(d) In the event the Development Approval has not issued and taken effect pursuant to SPA by the extended Development Approval Date, the Buyer may terminate this Deed in which event the provisions of clauses 2.2(a) and 2.2(b) apply.

(e) After the Development Approval has issued and the Plan has been sealed by the Local Authority the Seller will at its cost lodge the Plan for registration with the Department. The Seller will notify the Buyer in writing immediately after the Plan has been registered in the Department and will provide a copy of the Registration Confirmation Statement."

[21] Clause 5 provides for the Call Option, that is, the option in favour of the Plaintiffs and clause 6 provides for the Put option, that is, the option in favour of the Defendant. It is the call option which is important here, so clause 5 provides as follows:

"**5 Call Option**

5.1 Grant of Call Option

(a) In consideration of the payment of the Call Option Fee by the Buyer to the Seller, the Seller grants to the Buyer a Call Option for the Buyer or a Nominee to purchase the Property.

(b) The Seller acknowledges receipt of the Call Option Fee.

(c) The Call Option Fee is non-refundable.

5.2 Exercise of Call Option

The Buyer or Nominee may exercise the Call Option at any time during the Call Option Period and may do so only by giving to the Seller or to the Seller's Solicitor the following items:

(a) a Call Option Notice duly completed and executed by the Buyer or Nominee;

(b) the Contract signed by:

(1) if the Buyer does not make a nomination under clause 8.1, the Buyer only; or

(2) if the Buyer does make a nomination under clause 8.1, the Nominee (in its capacity as buyer);

(c) a cheque for the Third Security Deposit payable to the Stakeholder;

(d) the documents referred to in this clause may be given by way of delivery, facsimile or electronic mail in accordance with the provisions of clause 14.1."

[22] Importantly, the Call Option may be exercised as provided by clause 5.2 at any time during the "Call Option period". The term "Call Option period" is defined as:

"The Period:

(1) Beginning at 9am on the day immediately after the Conditions Precedent Date; and

(2) Ending at 5pm on the day being five business days after the Conditions Precedent Date."

[23] The term "Conditions Precedent Date" is defined as "that date being two business days after the later of the Due Diligence Date and/or the Development Approval Date". I have already referred to the definition of the Due Diligence Date. The Development Approval Date is defined as "that day being nine months from the Due Diligence Date subject to the provisions of clause 4 and being the date when the Development Approval has been obtained". I have already mentioned clause 4 which contains various provisions concerning the relevant approval.

[24] There is dispute as to the date which is the Development Approval Date, and I will return to that issue later.

[25] There is dispute between the parties as to whether the Plaintiffs have advised of due diligence within time and in accordance with the terms of the Option Deed. It is not necessary to form a view about that because of the way in which Mr Peden QC, who led for the Defendant, approached the defence of the application.

[26] Mr Peden QC submitted that any factual disputes concerning the Plaintiffs' satisfaction of the due diligence condition were irrelevant, because the Plaintiffs did not exercise the option within time. He relied upon two authorities, being *Duncan Properties v Hunter* [1991] 1 Qd R 101 and Justice Mullins' decision in *JV Tub Group Pty Ltd v Red Carpet Real Estate Pty Ltd* [2014] QSC 232.

[27] Mr Peden's submission was that, based on the authority of those two cases, if an option is not exercised within the option period, then the rights under the agreement are exhausted, although there might, of course, be rights to damages for breaches of the option agreement which were committed before the expiry of the option period. If Mr Peden made good his submission to the extent that there was no real question to be tried about its correctness, then the Defendant must succeed in its defence of the application, at least as it relates to the categories of relief that are presently being considered. Mr Peden sensibly conceded that if I did not accept his submission on this point about the exercise of the option, then the Plaintiffs have shown a prima facie case and the only remaining issue is the balance of convenience. Mr Peden's concession was properly made.

[28] What the Defendant pleads on this issue and presses on the current application is that the Call Option Period commenced on 11 October 2017 and expired on 17 October 2017. That date is identified because the Due Diligence Date on the Plaintiffs' case is fixed at 6 October, being the date that the First Plaintiff purported to notify the Defendant that it was satisfied with its Due Diligence Investigations. The Conditions Precedent date is, therefore, two business days later, so the Call Option Period starts the next day, i.e., 11 October, and expired on 17 October.

[29] However, the Call Option period, as has already been set out, depends upon the Conditions Precedent Date. The Conditions Precedent Date is set by reference to the later of the Due Diligence Date and the Development Approval Date. The Defendant

says that the later of the Due Diligence Date and the Development Approval Date is the Development Approval Date, not the Due Diligence Date.

[30] The Plaintiff and Defendant differ in their submissions as to the Development Approval Date. The Defendant says that the Development Approval Date is 4 August 2017. That is based on a development approval for a plan lodged for approval in July. However, there were various plans prepared and, in particular, one in September 2017.

[31] The Plaintiffs say the Defendant had abandoned the July 2017 plan and proceeded on the basis of the September plan. Therefore, the relevant Development Approval Date will be calculated by reference to a development approval consistently with the September 2017 plan, which was obtained on 6 November. Consequently, so submit the plaintiffs, exercise of the Call Option in November 2017 was within time.

[32] I can see some potential difficulties with the Plaintiffs' submission in this respect; however, the submission clearly raises legal issues as to the proper construction of the Option Deed and raises factual issues concerning the preparation of the various plans, the communications between the parties and, ultimately, a determination of what was the Development Approval Date for the purposes of the Option Deed. It seems to me that a prima facie case is shown that the option was exercised within time. Therefore, the plaintiffs have made out a prima facie case to support the injunctive relief sought in category 1, category 2 and category 5 relief.

[33] Turning, then, to the question of the balance of convenience; the Plaintiffs, on the question of the balance of convenience, submit as follows:

(i) The Option Deed and the Settlement Contract, which is the agreement which will be entered into if the Call Option has been properly exercised, are a set of contractual obligations which are capable of being specifically performed. That can be accepted.

(ii) If the injunction is not granted, then the Plaintiffs could lose their interest in Proposed Lot 1, and damages is not an adequate remedy. Certainly, given that the Defendant is intent on developing the land, the refusal of interlocutory relief will

undoubtedly lead to the practical loss of the Plaintiffs' interests. As to damages not being an adequate remedy, I shall return to that issue later.

(iii) The Defendant intends to register a plan created in March 2018. It is submitted by the Plaintiffs that such registration would frustrate the completion of the Settlement Contract because Proposed Lot 1, as contemplated by that proposed contract, would never come into existence. That is no doubt true but probably adds little to the balance of convenience argument beyond consideration (ii) above.

(iv) If the Defendant and/or Boardwalk entered into agreements with Caltex or other tenants, then third-party interests may frustrate the interests of the Plaintiffs. That is no doubt true, but, again, it probably adds little to considerations (ii) and (iii) above.

(v) The Plaintiffs say that there would be various consequential effects of the practical termination of the deed such that damages would not adequately compensate the Plaintiffs. As already indicated, I will say more about damages being an adequate remedy later.

(vi) The Plaintiffs submit that they do not seek to restrain the Defendant from developing the remainder of the Hendra site. The Plaintiffs are only concerned with Proposed Lot 1. That is true to a point; however, as I will explain, the area and boundaries of Proposed Lot 1 impact the configuration of other proposed subdivided lots in the parcel. While the Plaintiffs are only interested in Proposed Lot 1, it is an interest in Proposed Lot 1 as then configured. That configuration is not consistent with the Defendant's present plans, so an injunction would, in practical terms, be likely to affect the development of the balance of the land.

(vii) The Plaintiffs submit that there is no real evidence of prejudice or hardship to the Defendant if injunctions are granted. I do not accept that submission and will return to that issue.

(viii) The Plaintiffs submit that any damage which the Defendant may suffer as a result of dealings it has had since the dispute with the Plaintiffs began are troubles of their own making, and the Plaintiffs particularly rely upon the judgment of Justice von Doussa in *Koppamurra Wines Pty Ltd v Mildara Blass Ltd* (1998) 41 IPR 154. I reject that submission but will return to it later.

(ix) Any interlocutory injunction will be for a relatively short period because the matter could be quickly made ready for trial. No doubt that is so to a point, and that is a matter to take into account on the balance of convenience. However, damage would still be suffered by the Defendant.

(x) By way of concluding submission, the Plaintiffs submit that the balance of convenience favours the protection of the status quo.

[34] The Defendant, on the other hand, urges that the following factors be taken into account:

(i) The Plaintiffs have known of the Defendant's position since 12 October 2017 and, over the following months, was aware that the Defendant was taking steps to develop the property but took no steps until recently to file an application for an interlocutory injunction.

(ii) The Defendant has incurred costs in the further development of the site of about $1,184,052.62.

(iii) It is no longer practical to convey Proposed Lot 1 in accordance with the Settlement Contract, as a new development approval showing Proposed Lot 1 with different boundaries has been lodged and is expected to be approved in June.

(iv) Third-party interests have since been created. These include:

(a) Negotiations (not concluded) with a proposed purchaser of Proposed Lot 2 on the land. An offer of $4 million for Proposed Lot 2 has been received but is dependent upon Lot 2 having access and easement arrangements in

accordance with the new proposed plan. An injunction would prevent the Defendant from accepting the offer.

(b) The Council is developing a site adjoining the boundary of the land, and the Defendant has agreed with the Council in principle to an access easement over Council land, which satisfies the condition of the offer to purchase Proposed Lot 2.

(c) Heads of agreement have been entered into between Boardwalk and Caltex.

(d) The Defendant is a special purpose vehicle within the BMI Group. If the Defendant was enjoined, then BMI would be in default of its lending arrangements with the National Australia Bank, and the bank could either call up loans or review its lending to the BMI Group.

(e) The financial impact of an injunction on the BMI Group's business is estimated to be at least $7 million and up to $9.4 million.

(f) The Defendant submits that damages are an adequate remedy for the Plaintiffs.

[35] I have considered those submissions and the broad question of the balance of convenience. Of significance is the acceptance or otherwise of the submission by the Plaintiffs that damages would not be an adequate remedy. Often that is the case where the subject matter of the dispute is land. Any parcel of land is, in some respects at least, unique. On the other hand, there is no suggestion that the land here is to be used by the Plaintiffs in their broader business. It is simply being developed for profit. It is not the case, it seems, that the Defendant would not be able to meet any damages claim. It is unlikely there will be difficulty in assessing damages.

[36] The loss to the Plaintiffs would be categorised as the loss of an opportunity to enter into the contract contemplated by the Option Deed and then to secure and develop Proposed Lot 1. It seems highly likely that the site will be developed and will be developed as a service station, as was contemplated by the Plaintiffs. The resultant developed land

could then be easily valued. Therefore, I cannot see any obvious difficulties in the assessment of the Plaintiffs' damages if it comes to that.

[37] When the present application was filed, the Defendant, through its solicitors, raised questions as to the value of the Plaintiffs' undertaking as to damages. Mr Jones, the Plaintiffs' solicitor, swore an affidavit on 5 April 2018 whereby he exhibited a bank statement of an account held in the name of the first plaintiff showing a credit balance of $964,236.26. Of course, that, in itself, proves very little. Depending upon its financial commitments, the first Plaintiff may very well have that credit balance of almost $1 million, but may still be completely insolvent.

[38] Mr Jones swore another affidavit pursuant to the leave I gave on 6 April. To that affidavit, Mr Jones exhibited a letter from Cordner Advisory, the controller of which is Mr Jason Cordner, a certified practising accountant, and who is the accountant of the first Plaintiff and its related companies.

[39] Mr Cordner's letter attaches financial statements of the first plaintiff. Unfortunately, the evidence of Mr Cordner, which comes in through Mr Jones, somewhat raises more questions than it answers. The First Plaintiff is a property developer, and Mr Cordner says the projects which it has completed have all been successful. Mr Cordner points to the net assets of the company at $3,158,571. However, the assets of the First Plaintiff largely comprise loans to related parties. Mr Cordner explains:

> "Loans to related parties are either advances to various project entities to fund their developments where these loans are repaid at completion or advances to entities controlled by the directors Marcus Dore and Geordie Whitcombe where those amounts are repayable at call."

[40] Therefore, the business model seems to be a series of single project companies in a silo structure. There is no suggestion of any real estate being held by the First Plaintiff or any other commercially realisable assets such as shares or securities. There is no real evidence as to the ability of the stand-alone companies to repay the loans.

[41] The Defendant has properly raised with the Plaintiffs the question of the worth of their undertaking. While there is certainly cash at bank, there is no evidence to explain what

claims there are upon that cash and whether, in particular, the related entities may call upon it.

[42] The Defendant very clearly raised with the Plaintiffs that it did not accept the value of their undertaking as to damages. Despite that issue being raised, an undertaking on behalf of the Second Plaintiff was only offered at the hearing before me. The only evidence at the hearing before me on the topic was the evidence of Mr Jones exhibiting the bank statement, and even after leave was given to the Plaintiffs to adduce further evidence on this issue, all that was produced was an affidavit of the Plaintiffs' solicitors swearing certain belief on information from the Plaintiffs' financial adviser. In particular:

(i) There is no affidavit from the directors of the Plaintiffs verifying any of this. Of course, if there had been such an affidavit, Mr Peden QC may have sought to explore the position in cross-examination.

(ii) What evidence there is about the operation of the Plaintiffs' group of companies is scant.

(iii) Whilst there are broad statements in Mr Cordner's letters about the profitability of the group and its financial stability, there has been no attempt to provide any real evidence which will give any faith that the intercompany loans are sound.

(iv) While those standing behind the Plaintiffs urge me to accept the value of the undertaking as sufficient protection for the Defendant, those persons are apparently not prepared to stand behind the undertaking themselves by giving their personal undertakings.

[43] I am not satisfied that the undertakings as to damages which are offered are of significant value.

[44] There were objections taken to various parts of the Defendant's material, which was relied upon to prove the likely damage caused by any injunction. This is how the

Defendant seeks to establish a potential loss of between 7 million and 9 million dollars. I am not prepared to find, even on an interlocutory basis, potential losses of that extent.

[45] It is not necessary to determine the objections to evidence one by one. Broad, clearly admissible statements of the types of loss that may be suffered were made by the deponent to the Defendant's affidavits without challenge by way of cross-examination. While I'm not prepared to find potential losses as between 7 and 9.4 million dollars, I draw the inference that losses caused by the interlocutory injunction may be significant. In particular:

(i) The injunction will bring the whole project to a temporary halt.

(ii) The injunction will put in jeopardy the Defendant's dealings with third parties.

(iii) There will be holding costs.

(iv) There will, at least potentially, be an impact upon the broader BMI Group.

[46] I reject the Plaintiffs' submissions that, in assessing the potential loss to the Defendant if an injunction is granted, I can only look strictly at loss suffered by the single entity, being the Defendant. The Defendant is part of a wider group, and I cannot see why I can't take into account the broader damage that the group of companies will suffer in considering the balance of convenience. The granting of an injunction will prevent the development continuing at least for a period and will frustrate third parties who have been dealing with the Defendant.

[47] It is said that the matter can be readied for trial quickly. In practical terms, though, taking into account preparing the case, listing the trial, the hearing itself, the judgment being reserved for a period and any potential appeal, the proceedings are unlikely to be resolved this year.

[48] The Plaintiffs submit, in effect, that I ought to ignore the fact that the Defendant might suffer any inconvenience in undoing any steps that it has taken since October 2017 or any inconvenience caused or exacerbated by steps taken by the Defendant since October

2017. The Plaintiffs say that the Defendant took those steps knowing that the Plaintiffs asserted an interest in the land.

[49] In support of that submission, Mr Cooper QC in oral submissions cited the decision of Justice von Doussa in *Koppamurra Wines Pty Ltd and Mildara Blass Ltd* (1998) 41 IPR 154, to which I have referred earlier. That case concerned a dispute about a trademark, "Koppamurra". Mildara Blass Ltd commenced a campaign to promote the name "Koppamurra" as a regional geographic name describing a particular area. Knowing the interests of Koppamurra Wines Pty Ltd in the trademark, Mildara Blass marketed products utilising the name "Koppamurra" in a clear challenge to the trademark. When an application was made for an interlocutory injunction, Mildara Blass pointed to the losses it would suffer if it had to withdraw the products from the market. In that context, Justice von Doussa said, at page 160:

> "I consider that many of the losses which the respondent says are likely to flow from an injunction are losses that the respondent will encounter because it chose to pursue a commercial solution to the problem and the risks that were associated with it. It is in that sense, I think, that the High Court in the Beecham case at 626 talks about someone going into a situation with their eyes open."

[50] It was that passage in particular that Mr Cooper QC sought to rely upon.

[51] There is no principle of law that a court considering whether to make an injunction to enjoin a party cannot consider events subsequent to the events giving rise to the dispute and consider the damage or impact upon the party being sought to be enjoined. Certainly, *Koppamurra Wines v Mildara Blass* is not authority for such a proposition. It is simply an example of a case where the respondent's conduct after the dispute arose was looked at when assessing where the justice of the case might lie; in particular when assessing, in the exercise of discretion, any loss which might be suffered by the party sought to be enjoined. That is made clear by Justice von Doussa at page 159 in the passage:

> "The respondent has deliberately sought to resolve the dispute over the use of the Koppamurra name by taking the matter into its own hands. In my view, there were other courses that it could have taken, but it has chosen to take a commercial risk in forcing the issue. The respondent is substantially the stronger economic entity, and, in my view, it has played on that fact to try and resolve the dispute in the marketplace rather than in the court."

[52] His Honour then went on in a similar vein to consider other aspects of the specific conduct of Mildara Blass in that case. This is a very different case. Here, the Defendant is the registered proprietor of a valuable piece of land which is ripe for development. Third parties with major commercial interests, such as the petroleum company, Caltex have been attracted to the site. Once the Defendant's view that the option had been lost by the Plaintiffs had been clearly communicated to the Plaintiffs, the Plaintiffs commenced action on 23 November 2017. There is no reason to think that it was reasonable for the Plaintiffs to assume that the Defendant would simply sit on its hands and hold the land. Frankly, the sensible thing to do was to put the land to its best use, which is as a development site. The Plaintiffs have waited some time to seek interlocutory relief.

[53] The balance of convenience in relation to the first, second and fifth categories of relief favour the Defendant and I decline to enjoin the Defendant. The fourth category of relief is the joinder of Boardwalk, which has been dealt with. The remaining relief under category 3 concerns the confidential information. As previously observed, there are both the relevant documents and other information.

[54] There were submissions made as to whether documents which came into existence could be described as confidential and, similarly, whether the information was confidential. There are obviously disputes about that which need to be tried.

[55] Therefore, I would refuse final relief in relation to delivery up of the relevant documents.

[56] The real issue is whether interlocutory relief should be given to enjoin the Defendant from use of the relevant documents and information pending trial.

[57] I am prepared to accept that there is a prima facie case that at least some of the relevant documents which came into existence and some of the information may be confidential and that the Plaintiffs may have a claim in that respect. What is unclear to me at the moment is the extent of that claim and the identification of particular documents and information to which confidentiality may attach. This raises the considerations

identified in *Rapid Metal Developments (Australia) Proprietary Limited v Anderson Formrite Proprietary Limited & Anor* [2005] WASC 255 at [81].

[58] There is no real prospect, in my assessment, that any of the documents might be destroyed or corrupted and no suggestion that proper disclosure will not be made in the course of the litigation. Any injunction may disrupt the Defendant's continued development of the land and, as I've already explained, on the balance of convenience, the Defendant's continued development of the land is to be preferred, with the Plaintiffs to pursue damages claims if they choose to do so. The balance of convenience favours refusal of interlocutory relief for the third category of relief. For those reasons, apart from the orders I made on 6 April 2018, I dismiss the Plaintiffs' application. I'll hear the parties on costs.

...

[59] **HIS HONOUR:** The Defendant, who was the respondent to the injunction, submits that it should have its costs of the application for the injunction, and the basis upon which that claim is made is basically that costs follow the event. They have been successful. There is, of course, some justification for that under the Rules and some force in that argument.

[60] Mr Cooper, who leads for the Plaintiffs, on the other hand, points to the following factors. Firstly, he says that there was an application to join Boardwalk as a party to the proceedings. That was opposed until the actual hearing. So Mr Cooper can claim some success in the application. It has to be said, of course, that has to be regarded as a minor success in the overall scheme of things. Secondly, though, and to my mind more importantly, Mr Cooper says that whilst he's been unsuccessful in the application, he was unsuccessful on discretionary grounds. I found that a prima facie case for the relief sought was made out.

[61] The case is a complicated one. I think it's fair to say, in a loose sense, that the case has a long way to go. I have some sympathy for the fact that the plaintiffs only lost upon the exercise of discretion, and that was by no means a clear-cut issue. Mr Cooper has submitted that the costs ought to be costs in the cause; however, in my judgment, there

may be many factors which arise between now and final determination of the case which might bear upon the reasonableness or otherwise of the position of both parties before me on the application for the injunctions. Each parties' costs of the application ought to be reserved.