SUPREME COURT OF QUEENSLAND

CITATION:	*State Gas Limited v Dome Petroleum Resources PLC* [2019] QSC 231
PARTIES:	**STATE GAS LIMITED ACN 617 322 488** (Plaintiff) **v** **DOME PETROLEUM RESOURCES PLC ARBN 126 449 527** (Defendant)
FILE NO/S:	BS 1269 of 2019
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	17 September 2019 (orders made on 16 September 2019)
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2019
JUDGE:	Bowskill J
ORDER:	**Orders made on 16 September 2019, in the terms attached to these Reasons.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – ABSENCE OF PARTY – where the plaintiff seeks declarations and consequential orders for specific performance of the sale of the defendant's remaining 20% Participating Interest in a petroleum mining joint venture in accordance with the terms of a Joint Operating Agreement enabling the plaintiff to cause the defendant to make a Deemed Sale Offer in respect of the defendant's remaining Participating Interest, once that fell below the Minimum Interest of 25% – where the defendant defends the claim, and counterclaims, on the basis the plaintiff engaged in unconscionable conduct and ought to be estopped from specifically performing the sale provisions on the basis of a representation alleged to have been made, and engaged in misleading and deceptive conduct and a breach of fiduciary duty by failing to disclose certain material information – where the defendant did not appear at the trial – where the defendant was clearly aware of the trial dates, and the evidence showed the defendant made an informed and definite decision not to appear – whether the plaintiff has established an entitlement to judgment on its claim against the defendant under *Uniform Civil Procedure Rules* 1999

(Qld) r 476(1) – whether the defendant's counterclaim should be dismissed under r 476(2) in default of the defendant's appearance

Uniform Civil Procedure Rules 1999 (Qld) r 476

Banque Commerciale SA en liquidation v Akhil Holdings Ltd (1990) 169 CLR 279
Bull v Wimble (2004) 12 BPR 22,223
Downs Irrigation Co-operative Association Ltd v The National Bank of Australasia Ltd [1983] Qd R 130
Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593

COUNSEL: GA Thompson QC and C Wilkins for the plaintiff
No appearance for the defendant

SOLICITORS: Allens for the plaintiff
No appearance for the defendant

[1] The plaintiff and the defendant entered into a mining joint venture with each other in February 2017, in relation to a petroleum lease. The plaintiff had a 60% interest, and the defendant had a 40% interest. In November 2018, the defendant sold a 20% interest in the joint venture to the plaintiff, leaving it with only a 20% interest. Where a participant's interest in the joint venture falls below 25%, there are provisions in the joint venture agreement which enable the other party to, effectively, purchase their remaining interest. The plaintiff instigated that process in December 2018. The defendant has refused to complete the process. By this proceeding, the plaintiff seeks specific performance of these sale provisions of the joint venture agreement. The defendant has opposed the grant of such relief, and brought a counterclaim against the plaintiff, on bases including that the plaintiff is estopped from relying upon the relevant provisions; misleading and deceptive conduct; and breach of fiduciary duty.

[2] The trial commenced at 10.00 am on 16 September 2019. The defendant did not appear.

[3] After hearing the submissions on behalf of the plaintiff, and being satisfied it was appropriate to do so, I gave judgment for the plaintiff in the terms attached to these reasons and indicated that my reasons would be published in writing after the hearing. These are my reasons for making the orders.

[4] It is relevant to begin by outlining, albeit briefly, the procedural history of this matter.

[5] The proceeding was commenced by originating application filed on 8 February 2019.

[6] On 15 February 2019, an order was made under r 14(2)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) that the proceeding continue as if started by claim; and directions were made for the filing of pleadings.

[7] On 15 April 2019, a further order was made, by Jackson J, that the proceeding be placed on the Commercial List, and setting the proceeding down for hearing for 4 days commencing on Monday, 16 September 2019. Further directions were made in relation to disclosure, mediation, for the filing of affidavits of evidence in chief of lay witnesses (or summaries of evidence expected to be given by witnesses under subpoena), objections, expert evidence, preparation of a trial bundle of documents and the filing of written opening summaries.

[8] On 24 July 2019, Jackson J made further orders, including giving the parties leave to rely on particular affidavits and directing the filing of further affidavits by the defendant. His Honour also made an order, on the oral application of the defendant, granting leave to one of the directors of the defendant, Mr John Owen, to appear for the defendant in the proceeding, including at the trial, until further order. Mr Owen identified himself as a retired English solicitor of some 40 years' experience. The defendant submitted that it had been represented by two firms of solicitors, who had failed in some way to carry out the defendant's instructions and had, subsequently, encountered immense difficulty obtaining alternative legal representation.

[9] At the end of the hearing before Jackson J on 24 July 2019 Mr Owen made reference to an (unfiled) application by the defendant for summary dismissal of the plaintiff's claim. Jackson J declined to deal with that, observing that the time for such an application was "long ago", with the trial due to commence in a few weeks' time. It appears from correspondence on the court file that the defendant made a subsequent attempt to file an application for summary judgment, but leave to do so was refused.[1]

[10] As the hearing of the trial was allocated to me, I convened a review hearing which took place on 3 September 2019. Mr Owen appeared, by telephone, for the defendant. Prior to the review hearing, by email to my associate dated 3 September 2019, Mr Owen again agitated for summary dismissal of the plaintiff's claim. At the review hearing, I declined to deal with any such application, noting Jackson J's previous refusal of leave to file such an application. Mr Owen also indicated the defendant wished to seek leave to rely upon the evidence of additional witnesses, from whom no affidavit or summary of evidence had yet been obtained, and to whom no subpoena had been issued. Such leave was required, because of the detailed directions made on 15 April 2019. Mr Owen said the defendant had been unable to previously file such evidence, because it only became aware of it after material was provided to the defendant through non-party disclosure on 17 June 2019 (the date for filing lay evidence by order 11 made on 15 April 2019). This issue was not, however, raised when the matter was before Jackson J on 24 July 2019 (over a month later), at which time further directions were made. I refused leave for the defendant to call evidence at the trial from any witness from whom an affidavit or summary of evidence had not yet been filed, in circumstances where the proceeding has been managed on the Commercial List since 15 April 2019; clear orders for the filing of affidavits and/or

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1 See Practice Direction No. 3 of 2002 at paragraphs 16 and 17.

witness summaries were made at that time; the matter was again before a Commercial List judge on 24 July 2019, and this issue was not raised; there was no acceptable explanation for the delay in seeking leave until 14 days before the commencement of the trial; and Mr Owen could not clearly articulate what the evidence of the additional witnesses was expected to be, or what issue on the pleadings it related to.

[11] The only orders made on 3 September 2019 were in relation to extending the date for filing opening summaries and providing working copies of affidavits. Those orders were complied with.

[12] On Friday, 13 September 2019, my associate received an email from Mr Owen, on behalf of the defendant. The email bears the date 12 September 2019, and a time of 5.08am; but it was received by my associate at approximately 2.15pm on 13 September 2019. The email reads:

> "At the Review of this matter on 3 September by Bowskill J, I advised her Honour that, as both firms of solicitors which had previously acted for the defendant had failed to comply with its instructions, their services had been dispensed with. I confirmed to her Honour that the defendant was still trying to obtain the services of new solicitors and that it would continue to do so. However, I have to advise you and her Honour that, despite every effort being made up to the present time, that attempt has regrettably proved unsuccessful.
>
> At the Review, her Honour declined, on the second occasion on which the defendant had applied for it to the Court, to grant summary judgment in favour of the defendant, which had submitted that the plaintiff's claim was a clear abuse of the process of the Court. Her Honour also declined to permit the defendant to call as witnesses certain current and former Directors of the plaintiff, or representatives of Highbury Partnership Pty Ltd and Santos Ltd, to give important evidence which the defendant believes would have demonstrated beyond doubt that the plaintiff's claim in this matter has no justification.
>
> In the light of all these factors, and of their complete confidence in the strength of the defendant's position, the Directors of the defendant have asked me to advise you and her Honour that they have reluctantly concluded that no purpose would now be served by the defendant attending the trial of this matter, and that it no longer intends to do so.
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> In the circumstances, the defendant relies on her Honour to take fully into account in arriving at her Judgment the matters raised in the pleadings and affidavit evidence on behalf of the defendant and in its proposed opening statement, which the defendant believes are sufficiently persuasive on their own of the correctness of the defendant's position even without the personal

> attendance of the Directors of the defendant at the trial. As her Honour is aware, the defendant places particular reliance on the terms of the email of 25 November 2018 at 1.31 p.m. from Ms Snelling of the plaintiff to others within the plaintiff, and on her email to Francesco Fucilla of the defendant on 26 November 2018. Copies of these emails are contained at pages 8 to 10 and 6 & 7 respectively of Exhibit WAF-2 to the affidavit of William Alexander Fucilla sworn on 24 June 2019.
>
> The Directors of the defendant have attempted until the latest possible time to comply with her Honour's request that the defendant should obtain further legal representation. They much regret that their attempt to do so has ultimately been unsuccessful and that they have had to take their decision so shortly before the trial of this matter. The Directors have asked me to express their apologies to her Honour.
>
> I am of course copying this letter to the solicitors for the plaintiff."

[13] At my direction, my associate responded to Mr Owen's email, by email sent at 3.07 pm on 13 September 2019, as follows:

> "I have referred your email below to Justice Bowskill. She has asked me to respond to you in the following terms. First, to advise you that the trial procedure in this jurisdiction is an adversarial one, not an inquisitorial one. This means that the proceeding will be determined on the basis of evidence admitted at the trial, and the submissions made by each of the parties about the evidence. The fact that affidavits have been filed with the court, by either party, does not result in the content of those affidavits becoming evidence before the court on the trial, in the absence of the party appearing at the trial to tender the affidavit as evidence and, if requested, making the deponent of the affidavit available for cross-examination. You should also be aware that there are rules of court, which may be invoked by the opposing party, which enable judgment to be entered on a party's claim (or counterclaim) where that party does not appear at the trial. Finally, her Honour has asked me to confirm that you were given leave, by order 6 of Jackson J made on 24 July 2019, to appear for the defendant company at the trial. You remain permitted to appear on behalf of the company, although are required to do so in person."[2]

[14] No further correspondence was received by my associate from the defendant.

[15] The solicitors for the plaintiff wrote to Mr Owen on the afternoon of 13 September 2019, referring to Mr Owen's email to my associate, and advising that the plaintiff intended to seek judgment on its case at the commencement of the trial and seek an

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[2] Mr Owen's email, and my associate's response, are exhibit 1.

order that the counterclaim be dismissed, and also foreshadowing the orders which were sought as to costs, and payment into court of the transfer price.[3] Later on 13 September the solicitors for the plaintiff sent copies of the draft order, which was sought by the plaintiff at the hearing on 16 September 2019, to Mr Owen and Mr Fucilla of the defendant.[4]

[16] When the matter was called on for trial at 10.00 am on 16 September 2019, there was no appearance for the defendant in court. The name of the defendant was called outside court, and there was still no appearance.

[17] There is no doubt the defendant was aware of the trial date. As already mentioned, the order listing the matter for trial was made on 15 April 2019. As recently as 3 September 2019, Mr Owen appeared for the defendant at the review hearing before me, at which the trial dates were clearly discussed. The email from Mr Owen on 13 September 2019 reveals an informed and definite decision on the part of the defendant not to appear at the trial. I was satisfied it was appropriate to proceed despite the non-appearance of the defendant.

[18] The plaintiff pressed for judgment on its claim, and dismissal of the defendant's counterclaim, in default of the defendant's appearance at the trial, under r 476 of the UCPR. That rule provides:

> "**476 Default of attendance**
>
> (1) If a defendant does not appear when the trial starts, the plaintiff may call evidence to establish an entitlement to judgment against the defendant, in the way the court directs.
>
> (2) If the plaintiff[5] does not appear when the trial starts, the defendant is entitled to dismissal of the plaintiff's claim and the defendant may call evidence necessary to establish an entitlement to judgment under a counterclaim against the plaintiff, in the way the court directs.
>
> (3) Despite subrule (2), the defendant may submit to judgment if the plaintiff does not appear when the trial starts.
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> (4) The court may set aside or vary any judgment or order obtained because of subrule (1) on terms the court considers appropriate."[6]

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3 Affidavit of Mr Morgan (9 paragraphs) sworn 16 September 2019, at p 5 of the exhibits.
4 Ibid, p 6.
5 See the definition of "plaintiff" in schedule 3 to the UCPR, to include a party who files a counterclaim.
6 Underlining added.

[19] For the purpose of establishing its entitlement to judgment on its claim, the plaintiff read the affidavit of Ms Snelling filed 8 February 2019 (CFI 2) and tendered two of the documents from the trial bundle:

1. the document at tab 90, comprising an email from Ms Snelling to Mr Fucilla (and others) dated 26 November 2018, in response to an email from Mr Fucilla to Ms Snelling dated 24 November 2018 (exhibit 2); and

2. the document at tab 105, comprising an email from Mr Fucilla to Ms Snelling dated 27 November 2018, attaching the signed Sale Agreement and transfer forms (exhibit 3).

[20] The plaintiff also filed (with leave) and read two affidavits of the plaintiff's solicitor, Mr Morgan, in support of its contention as to the appropriate basis on which costs should be awarded and the appropriateness of order 7.

[21] For the following reasons, I am satisfied the plaintiff has established an entitlement to judgment on its claim.

[22] On 13 February 2017 the plaintiff and the defendant entered into a written agreement called the Petroleum Joint Operating Agreement (**JOA**).[7]

[23] According to Ms Snelling's affidavit, the plaintiff (as to 80%) and defendant (as to 20%)[8] are the holders of a petroleum lease, which covers about 181 km^2 in central eastern Queensland. The objects of the JOA included to maintain the petroleum lease, explore for reserves of petroleum within the permit area and, if commercial reserves of petroleum are discovered and subject to the approval of the parties, to develop, produce and dispose of that petroleum.[9] The plaintiff was the operator under the JOA.

[24] Relevantly, in the JOA:

1. "Implied Value" is defined to mean "$1,166,667, calculated based on a commitment of certain investors unrelated to the Operator or any Participant to contribute $500,000 to earn 71.4% of the Operator (or a 42.9% Participating Interest on a 'look-through' basis)" (cl 1.1).

2. "Minimum Interest" is defined to mean 25% (cl 1.1).

3. "Transfer Price" is defined to mean "until such time as the Participants expend, in total, $5 million to explore for and, if successful, appraise, develop and produce Petroleum in the area of the Petroleum Title, the Implied value for a Participating Interest, and, thereafter, a fair market price for a Participating Interest as at the

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7 Admitted in [3] of the defence. A copy of the JOA appears at pp 20-84 of Ms Snelling's affidavit.

8 For completeness, I note that these are the respective percentage interests, following the Sale Agreement referred to below. At the time of entry into the JOA, the Participating Interests were 60% for the plaintiff and 40% for the defendant (see cl 4.1).

9 Snelling at [6]-[9].

date of a Deemed Sale Offer, as determined by an Expert appointed under this agreement, in each case less all amounts due by the transferring Participant to the Operator or the other Participants under this agreement, including interest at the Agreed Interest Rate, and the amount of all liability of the transferring Participant to meet existing Abandonment Obligations as reasonably determined by the Operator as at the date of payment" (cl 1.1).[10]

4. "Defaulting Participant" is defined to mean "a Participant which has committed a breach of this agreement, whether as an Unpaid Monies Default Event or a Breach Default Event[11] or to which (or to an Affiliate of which) a Breach Default Event relates" (cl 1.1).

5. Clause 4.1 identifies the Participating Interests of the Participants as 60% for the plaintiff and 40% for the defendant.

6. Clause 14.6 relevantly provides:

> "…
>
> (c) If the Participating Interest of a Participant reduces to below the Minimum Interest, whether by sale, or other disposition or dilution as permitted under this agreement, any other Participant may, by notice given to all the Participants and the Operator, cause that Participant to make a Deemed Sale Offer as at the date of the notice to the other Participants.
>
> (d) Within 7 days after notice of the Deemed Sale Offer is given, the Participants must (if required) appoint an Expert to determine the Transfer Price.
>
> (e) On determination of the Transfer Price, the Deemed Sale Offer is open for acceptance by all the other Participants pro rata in proportion to their respective Percentage Shares or such other proportions as they may agree and is irrevocable for a period of 60 days.
>
> (f) … A Deemed Sale offer of a less than Minimum Interest must be accepted by all of the other Participants.
>
> (g) Upon a Deemed Sale Offer being accepted: (i) the transferring Participant must sell, and the accepting Participants must purchase, the whole of its Participant Interest on the terms of the Deemed Sale Offer, subject only to obtaining all relevant Authorisations; and (ii)

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[10] Underlining added.

[11] "Breach Default Event" is defined to include "a breach of any of its material obligations under this agreement".

> completion of the transfer of the Participating Interest must occur within 60 days after acceptance at which time the transferring Participant must complete and deliver all required Assignment documentation, including a discharge of all Encumbrances, to the accepting Participants and the accepting Participants must pay the Transfer Price to the transferring Participant in immediately available funds subject to the relevant Authorisations being obtained.
>
> …"

7. Clause 15.3(c) provides that:

> "A Defaulting Participant must pay or reimburse all reasonable costs and expenses (including legal costs and expenses on a full indemnity basis) incurred by the Operator, a Paying Participant or a Non-Defaulting Participant which are directly attributable to pursuing a Default Remedy or remedying a Default Event. All reasonable costs and expenses so paid become Unpaid Monies due for payment by the Defaulting Participant to the payer on demand."

[25] On 27 (or 28) November 2018 the plaintiff and the defendant entered into a written agreement referred to as the "State Gas Ltd & Dome Petroleum Resources Plc – Acquisition of 20% interest", or Sale Agreement.[12]

[26] Under the Sale Agreement, the plaintiff acquired the defendant's 20% interest in the petroleum lease and 20% of the defendant's participating interest in the joint venture (see clause 2.1 and the definition of "interest" in clause 1.2).[13]

[27] By clause 4 of the Sale Agreement, the parties agreed as follows:

> "4. Confirmation of the JOA
>
> The parties agree that the JOA:
>
> (a) will be read and construed subject to this document, and in all other respects the provisions of the JOA are ratified and confirmed; and
>
> (b) subject to the assignment and assumption provided for in this document, will continue in full force and effect."

[28] The transfer of the defendant's 20% participating interest under the Sale Agreement transfer triggered the process under clause 14.6 of the JOA. This is because, as a result

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[12] On the basis that the relevant date is 28 November 2019, this is admitted in [5] of the defence. A copy of the signed Sale Agreement is part of exhibit 3 (an annexure to the email from Mr Fucilla to Ms Snelling of 27 November 2018).

[13] Snelling at [12]-[14].

of the transfer, the defendant's Participating Interest was reduced to 20%, which is below the "Minimum Interest" of 25%.[14]

[29] The plaintiff proceeded, in accordance with clause 14.6(c) of the JOA, by notice to the defendant dated 4 December 2018, to cause the defendant to make a Deemed Sale Offer. On the same date, the plaintiff communicated its acceptance of that offer.[15] There are, of course, no other Participants (cf cl 14.6(e)).

[30] The "Transfer Price" was calculated as $233,333.40, being 20% of the "Implied Value". Having regard to the definition of "Transfer Price", this was an appropriate method of calculation as the parties had not yet expended, in total, $5 million "to explore for and, if successful, appraise, develop and produce Petroleum in the area of the Petroleum Title".[16] Accordingly, there was no reason for the appointment of an expert to determine the Transfer Price (cf clause 14.6(d), which provided for the appointment of such an expert only "if required").

[31] In its notice of acceptance of the deemed sale offer dated 4 December 2018, the plaintiff requested that the defendant sign the transfer documentation, provide its bank account details and nominate a date for delivery of the signed documentation in exchange for payment.[17]

[32] The defendant's response, in an email from Mr Fucilla dated 5 December 2018, was said to be one of shock, asserting that the "asset is not for sale" and that clause 14.6(e) of the JOA is not applicable "for we clearly made sure that in our agreeing to give away the 20% that Dome State Gas JV would remain intact".[18]

[33] Despite various demands since then, the defendant has failed to complete the transfer of its remaining participating interest, in accordance with clauses 14.6(c), (e) and (f). There is evidence that the plaintiff remains ready, willing and able to complete that sale process.[19]

[34] By this proceeding, the plaintiff seeks orders for specific performance of the sale process under clause 14.6 of the JOA.

[35] In the defence, each of these various steps (the JOA; the sale of the defendant's 20% interest, reducing its Participating Interest below the Minimum Interest of 25%; the giving of a notice causing the defendant to make a Deemed Sale Offer; the basis of calculation of the Transfer Price; and the plaintiff's acceptance of that offer) are admitted.

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14 Snelling at [16]-[17]. This is admitted in [6] of the defence.
15 Snelling at [18]-[19]; and the notices at pp 102-105 of the exhibits. This is admitted in [7] of the defence.
16 This is admitted in [8] and [9] of the defence. See also Snelling at [19].
17 Snelling at [20] and exhibits at p 104.
18 Page 106 of the exhibits to Ms Snelling's affidavit.
19 Snelling at [31] and [33]; further affidavit of Ms Snelling filed by leave on 16 September 2019.

[36] By its defence, the defendant denies the plaintiff is entitled to specific performance of that agreement on the following bases:

1. That the plaintiff engaged in unconscionable conduct and/or ought to be estopped on the basis of the doctrine of promissory estoppel, in circumstances where the defendant assumed that, if it entered into the Sale Agreement, the plaintiff would not cause the defendant to make a Deemed Sale Offer in respect of its remaining Participating Interest under the JOA; this assumption was induced by the plaintiff by a representation made by Ms Snelling in an email dated 26 November 2018; the defendant acted in reliance on the assumption; the plaintiff knew it did so; and the defendant will suffer detriment if the assumption is not fulfilled (defence at [13]; counterclaim at [1]).

2. Further, the plaintiff engaged in misleading and deceptive conduct, prior to entering into the Sale Agreement, by failing to disclose to the defendant "Material Information" (as to the presence of coal seam gas in one of the wells within the petroleum lease area). The defence pleads that but for that conduct, it would not have entered into the Sale Agreement (and seeks relief under the *Australian Consumer Law*) (defence at [14]; counterclaim at [1]).

3. Further, that the plaintiff was obliged, according to the fiduciary obligations it owed to the defendant under the JOA, to disclose the "Material Information" and its failure to do so entitles the defendant to compensation for breach of fiduciary duty (defence at [15]; counterclaim at [1]).

[37] Each of those allegations are put in issue by the plaintiff in its reply.[20]

[38] The evidence tendered by the plaintiff does include the email of 26 November 2018 referred to in the particulars to [13] of the defence. Exhibit 2 comprises an email chain commencing with an email from Mr Fucilla to Ms Snelling dated 22 November 2018. From that email, and Ms Snelling's response, it appears there was a dispute between the parties about the defendant's payment of a cash call under the JOA. Mr Fucilla says, at the end of his email of 22 November, that the defendant's Board of Directors "is of the opinion that, if we cannot resolve these minor issues amicably and honourably, [the defendant] should consider offering to sell to [the plaintiff] a further proportion of [the defendant's] equity in the JV project at its current valuation so that [the defendant] can then be free carried to production". Ms Snelling responds by email on 22 November 2018, among other things, to say that the plaintiff may be interested in purchasing the defendant's interest (referring to previous offers to do so), but "it is unlikely we would consider favourably a free carry obligation such as that you have suggested in your email". Mr Fucilla then sends a lengthy email dated 24 November 2018, outlining what may be inferred are complaints about management expenses incurred to date. The email includes the following:

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[20] For completeness, I note that an amended reply was filed by leave on 16 September 2019 (the amendments being limited to amending a non-admission to an admission, and fixing some typographical errors).

> "hence we have a simple solution.
>
> We offer to sale 20% of DOME interest to State gas at 300K as per agreed 150K per each 10%.
>
> We will contribute to the second well at 20% (that is the second cash call at 20%) and any program that will follow.
>
> We agree to get partners to come in for the next phase program after this second well is finished, to contribute to the development program in order to see the project to production.
>
> State Gas will not be required to repay back the first cash call.
>
> and finally we agree that
>
> When we will get to production we would expect to have our own contract with the buyers to pay us directly.
>
> Please let us know if this is acceptable…"

[39] Ms Snelling responds to that by email dated 26 November 2018, which commences "[a]fter some consideration State Gas has determined to accept your offer as set out below. Attached are the documents to give effect to the transfer…" (attaching the Sale Agreement, and an application to register a transfer of shares between holders of the petroleum licence). The email concludes "[w]e look forward to moving forward in partnership with Dome under these revised arrangements".

[40] Exhibit 3 is the response from Mr Fucilla, on 27 November 2018, attaching the signed documents (Sale Agreement and transfer form). The email concludes by saying "[w]e look forward to progressing the project with you".

[41] In pressing for judgment on its claim under r 476(1) of the UCPR the plaintiff has tendered the evidence that it relies upon to establish an entitlement to the relief which it seeks. That was an appropriate course. Even if the defendant had appeared at the trial, it would have been an acceptable and appropriate course for the plaintiff to tender the evidence in support of the issues on which it bears the burden of proof; and leave for rebuttal any evidence on which it would rely in defence of the matters in respect of which the defendant bears of the onus.[21]

[42] The defendant bore the onus of proving the matters pleaded in, particularly, paragraphs [13], [14] and [15] of its defence and the counterclaim.

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[21] See *Downs Irrigation Co-operative Association Ltd v The National Bank of Australasia Ltd* [1983] 1 Qd R 130 at 134 and 137 per Connolly J and at 144 per Thomas J.

[43] As a matter of principle, I proceed on the basis that, where a defendant does not appear at the trial, the court must nevertheless have regard to the pleaded defence. If the evidence led by the plaintiff, in proof of its entitlement to the relief it claims, discloses facts which establish a defendant's defence, then the plaintiff would not be entitled to judgment on that basis.[22]

[44] That is not a conclusion which is open here, having regard to the evidence led by the plaintiff.

[45] There is no evidence before the court which addresses the matters pleaded in paragraphs 14 and 15 of the defence. The email exchanges comprising exhibit 2 do not support any finding, in terms of paragraph 13 of the defence, which would disentitle the plaintiff from the relief which it seeks. The defendant effectively contends that it made an offer in Mr Fucilla's email of 24 November 2018, which was accepted by the plaintiff in Ms Snelling's email of 26 November 2018. It is difficult to discern from Mr Fucilla's email what is being conveyed; although it is fair to say a continuing involvement in the joint venture is contemplated. For the plaintiff, it is submitted that Ms Snelling's email of 26 November ought properly to be construed as a counter-offer, in terms of the written Sale Agreement provided with that email. That counter-offer was accepted by the defendant when it executed the Sale Agreement (exhibit 3). Given the uncertainties attending the content of Mr Fucilla's email of 24 November; and the proffering of a written Sale Agreement on 26 November, that is a reasonable construction of the correspondence. Whilst Ms Snelling refers to "moving forward" in her email of 26 November 2018, she says nothing about clause 14.6 of the JOA. There is, in short, no evidence before the court from which it could reasonably be inferred that any representation was made by the plaintiff to the defendant that the plaintiff would not rely upon the discretionary right conferred under clause 14.6(c) of the JOA, to give a notice of Deemed Sale Offer, once the defendant's participating interest reduced below the minimum interest of 25%.

[46] The terms of the JOA, including clause 14.6, are clear. The parties ratified and confirmed the JOA in clause 4 of the Sale Agreement.

[47] I am satisfied the plaintiff has, on the evidence before the court, established an entitlement to the relief which it seeks, in terms of specific enforcement of the sale provisions in clauses 14.6(c), (e), (f) and (g) of the JOA. I am satisfied that the declarations in paragraph 1, and orders 3 and 4 of the attached judgment, are appropriate in this regard.[23]

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[22] *Banque Commerciale SA en liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 283 per Mason CJ and Gaudron J (in that case, in relation to a limitations defence).

[23] See generally, *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286 at 307 per Barwick CJ and Stephen J (and ss 7 and 10 of the *Civil Proceedings Act* 2011 (Qld)) in relation to the appropriateness of granting relief in terms of a declaration of the validity and enforceability of the JOA, together with consequential declarations and orders to give effect to the provisions of the JOA and bring finality to the proceedings. See also *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593 at 598.

[48] It is also appropriate that an order be made dismissing the defendant's counterclaim under r 476(2), in default of the defendant's appearance (order 5).

[49] I am satisfied it is appropriate to order that the defendant pay the plaintiff's costs of the proceeding on the indemnity basis (order 6). The court's discretion as to costs is appropriately exercised in that way having regard to the failure of the defendant to appear at the trial, and the plaintiff's success in obtaining judgment on its claim against the defendant, and dismissal of the counterclaim; the contractual provision in clause 15.3(c) of the JOA; and, in addition, by operation of r 361 of the UCPR. On 28 August 2019 the plaintiff made an offer to the defendant to settle the proceedings, on terms that the defendant deliver signed documents to give effect to the sale of its remaining interest, and for the payment of just over $366,668 by the plaintiff to the defendant, with each party bearing their own costs.[24] It is reasonable to conclude the judgment given today is no less favourable to the plaintiff, taking into account the orders as to costs.

[50] The orders also provide for the plaintiff to pay the Transfer Price into court (order 2) and for a procedure by which the plaintiff may access the moneys held in court in payment of its assessed costs (order 7). I accept, on the basis of the authorities referred to by Barrett J in *Bull v Wimble* (2004) 12 BPR 22,223 at [13]-[14], that in the circumstances of this case, the procedure outlined in order 7 is appropriate. The Transfer Price to be paid into court is $233,333.40. On the evidence, as at 16 September 2019, the plaintiff had incurred over $450,000 in legal fees and disbursements (not including final invoices from senior counsel since 3 September and from junior counsel since 15 July).[25] It is appropriate to conclude, in the circumstances, that the plaintiff has been put to unnecessary expense by these proceedings. There is no reason to limit the amount that remains in court, pending assessment of the plaintiff's costs (as occurred in *Bull v Wimble*). In any event, orders 7(a)(ii) and 7(c)(ii) provide for any balance, after satisfying the plaintiff's assessed costs, to be held for the defendant and paid to it.

[51] Finally, the order provides for liberty to apply (order 8), for reasons of the kind outlined by McPherson SPJ (as his Honour then was) in *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593 at 598 – that is, in the event that some further orders or directions are required in order to give efficacy to the orders which have been made. It is, nevertheless, a final order.

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[24] See the affidavit of Mr Morgan (3 paragraphs) sworn 16 September 2019, at pp 11-13 of the exhibits.
[25] Affidavit of Mr Morgan (9 paragraphs) at [4]-[6].

JUDGMENT

Before:	Bowskill J
Date:	16 September 2019
Basis of judgment:	Judgment after hearing of an originating application filed on 8 February 2019 which was later ordered to continue as if commenced by claim.

THE JUDGMENT OF THE COURT IS THAT:

1. It is declared that:
   (a) the agreement entitled "Petroleum Joint Operating Agreement" made between the plaintiff and the defendant and dated 13 February 2017 (the ***JOA***) is valid and enforceable;
   (b) on 4 December 2018, pursuant to clauses 14.6(c), 14.6(e) and 14.6(f) of the JOA, the plaintiff purchased the whole of the 20% "Participating Interest" (as defined in clause 1.1 of the JOA) of the defendant; and
   (c) the "Transfer Price" (as defined in clause 1.1 of the JOA) payable by the plaintiff under clause 14.6(g) of the JOA to complete that purchase is $233,333.40.
2. The plaintiff pay $233,333.40 into Court on or before Thursday, 19 September 2019.
3. The defendant specifically perform the JOA by signing, within 7 days of service of this judgment upon it, all notices, applications to transfer, withdrawals of caveats lodged by the defendant in respect of Petroleum Lease 231, and other forms that may reasonably be required by the plaintiff to effect a transfer to the plaintiff of the whole of the defendant's 20% interest in the joint venture the subject of the JOA known as the "Reids Dome Joint Venture".
4. Pursuant to *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), r 899, upon the solicitors for the plaintiff filing an affidavit proving service of this judgment upon the defendant and that the defendant has failed to comply with Order 3 above (for specific performance of the JOA), such notices, applications to transfer, withdrawals of caveats lodged by the defendant in respect of Petroleum Lease 231, and other forms that may reasonably be required by the plaintiff to effect a transfer to the plaintiff of the whole of the defendant's 20% interest in the joint venture the subject of the JOA known as the "Reids Dome Joint Venture" be executed by the Registrar in the name of and on behalf of the defendant.
5. The counterclaim be dismissed.
6. The defendant pay the plaintiff's costs of the proceeding to be assessed on an indemnity basis.

7. The amount paid into Court by the plaintiff in accordance with Order 2 above remain in Court on the basis that:

   (a) if, within 12 months after this judgment, a costs assessor's certificate for the costs order in Order 6 above is filed (or, alternatively, if, within 12 months after this judgment, the solicitors for the plaintiff file an affidavit proving that an agreement has been reached between the plaintiff and the defendant about the amount payable by the defendant to the plaintiff pursuant to Order 6 above), then:

      (i) the amount paid into Court with accretions shall be applied in or towards satisfying the costs payable by the defendant to the plaintiff pursuant to Order 6 above; and

      (ii) any balance of the amount paid into Court with accretions after satisfying the costs payable by the defendant to the plaintiff pursuant to Order 6 above shall be held for the defendant;

   (b) if, within 12 months after this judgment, a cost assessor's certificate for the costs order in Order 6 above has not been filed and the solicitors for the plaintiff have not filed an affidavit proving that an agreement has been reached between the plaintiff and the defendant about the amount payable by the defendant to the plaintiff pursuant to Order 6 above, then the amount paid into Court with accretions shall be held for the defendant, in which case Order 7(c) below shall cease to have effect.

   (c) pursuant to UCPR, r 561 and *Court Funds Regulations 2009* (Qld), s 8, within 7 days after the day on which judgment for the amount of the plaintiff's assessed costs under Order 6 above becomes enforceable in accordance with UCPR, r 740 (or, alternatively, within 7 days after the day on which the solicitors for the plaintiff file an affidavit proving that an agreement has been reached between the plaintiff and the defendant about the amount payable by the defendant to the plaintiff pursuant to Order 6 above), the Registrar is authorised and directed to pay:

      (i) to the plaintiff, so much of the amount paid into Court with accretions as may be required to satisfy the costs payable by the defendant to the plaintiff pursuant to Order 6 above; and

      (ii) to the defendant, any balance of the amount paid into Court with accretions which remains after satisfying the costs payable by the defendant to the plaintiff pursuant to Order 6 above; and

   (d) nothing in this order restricts the ability of the plaintiff to recover from the defendant the costs the subject of Order 6 above.

8. The parties have liberty to apply on seven days' notice.