SUPREME COURT OF QUEENSLAND

CITATION:	*State Gas Limited v Dome Petroleum Resources PLC* [2019] QCA 307
PARTIES:	**STATE GAS LIMITED** ACN 617 322 488 (respondent/applicant) **v** **DOME PETROLEUM RESOURCES PLC** ARBN 126 449 527 (appellant/respondent)
FILE NO/S:	Appeal No 10328 of 2019 SC No 1269 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 231 (Bowskill J)
DELIVERED ON:	Date of Orders: 27 November 2019 Date of Publication of Reasons: 20 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2019
JUDGES:	Philippides JA
ORDERS:	**Date of Orders: 27 November 2019** **1. The appeal proceeding CA 10328/19 be struck out.** **2. The applications filed by the appellant in proceeding CA 10328/19 are dismissed.** **3. The appellant is to pay the respondent's costs of and incidental to the appeal and of each of the interlocutory applications filed in proceeding CA 10328/19 on an indemnity basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – OTHER MATTERS – STRIKE OUT – where the applicant (the respondent to the appeal) applied to have the appeal proceedings struck out on the basis that there was no arguable error on the part of the primary judge, and that to require the applicant to meet the appeal would be oppressive – where the applicant and the respondent (the appellant in the appeal) entered into a Joint Operating Agreement to explore for, develop, produce and dispose of petroleum in an area covered by a petroleum lease – where the respondent's Participating Interest in the joint venture fell

below 20 per cent and became mandatorily purchasable by the applicant under the Joint Operating Agreement – where the applicant sought to enforce the purchase of the respondent's remaining Participating Interest – where, at trial, the primary judge declared, *inter alia*, that the Joint Operating Agreement was valid and enforceable and that the applicant purchased the respondent's Participating Interest under it – where the primary judge ordered that the respondent specifically perform the Joint Operating Agreement to effect a transfer to the applicant of its Participating Interest – where the respondent appealed that decision – whether the appeal proceedings should be struck out

Uniform Civil Procedure Rules 1999 (Qld), r 16(e)

COUNSEL: G A Thompson QC, with J Hughes, for the respondent/applicant
No appearance for the appellant/respondent

SOLICITORS: Allens for the respondent/applicant
No appearance for the appellant/respondent

[1] **PHILIPPIDES JA:** The present applications arise in relation to an appeal against orders made by Bowskill J on the hearing of a proceeding seeking declarations and other orders for specific performance. The proceeding concerned an agreement entitled "Petroleum Joint Operating Agreement" and dated 13 February 2017 (the JOA) made between State Gas Limited (State Gas), the plaintiff in the proceeding, and Dome Petroleum Resources Plc (Dome) the defendant.

[2] Bowskill J made orders on 16 September 2019, after a hearing in default of appearance by Dome:

1. declaring that:

   (a) the JOA made between State Gas and Dome was valid and enforceable;

   (b) on 4 December 2018, pursuant to clauses 14.6(c), 14.6(e) and 14.6(f) of the JOA, State Gas purchased the whole of the 20 per cent "Participating Interest" (as defined in clause 1.1 of the JOA) of Dome;

   (c) the "Transfer Price" (as defined in clause 1.1 of the JOA) payable by State Gas under clause 14.6(g) of the JOA to complete that purchase is $233,333.40.

2. State Gas pay $233,333.40 into Court by 19 September 2019;

3. Dome specifically perform the JOA by signing, within seven days of service of the judgment upon it, all notices, applications to transfer, withdrawals of caveats lodged by Dome in respect of Petroleum Lease 231, and other forms that may reasonably be required by State Gas to effect a transfer to it of the whole of Dome's 20 per cent interest in the joint venture the subject of the JOA known as the "Reids Dome Joint Venture";

4. Pursuant to r 899 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR) upon the solicitors for State Gas filing an affidavit proving service of this judgment upon Dome and that Dome has failed to comply with Order 3 above

(for specific performance of the JOA), such notices, applications to transfer, withdrawals of caveats lodged by Dome in respect of Petroleum Lease 231, and other forms that may reasonably be required by State Gas to effect a transfer to it of the whole of Dome's 20 per cent 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 Dome.

5. Dome's counterclaim be dismissed;

6. Dome pay State Gas' costs of the proceeding to be assessed on an indemnity basis.

[3] On 23 September 2019, Dome filed a Notice of Appeal seeking orders that Bowskill J's orders of 16 September 2019 be set aside in its entirety and that the relief sought in its counterclaim be granted on the grounds that her Honour:

1. erred in acting contrary to the rules of natural justice;

2. erred in her construction of email correspondence;

[4] On 16 October 2019, State Gas filed an application by which it sought orders that Dome's notice of appeal be set aside on the basis that it disclosed no reasonable grounds of appeal, alternatively that the proceeding be stayed until a solicitor appeared on the record and that further or alternatively, Dome provide security for costs.

[5] An application was also filed by Dome on 24 September 2019 for orders that enforcement of the judgment of Bowskill J be postponed until the appeal was heard and determined. It also filed an application to adduce further evidence on 30 October 2019.

[6] On 27 November 2019, the applications were heard before me. It should be mentioned at the outset that, as in the trial below, there was no appearance on behalf of Dome. Mr Owen, a director of Dome, resident outside the jurisdiction (in the United Kingdom) had been permitted by Bowskill J to appear on behalf of Dome, but he was required to appear in person at the trial (having previously been permitted to appear by phone). I refused Mr Owen leave to appear by phone and the hearing of the applications, which was originally set down for 13 November 2019, was adjourned to give him time to either instruct representation or travel to Australia to appear. Neither course was taken. Accordingly, the application proceeded in the absence of any appearance on behalf of Dome. On 27 November 2019, orders were made (with reasons to be published) as follows:

1. The appeal proceeding CA 10328/19 be struck out.

2. The applications filed by the appellant in proceeding CA 10328/19 are dismissed.

3. The appellant is to pay the respondent's costs of and incidental to the appeal and of each of the interlocutory applications filed in proceeding CA 10328/19 on an indemnity basis.

[7] What follows are my reasons for making those orders.

Decision at first instance

[8] At a pre-trial hearing conducted by Bowskill J on 3 September 2019, at which Mr Owen appeared by telephone for Dome, her Honour declined to deal with any application by Dome for summary dismissal of State Gas' claim. Her Honour also refused leave for Dome to call new evidence contrary to previous directions.

[9] On 13 September 2019, Mr Owen, on behalf of Dome, sent an email to her Honour's associate which referred to the events on 3 September 2019 and stated *inter alia*:[1]

> "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.
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> 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."

[10] Her Honour's associate responded on 13 September 2019 as follows:[2]

> "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

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1 Reasons at [12].
2 Reasons at [13].

> 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."

[11] On 16 September 2019, the trial judge determined that it was appropriate to proceed in the absence of Dome and to consider State Gas' entitlement, pursuant to r 476 UCPR, to judgment on its claim and dismissal of Dome's counter-claim. Bowskill J referred to the affidavit material relied upon by State Gas in that regard, which included an affidavit of Ms Snelling filed 8 February 2019, which exhibited a copy of the JOA. It also included two documents tendered from the trial bundle (exhibits 2 and 3). Her Honour set out the following based on admissions in the defence and the affidavit of Mr Snelling.

[12] It was admitted that the JOA had been entered into between the parties on 13 February 2017. According to Ms Snelling's affidavit, State Gas (as to 80 per cent) and Dome (as to 20 per cent) were the holders of a petroleum lease, covering 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. State Gas was the operator under the JOA.

[13] The JOA contained the following provisions which Bowskill J noted:[3]

> "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).
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> 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 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).

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[3] Reasons at [24] emphasis added.

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[4] 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) 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:

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

> '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.'"

[14] On 27 or 28 November 2019, State Gas and Dome entered into a written agreement referred to as the "State Gas Ltd & Dome Petroleum Resources Plc – Acquisition of 20 per cent interest", or Sale Agreement. A copy of the signed Sale Agreement formed part of exhibit 3 to Mr Snelling's affidavit. Under the Sale Agreement, State Gas acquired Dome's 20 per cent interest in the petroleum lease and 20 per cent of Dome's Participating Interest in the joint venture: Snelling [12]-[14].[5] By cl 4 of the Sale Agreement, it was provided that the JOA be read and construed subject to the Sale Agreement.[6] The transfer of Dome's 20 per cent Participating Interest under the Sale Agreement transfer triggered the process under cl 14.6 of the JOA because, as a result of the transfer, Dome's Participating Interest was reduced to 20 per cent, which was below the "Minimum Interest" of 25 per cent as defined in the JOA: Snelling at [16]-[17].[7]

[15] By notice to Dome dated 4 December 2018, State Gas proceeded in accordance with cl 14.6 to cause Dome to make a Deemed Sale Offer, which was accepted by State Gas by communication on the same day.[8]

[16] The "Transfer Price" was calculated as $233,333.40, being 20 per cent 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".[9] 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").[10]

[17] 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.[11]

[18] Her Honour referred[12] to an email from Mr Fucilla of Dome dated 5 December 2018, wherein Dome asserted the "asset is not for sale" and that cl 14.6(e) of the JOA was not applicable. It was further asserted, "for we clearly made sure that in our agreeing to give away the 20 per cent that Dome State Gas JV would remain intact".

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5 Reasons at [26] (referring to cl 2.1 and the definition of "interest" in cl 1.2 of the JOA).
6 Reasons at [27].
7 Reasons at [28].
8 Reasons at [29].
9 This is admitted in [8] and [9] of the defence. See also Snelling at [19].
10 Reasons at [30].
11 Reasons at [31]; Snelling at [20] and exhibits at p 104.
12 Reasons at [32].

[19] Her Honour noted[13] the affidavit evidence that despite demands, Dome failed to transfer its remaining Participating Interest and that Sate Gas remained ready willing and able to complete that sale process.

[20] In respect of the orders sought by State Gas for specific performance of the sale process under cl 14.6 of the JOA, her Honour observed,[14] importantly, that in the defence, each of the various steps (the JOA; the sale of Dome's 20 per cent interest, reducing its Participating Interest below the minimum interest of 25 per cent; the giving of a notice causing Dome to make a deemed sale offer; the basis of calculation of the Transfer Price; and State Gas' acceptance of that offer) were admitted.[15]

[21] Her Honour noted[16] that, by its defence, Dome denied State Gas was entitled to specific performance of that agreement on the following bases:

1. That State Gas engaged in unconscionable conduct and/or ought to be estopped on the basis of the doctrine of promissory estoppel, in circumstances where Dome assumed that, if it entered into the Sale Agreement, State Gas would not cause Dome to make a Deemed Sale Offer in respect of its remaining Participating Interest under the JOA; this assumption was induced by State Gas by a representation made by Ms Snelling in an email dated 26 November 2018; Dome acted in reliance on the assumption; State Gas knew it did so; and Dome would suffer detriment if the assumption was not fulfilled (defence at [13]; counterclaim at [1]).
2. Further, State Gas engaged in misleading and deceptive conduct, prior to entering into the Sale Agreement, by failing to disclose to Dome "Material Information" (as to the presence of coal seam gas in one of the wells within the petroleum lease area). It was pleaded that, but for that conduct, it would not have entered into the Sale Agreement (and sought relief under the *Australian Consumer Law*) (defence at [14]; counterclaim at [1]).
3. Further, that State Gas was obliged, according to the fiduciary obligations it owed to Dome under the JOA, to disclose the "Material Information" and its failure to do so entitled Dome to compensation for breach of fiduciary duty (defence at [15]; counterclaim at [1]).

[22] Those allegations were put in issue by State Gas in its reply.

[23] Her Honour turned to the evidence of the email exchanges (Ex 2 and 3) before the Court and stated:

> "[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

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13 Reasons at [33].
14 Reasons at [35].
15 Reasons at [35].
16 Reasons at [36].

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:

> '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.
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> 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.[17]
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> [42] The defendant bore the onus of proving the matters pleaded in, particularly, paragraphs [13], [14] and [15] of its defence and the counterclaim."

[24] Having regard to Dome's failure to appear, her Honour adopted the following approach:

> "[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.[18]
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> [44] That is not a conclusion which is open here, having regard to the evidence led by the plaintiff."

[25] Her Honour turned to the matters pleaded in the defence and observed:

> "[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

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

18 *Banque Commerciale SA (En liq) 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).

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."

[26] Her Honour concluded:

"[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.[19]

[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)."

[27] On the matter of costs, her Honour stated:

"[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.[20] It is reasonable to conclude the judgment given today is no less favourable to the plaintiff, taking into account the orders as to costs."

[28] Her Honour explained other aspects of the orders:

"[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

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19 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.

20 See the affidavit of Mr Morgan (3 paragraphs) sworn 16 September 2019, at pp 11-13 of the exhibits.

> 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).[21] 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.
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> [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."

Application that the appeal be struck out

[29] State Gas contended that the appeal should be set aside as it was bound to fail and should be struck out pursuant to r 16(e) of the UCPR, or the Court's inherent jurisdiction on the basis that the grounds of appeal revealed no arguable error below and that being required to respond to them would be oppressive.

[30] I will deal with the submissions advanced in respect of each ground of appeal raised in the Notice of Appeal.

Ground 1

[31] This ground raised two complaints that her Honour acted in breach of the rules of natural justice.

Ground 1.1

[32] First, it was asserted in the Notice of Appeal that Bowskill J acted contrary to the principles of natural justice by refusing to grant summary judgment in favour of Dome, notwithstanding clear evidence of misleading and deceptive conduct by State Gas toward Dome.

[33] The matter of summary judgment was initially raised on 24 July 2019 before Jackson J by Mr Owen (at which stage no application for summary dismissal of State Gas' claim had been filed). Jackson J stated that no application would be entertained, as it ought to have been brought long ago, the matter already having been listed for trial. That approach was also adopted by Bowskill J at a pre-trial review on 3 September 2019 when the matter was again broached some two weeks before the hearing date. Her Honour reiterated at the review that the Court would not entertain any application for summary dismissal by Dome so late in the proceeding. There can be no arguable basis for appeal on the ground that there was

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21 Affidavit of Mr Morgan (9 paragraphs) at [4]-[6].

a breach of the rules of natural justice on the ground of her Honour's exercise of her discretion.

Ground 1.2

[34] Secondly, it was asserted in the notice of appeal that Bowskill J acted contrary to the principles of natural justice in failing to permit Dome to call as witnesses certain current and former directors of State Gas (and representatives of Highbury Partnership Pty Ltd and Santos Ltd) thereby preventing Dome from proving in Court that State Gas had acted towards Dome in a misleading and deceptive manner.

[35] At the pre-trial review on 3 September 2019, her Honour refused to give Dome leave to call evidence at the trial from any witness from who an affidavit or summary of evidence had not then been filed in accordance with previous directions. Her Honour stated her reasons for that refusal.[22] Her Honour's reasoning was entirely sound. Her Honour observed that directions made on 15 April 2019 required the affidavit evidence of Dome's witnesses to be provided by 17 June 2019 and summaries of evidence from witnesses on subpoena by 15 July 2019. The directions provided also (by para 14) that a party may only adduce evidence from law witnesses in relation to whom an affidavit or summary has been filed in accordance with those directions. Mr Owen, on behalf of Dome, submitted before her Honour that Dome had become aware of "a number of matters" as a result of obtaining documents on non-party disclosure on 17 June 2019, and that was the source of its desire to have additional witnesses give evidence.[23] However, as her Honour observed Dome did not raise the matter of subpoenaing witnesses or adducing further evidence at the hearing before Jackson J on 24 July 2019, when Jackson J had extended the time for evidence to 7 August 2019. Nor had Dome taken any step to subpoena witnesses or provide summaries of the evidence they might give by 3 September 2019.[24] Further, her Honour observed that, on 3 September 2019, Mr Owen was unable to give any sensible explanation of what evidence the additional witnesses might give or how any such evidence was relevant to issues on the pleadings.[25] Nor was any satisfactory explanation given by Mr Owen for Dome waiting until 14 days before commencement of the trial to raise the issue of further witnesses.[26]

[36] Any contention that Mr Owen raised Dome's desire to call such evidence before Jackson J on 24 July 2019 and that his Honour "granted permission to Dome to raise it subsequently, as it did"[27] is not borne out by the transcript. As State Gas submitted, it was an application for disclosure by Dome which Jackson J indicated Dome might be able later to pursue.[28] The first occasion that Dome raised with the Court the desire to call further witnesses was on 3 September 2019.

[37] There can be no arguable ground of appeal against the orders of 16 September 2019 on the ground that the exercise of the discretion to refuse to grant leave to Dome to

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22 Reasons at [10].
23 Transcript, 3 September 2019 at 1-5.35.
24 Transcript, 3 September 2019 at 1-5.40.
25 See Reasons at [10]; Transcript, 3 September 2019 at 1-6.20-1-8.20 and 1-10.18-25.
26 See Reasons at [10]; Transcript, 3 September 2019 at 1-10.10-15.
27 See Mr Ilott's affidavit, Ex. MGI-1 at 13; Dome submissions dated 14 October 2019 paragraph 1.2.
28 See Transcript, 24 July 2019 (Jackson J) at 1-4.46-1-15.28.

call evidence at the trial from any witness from who an affidavit or summary of evidence had not yet been filed amounted to a denial of natural justice.

Ground 2

[38] Dome contended by ground 2 of the notice of appeal that no reasonable judge could have construed the email correspondence on 24 and 26 November 2018 between Ms Snelling and Mr Fucilla in the way the trial judge did on the following bases.

Ground 2.1

[39] This ground alleges that Bowskill J erred in denying Dome's promissory estoppel defence in concluding[29] that the "email exchanges comprising Exhibit 2 did not support any finding, in terms of para 13 of the defence [the promissory estoppel defence], which would disentitle [State Gas] from the relief which it seeks". The argument is premised on Mr Fucilla's email of 24 November 2018[30] and the contentions set out in the reasons at [45].

[40] It is material to note that Dome made a conscious decision not to appear at the trial.[31] Bowskill J found,[32] that no evidence was adduced at the trial in respect of the defences in respect of which Dome bore the onus of proof. The fundamental difficulty was that identified by Bowskill J that there was no evidence from which it could reasonably be inferred that any representation was made by State Gas to Dome that the plaintiff would not rely on the discretionary right conferred under clause 14.6(c) of the JOA, to give a notice of Deemed Sale Offer. The Sale Agreement specifically ratified and confirmed the JOA, and thereby included cl 14.6 which was in unambiguous terms. Her Honour identified a fatal obstacle to the establishment of a viable defence. There was no representation sufficient to found an estoppel.[33] In any event, there was no evidence adduced of reliance by Dome on the alleged representation.

Ground 2.2

[41] This ground purports to raise a mutual mistake argument. The argument put forward in the notice of appeal was that Ms Snelling's email to Mr Fucilla of 26 November 2018 represented a counteroffer to the offer by Mr Fucilla, but was not stated to be a counteroffer, and was not understood to be a counteroffer by Dome. If the email by Ms Snelling was intended as a counteroffer, the only proper construction to be placed on the exchange of emails was that there was a *mutual mistake* by the parties as to the nature and effect of the purported agreement, which should be set aside on that ground. In that event, Dome would have retained its final 20 per cent share of Reid's Dome and would have been entitled to the transfer back of its penultimate 20 per cent share.

[42] That defence was not a matter pleaded. Nor, unsurprisingly, was there any evidence of any mistake placed before her Honour. There can be no substance in this ground.

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29 Reasons at [45].
30 Set out at [38] of the Reasons.
31 Reasons at [12]; Mr Ilott's affidavit, Ex. MGI-1, p 17.
32 Reasons at [42]-[45].
33 *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1; [2016] HCA 26 at [35] per French CJ, Kiefel and Bell JJ.

Ground 2.3

[43] This ground alleges a variety of defences, most of which were not pleaded and none of which were supported by evidence at the trial. It was contended by this ground that the trial judge had not shown in her Reasons why promissory estoppel, the clean hands doctrine and those of *ex debito iustitiae*, *ex turpi causa non oritur actio* and unjust enrichment, all of which Dome had raised in the course of the proceedings, should not be invoked.

[44] The notice of appeal on this ground proceeds upon a misconception. As was made clear to Dome in the email from Bowskill J's associate of 13 September 2019, the trial procedure in the proceeding before her Honour was not inquisitorial but adversarial and to be determined on the evidence admitted at trial. The deliberate decision by Dome not to appear at the trial did not oblige the Court to undertake its own investigations.

Dome's cross-application to adduce further evidence pursuant to r 766 of the UCPR

[45] Dome filed an application seeking to adduce further evidence of an opinion from Italian lawyers. The supporting affidavit of Mr Fucilla stated that, during September 2019, Dome was "urgently seeking to obtain legal advice on both criminal and civil law aspects of the matter", with a firm of lawyers identified on 30 September 2019 and a legal opinion being provided on 13 October 2019 from Italian lawyers and a translation being requested the following day. The translated opinion concluded, it was said, that the conduct of State Gas reflected in the emails of 24 to 26 November 2018 amounted to offences of fraud under the Italian Criminal Code, "as well as under international law." It was also stated by Mr Fucilla that the opinion provided was that under Italian Civil Law where a party's motive for entering into a contract to the detriment of the other party is illegal under Italian criminal law "the contract falls to be cancelled." It is not clear that Mr Fucilla's statements reflect the translated brief opinion exhibited to his affidavit. State Gas argued that, by this application, Dome attempted to introduce assertions of fraud according to an Italian expert in circumstances where they were irrelevant and inadmissible.

[46] It is clear from the affidavit of Mr Fucilla, that Dome was well aware of the constraints following the directions made by the court as to the adducing of evidence. Mr Fucilla's affidavit makes it evident that Dome was already alive to the issue of misleading or deceptive conduct, but chose not to pursue it "to afford [State Gas] every opportunity" up to the hearing by the trial judge "to remedy any such irregularities by withdrawing its claim". Far from it being "inappropriate" for Dome to have commissioned legal opinion *before* the hearing, as claimed by Mr Fucilla, it was imperative that Dome made every endeavour to obtain all relevant evidence in accordance with the directions made as to the adducing of evidence, and that any difficulty was raised promptly before the hearing. A late application to adduce opinion evidence as to Italian law would not have been likely to have been granted in the circumstances, particularly where that would have raised the need to amend the pleadings and would not have affected the outcome of the trial judge's decision.

Costs

[47] Dome should be required to pay the costs of the appeal and of each of the interlocutory applications filed in the appeal on the indemnity basis because the appeal had no prospects of success. In addition, as observed by the primary judge, and set out above, cl 15.3(c) of the JOA 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".