

SUPREME COURT OF QUEENSLAND

CITATION: *ACN 072 776 811 (formerly Advance Australasia) Pty Ltd & Anor v Advance Watch Co. (Far East) Ltd & Anor* [2005] QSC 159

PARTIES: **ACN 072 776 811 (FORMERLY ADVANCE AUSTRALASIA) PTY LTD**
(first plaintiff)

and

ADVANCE AUSTRALASIA PTY LTD (ACN 093 519 530)
(second plaintiff)

v

ADVANCE WATCH CO. (FAR EAST) LIMITED
(first defendant)

and

ADVANCE WATCH CO. LIMITED
(second defendant)

FILE NO: BS9784 of 2004

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 16 June 2005

DELIVERED AT: Brisbane

HEARING DATE: 18 April 2005

JUDGE: Douglas J

ORDER: **THAT THE AMENDED STATEMENT OF CLAIM BE STRUCK OUT.**

THAT THE FIRST DEFENDANT HAVE JUDGMENT ON ITS COUNTERCLAIM FOR US\$186,236.19 TOGETHER WITH INTEREST PURSUANT TO S 47 OF THE SUPREME COURT ACT 1995 AND THE COSTS OF AND INCIDENTAL TO ITS COUNTERCLAIM.

THAT THE PLAINTIFFS HAVE LIBERTY TO REPLEAD ON THE UNDERTAKING OF KERRY FRANCIS MOORE IN WRITING TO THE COURT TO BE PERSONALLY LIABLE FOR ANY COSTS AWARDED AGAINST THE PLAINTIFFS OF THE PROCEEDINGS TO DATE AND OF

ANY PROCEEDINGS ARISING FROM THE LIBERTY TO REPLEAD.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – where plaintiff respondent seeking a declaration that there was a ‘valid and binding agreement’ between one of the two plaintiffs and one of the two applicant defendants – where agreement alleged was for ‘exclusive distribution’ – where applicant sought summary judgment or the striking out of whole or part of the statement of claim – where evidence of the agreement alleged by the plaintiff was lacking – whether the plaintiff should have summary judgment entered against them.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSIDERATION – FAILURE OF CONSIDERATION – where purported exclusivity agreement made reference only to the plaintiff being granted the ‘exclusive trading rights’ for the defendants’ products – where no obligations imposed on the plaintiff – whether consideration had passed – whether promise to “purchase and distribute timepieces” was illusory consideration.

PERSONAL PROPERTY – ALIENATION OF PERSONAL PROPERTY – ASSIGNMENT OF CHOSSES IN ACTION GENERALLY – WHAT MAY BE ASSIGNED – where first plaintiff claimed to have assigned its alleged exclusivity agreement to the second defendant – whether required special personal qualifications in distributor – where sole director of both plaintiffs was the same individual – whether the alleged contract could be assigned.

Australian Woollen Mills Pty Ltd v The Commonwealth (1954) 92 CLR 424, followed

Hall v Busst (1960) 104 CLR 206, referred to

Harpur v Ariadne Australia Ltd [1984] 2 Qd R 523, cited

Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660, considered

Upper Hunter County District Council v Australian Chilling and Freezing Co. Ltd (1968) 118 CLR 429, cited

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, cited

Whitlock v Brew (1968) 118 CLR 445, referred to

Supreme Court Act 1995 (Queensland), s 47

Uniform Civil Procedure Rules 1999 (Queensland), r 173(3)

COUNSEL: D J Williams for the applicants

M D Martin for the respondents

SOLICITORS: Hopgood Ganim Lawyers for the applicants

Tucker & Cowan for the respondents

- [1] **Douglas J:** In what could be characterised as a pre-emptive strike the plaintiffs in this proceeding sought a declaration that there was a valid and binding agreement between the first plaintiff and one of the defendants or between the second plaintiff and one of the defendants “by which the first and/or second plaintiff is the exclusive distributor of the first and/or second defendant’s timepieces including Kenneth Cole watches in Australia and New Zealand until 31 December 2009”. They also seek damages for breach of that alleged agreement. When I speak of pre-emption I am referring to the fact that the second plaintiff admittedly owes US\$186,236.19 to the first defendant for timepieces supplied to it on credit, which it has not paid, claiming a set-off for the damages it claims in these proceedings.
- [2] This is an application brought by the defendants for summary judgment on the plaintiffs’ claim against them or to strike out the whole or part of the statement of claim, summary judgment on their counterclaim for US\$186,236.19 and security for costs.

Background facts

- [3] The statement of claim puts forward at least two possible distributorship agreements among the parties. The first is alleged to have been made partly orally and partly in writing between the first plaintiff, ACN 072 776 811 Pty Ltd (formerly Advance Australasia Pty Ltd), and the first and/or second defendant in 1996 or on 11 January 2000. The benefit of that agreement was said to have been assigned by the first plaintiff to the second plaintiff by written agreement dated 1 July 2000 or 7 December 2004. Notice of the assignment was said to have been given in writing on 7 December 2004.
- [4] The second agreement is pleaded as one made orally on or about 1 July 2000. Each agreement, insofar as it is said to have been made orally, relies on discussions between Kerry Moore on behalf of each plaintiff and Tom Farnen on behalf of each defendant. Each pleaded agreement includes terms that one of the plaintiffs would be the exclusive distributor of the “defendants’ time pieces in Australia and New Zealand” until 31 December 2009 and that during the currency of the agreements the relevant plaintiff “would purchase and distribute the defendants’ time pieces”.
- [5] The confusion arises because of the manner in which the plaintiffs have conducted their businesses over the years. Between 8 February 1996 and 17 July 2000 the first plaintiff, ACN 072 776 811 Pty Ltd, was known by the name Advance Australasia Pty Ltd, which is now used by the second plaintiff. For most of that time the first plaintiff imported watches from Hong Kong sold to it by the first defendant, Advance Watch Co. (Far East) Limited. That company is a wholly owned subsidiary of the second defendant, Advance Watch Co. Limited, a company incorporated in the state of Michigan in the United States of America.
- [6] Mr Moore, who is the sole director of each plaintiff, became concerned that the first plaintiff did not have the exclusive rights to import all the first defendant’s timepieces for sale to the Australian and the New Zealand markets. He says he discussed this with Mr Farnen, then the export manager of the first defendant. He says that Mr Farnen told him that the first defendant was prepared to grant his company exclusive rights as he had requested.
- [7] Mr Farnen’s evidence was that early on in their business dealings Mr Moore raised those concerns with him. He said that he first started doing business with Mr Moore

in about 1995 or 1996 and that he told Mr Moore that he would be the exclusive seller of all the second defendant's timepieces in Australia and New Zealand early on in those business dealings.

[8] Each of those deponents then refers to a written exclusivity agreement dated 11 January 2000. Mr Farnen says that the catalyst for that agreement was the purchase of the second defendant's shares by another American company which changed it from a family company to a more sophisticated corporate entity. At that time Mr Moore requested that a 10 year exclusivity arrangement be written and signed. Mr Farnen prepared a letter confirming the exclusivity arrangements and agreed on the wording on or about 11 January 2000. He also says that he handed the original letter to Mr Moore personally on one of Mr Moore's trips to Hong Kong but that he does not recall the exact date. Mr Moore believes he may have received the letter when he visited Hong Kong between 13 January 2000 and 17 January 2000 and again between 17 January and 19 January 2000 but says that he cannot recall when he received it.

[9] The agreement reads as follows –

“January 11, 2000

Advance Australasia Pty Ltd
Attn: Mr. Kerry Moore

Dear Sirs,

This is to confirm our exclusivity agreement between Advance Watch Company Limited (AWC) and Advance Australasia Pty Ltd (AA Pty Ltd), whereby AWC grants exclusive trading rights for all the AWC's timepieces and subsequent brands of AWC to AA Pty Ltd for the countries of Australia and New Zealand.

This agreement is valid from today until December 31st, 2009.”

[10] There are other features of this document which are important apart from its text and which cast serious doubt on its authenticity. It is on letterhead of the first defendant giving as its address the 12th and 13th floors of a building in Hong Kong and showing on it a symbol certifying that the first defendant had been found to conform to the management system standard ISO 9001:2000 by Det Norske Veritas. The evidence of Mr Chan establishes that the first defendant's letterhead recording that it used the 13th floor of the address at Hong Kong and recording its ISO certification was not used by it at any time before July 2000. There may be a factual issue about that to be explored if there is a trial of the action but the prima facie evidence supporting Mr Chan's version is strong.

[11] Originally the plaintiffs' solicitors had also asserted that the letter was sent by facsimile to their client in Australia. The only facsimile number apparent on the copy attached to Mr Moore's affidavits shows a facsimile imprint dated 17 May 2004, apparently from a Queensland number. Mr Farnen's explanation for the circumstances in which it was produced is that one of his staff printed the letter out for Mr Moore when he came to the first defendant's office on one of Mr Moore's frequent trips to Hong Kong, some time after they had agreed to reduce their oral

agreement to writing. He goes on to say “I recall that I signed the letter and a copy was handed to him some time thereafter”. The employees of the first defendant have not discovered any record of the letter in the company’s files.

[12] Mr Moore tried to explain these inconsistencies by saying that he originally thought he had received the letter by facsimile and instructed his solicitors accordingly. He went on to say “I must have received the original letter from Mr Tom Farnen while I was in Hong Kong.” The only period to which he deposes that he was in Hong Kong relevant to the date of the letter is the period in mid January to which I have already referred. Mr Farnen is no longer employed by either of the defendants and, apparently, left the employment of the first defendant in acrimonious circumstances. He appears to have remained friendly with Mr Moore.

[13] On 30 June 2000 the first plaintiff sold its stock, plant, equipment, fixtures and fittings, as well as some other incidental items to the second plaintiff and, on 1 July 2000, purported to transfer the benefit of “supply agreements and contracts” it held with the first defendant to the second plaintiff. Each company also changed its name at this time so that the second plaintiff adopted the name Advance Australasia Pty Ltd previously used by the first plaintiff. At a late stage of the hearing of this application the plaintiffs’ evidence was supplemented by a further affidavit by their solicitor referring to the transfer of the supply agreements and contracts from the first plaintiff to the second plaintiff in which the solicitor said that he was told by Mr Moore:

- “(a) that he had had several discussions with Mr Farnen about the change of company;
- (b) that he had advised Mr Farnen of the reason for the change of companies; and
- (c) that Mr Farnen had agreed with him, and consented to, the change of company.”

[14] On 7 May 2004 the first defendant ceased distributing watches in Australia through either plaintiff. On 7 December 2004, the first plaintiff purported again to assign the benefit of the agreement alleged to have been made in or about 1996 or on 11 January 2000 to the second plaintiff and to give written notice of that assignment to the defendants on the same date, the day before they were to seek an interlocutory injunction from this Court. On 8 December 2004 McMurdo J refused the first plaintiff’s application for an injunction to restrain the first defendant from selling or distributing any of its timepieces within Australia and New Zealand to any person or entity other than that plaintiff.

Is an enforceable agreement established on the pleadings?

[15] The agreement alleged to have been made in or about 1996 or alternatively on 11 January 2000 depends, essentially, on the validity of the letter dated 11 January 2000 as, on the available evidence, there seems to be little likelihood of any agreement having been entered into in 1996 in any terms certain enough to establish the agreement pleaded. There is no evidence that any oral agreement dealt with the issue of the term of the agreement, which the letter says would last until 31 December 2009.

- [16] The letter dated 11 January 2000 suffers seriously as a foundation for any cause of action because of the doubts about the circumstances of its creation but its authenticity is not a question I can decide on the existing evidence.
- [17] Until the late affidavit by the plaintiffs' solicitor there was no evidence addressing the pleaded oral agreement made on or about 1 July 2000. That late affidavit, filed by leave on the day of the hearing, does not, in itself, provide any evidence of an independent oral agreement entered into between either of the defendants and the second plaintiff. The most charitable construction one can place on the evidence is that it may support an agreement by the first defendant to the assignment of the benefit of the first plaintiff's supply agreement and contracts with the first defendant to the second plaintiff. That is not the same as the agreement pleaded in paragraph 4D of the amended statement of claim which, for example, alleges that one of the terms of the second agreement made on or about 1 July 2000 was that it would last from 1 July 2000 until 31 December 2009, an issue not dealt with in the affidavit.
- [18] If this were a trial and the evidence about the alleged agreements was in the same state at the end of the trial as it is now there would be little doubt that the plaintiffs would fail. The evidence about the origin of the letter dated 11 January 2000 suggests a clumsy fabrication at a much later date while the evidence about the alleged oral agreements does not establish that they were created in the terms alleged.
- [19] The alleged written agreement has further problems. The terms of the letter dated 11 January 2000 do not establish that the first plaintiff undertook any obligation which could amount to consideration. As the High Court said in *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424, 457:
- “It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty. In such cases as the present, therefore, in order that a contract may be created by offer and acceptance, it is necessary that what is alleged to be an offer should have been intended to give rise, on the doing of the act, to an obligation.”
- [20] Although the letter purports to confirm an exclusivity agreement between the second defendant and the first plaintiff whereby the second defendant granted “exclusive trading rights for all of” its timepieces for the countries of Australia and New Zealand valid until 31 December 2009, there is no corresponding obligation created in the first plaintiff. It is not obliged by the terms of the letter, for example, to purchase any particular number of timepieces nor to undertake any other activities in the exercise of its exclusive trading rights.
- [21] The alleged written agreement contains other problems also. It purports to be between the first plaintiff and the second defendant but is signed for and on behalf of the first defendant. There is evidence that Mr Farnen held a position with the first defendant but none that he held any position of authority with the second defendant. Nor is the use of the word “exclusive” clear, as it does not distinguish between whether the trading rights purportedly granted require the first plaintiff to limit its trading of timepieces to those bought from the second defendant or whether they require the second defendant not to grant trading rights to other distributors in Australia and New Zealand, or whether it covers both of those possibilities.

- [22] The pleading in respect of the agreement that the plaintiffs “would purchase and distribute the defendants’ timepieces” might be established by oral evidence but I am not persuaded that a Court would intervene to create an agreement based on such an allegation by construing it as an obligation to purchase what might be regarded as a “reasonable” or a particular number of timepieces per annum. In truth the consideration is illusory; there is no external standard established on the evidence by which such an obligation of reasonableness could be measured; cf. *Hall v Busst* (1960) 104 CLR 206, 216 and *Whitlock v Brew* (1968) 118 CLR 445, 456 with the passage in *Upper Hunter County District Council v Australian Chilling and Freezing Co. Ltd* (1968) 118 CLR 429, 437 where Barwick CJ was anxious not to apply a narrow or pedantic approach to the search for the parties’ contractual intention. There he distinguished uncertainty from absence of meaning. Here there seems to me to be an absence of meaning attaching to the pleaded obligations of the plaintiffs and nothing in the alleged written agreement to show that they owed any obligations to the defendants. In my view it cannot be said that an agreement has been made out on the case pleaded.
- [23] For those reasons it is my view that the agreements alleged are not enforceable.

Assignability of the “agreements” pleaded

- [24] In the case of a distributorship of this nature the identity of the person having the benefit of the contract must be a matter of importance to the other party. Such contracts, “involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable”; see *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660, 668-670. That the plaintiffs here both had Mr Moore as their sole director does not seem to me to be relevant to that issue. They were different companies with potentially different attractions for the existing supplier. It was entitled to have a choice in the matter of the company to which it was asked to give credit; *Tolhurst* at 670. The late affidavit from the plaintiff’s solicitor does suggest the possibility that a novation could be pleaded rather than the assignments now pleaded in paras 4A and 4B of the amended statement of claim. I am not persuaded, however, that those “assignments” are sustainable in the current form of the pleading.

Miscellaneous criticisms of the pleading

- [25] The pleading is also criticised for continuing to contain as parties the first plaintiff and the second defendant on the bases that the first plaintiff has not traded in watches since 1 July 2000 and that there is no evidence that either of the plaintiffs has ever purchased goods from or been a distributor for the second defendant. Because of my decision to strike out the whole of the amended statement of claim it is not necessary for me to deal with a number of other individual criticisms that were made of it.

A further cause of action?

- [26] Towards the end of the argument Mr M D Martin for the plaintiffs submitted that an alternative cause of action was open to the plaintiffs based on the creation of an estoppel on the principles expressed in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. The existing pleading is not based on any allegations of that nature and, in my view, cannot be rescued in its current form for the reasons I have expressed. It does seem to me, however, that it may be open to the plaintiffs to

provide instructions consistent with some other form of relief at least against the first defendant and possibly the second defendant. Accordingly I propose to strike out the whole of the amended statement of claim but to give leave to the plaintiffs to replead.

- [27] I considered giving summary judgment for the second defendant against the plaintiffs but have decided against that course of action largely because of the uncertainty attending the possible allegations that may be said to create an estoppel. It does not seem to me to be appropriate to give summary judgment to either of the defendants in those circumstances.

Judgment on the counterclaim

- [28] The only reason offered by the plaintiffs why judgment should not now be entered on the counterclaim was that the plaintiffs' rights to damages could be set off against it. Because I have struck out the existing amended statement of claim it seems only right to me that I should allow judgment to be entered for the amount of the counterclaim on the basis that the plaintiffs have not been able to articulate any right to a set off on the pleadings as they stand; see r 173(3) of the *Uniform Civil Procedure Rules 1999*. It also seems to be relevant to me that the debts claimed under the counterclaim arose before the termination of the second plaintiff's distributorship by the first defendant. It is only since then that the second plaintiff claims to have suffered any loss.

Security for costs

- [29] Because of my decision to strike out the whole of the existing amended statement of claim the application for security for costs assumes less importance. In any event Mr Moore had, by the time of the hearing, as the person standing behind the plaintiffs, undertaken to be personally liable for any costs awarded against them. In those circumstances it seems appropriate to me that the leave to replead I propose to give be conditioned on his provision of that undertaking but that, otherwise, no order for security as to costs should be made; see *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523, 531-533.

Conclusion

- [30] Because the agreements pleaded by the plaintiffs are neither enforceable nor assignable the pleading should be struck out but they should be given liberty to replead as they may be advised. The first defendant should receive judgment on its counterclaim and the plaintiffs' liberty to replead is conditional on its director, Mr Moore, undertaking to be personally liable for any costs awarded against the second plaintiff. Accordingly, apart from the order as to the costs of and incidental to this application, the orders will be:

1. That the amended statement of claim be struck out.
2. That the first defendant have judgment on its counterclaim for US\$186,236.19 together with interest pursuant to s 47 of the *Supreme Court Act 1995* and the costs of and incidental to its counterclaim.
3. That the plaintiffs have liberty to replead on the undertaking of Kerry Francis Moore in writing to the Court to be personally liable for any costs awarded

against the plaintiffs of the proceedings to date and of any proceedings arising from the liberty to replead.

[31] I shall hear further submissions as to the costs of and incidental to this application.