SUPREME COURT OF QUEENSLAND

CITATION:	*AMA v KCD & Ors* [2007] QSC 304
PARTIES:	**AMA** (applicant) **v** **KCD** (first respondent) **S AS TRUSTEE FOR THE S HOLDINGS TRUST** (second respondent) **KCD AS TRUSTEE FOR THE C DISCRETIONARY TRUST** (third respondent) **S AS TRUSTEE FOR THE S INVESTMENT TRUST** (fourth respondent)
FILE NO:	BS 10180 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2007
JUDGE:	Mackenzie J
ORDER:	**1. Evidence in the affidavit of Warwick Gerard Jones sworn 16 October 2007 be not admitted** **2. Orders in terms of the draft initialled by me and placed with the papers**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – APPLICATIONS – where respondent made an offer to settle pursuant to *UCPR* Ch 9 Pt 5 – where applicant purported to accept the offer – where subsequent negotiations followed as to the orders to be made concerning security – whether the negotiations resulted in significant alterations to the original offer to settle – whether the parties intended to be bound by the original offer or by formal contract *Property Law Act 1974* (Qld) Pt 19 *Uniform Civil Procedure Rules* (Qld) Ch 9 Pt 5, r 365(a) *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2002) 22 WAR 101, cited

Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540, cited
Barrier Wharfs Ltd v W. Scott Fell & Co Ltd (1908) 5 CLR 647, cited
Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622, cited
Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd (1995) 7 BPR 14,551, cited
Masters v Cameron (1954) 91 CLR 353, cited

COUNSEL: T Sullivan for the applicant
G Beacham for the respondent

SOLICITORS: Hopgood Ganim Lawyers for the applicant
Jones Mitchell Lawyers for the respondent

[1] **MACKENZIE J:** This is an application in proceedings under Pt 19 of the *Property Law Act 1974* (Qld). There was apparently an issue whether a de facto relationship had existed for two years or less, but that was not contentious in the present application. On 1 August 2007, the first respondent's solicitors made a formal offer to settle pursuant to *UCPR* Ch 9 Pt 5, open for acceptance until 5pm on 16 August 2007. The proposal was as follows:

> "We are instructed to make the following proposal to finalise this matter:
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> 1. That (the first respondent) pay to (the applicant) the sum of $4,000,000 on or before 1 June 2008;
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> 2. That (the first respondent) cause the Landcruiser motor vehicle in (the applicant's) possession to be transferred to her, unencumbered;
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> 3. That each (the first respondent) and (the applicant's) otherwise retain all other assets, resources and interests in their respective names and possessions, free from any claim by the other (including the 2 million shares in A Limited transferred during the course of these proceedings and funds received or spent by (the applicant) post separation);
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> 4. That each (the first respondent) and (the applicant's) remain solely responsible for all liabilities in their own respective names or owing by entities or trusts controlled by each of them respectively and indemnify the other in relation to all such liabilities;
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> 5. That pending the payment to (the applicant) pursuant to paragraph 1, she be at liberty to continue residing in the residence. In the event that (the first respondent) sells the property before 1 June 2008, he will rent a property of (the applicant's) choice, for a maximum weekly rent of $500 per week, and pay the rent up to and including 1 June 2008;
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> 6. That by way of security for the payment of $4m to (the applicant):

(a) the 23 million shares in A Limited presently being held in escrow by Geoff Wilson and Warwick Jones remain so held and be released contemporaneously with the payment to (the applicant); and

(b) (the applicant) be provided a second mortgage registered upon the titles to the K property and if the K property is sold prior to 1 June 2008, (the applicant) immediately be provided with sufficient security over other real property in exchange for her release of the second mortgage registered over the K property.

7. That each party bear their own costs of and incidental to these proceedings."

[2] On 16 August 2007, the applicant telephoned the first respondent. The conversation concerned the applicant's immediate financial stress. It seems to be common ground that as a result of this conversation, the proposition that the applicant be paid a reduced sum of $3,500,000 in June 2008 and that 2,000,000 shares in the company, worth about $240,000 to $250,000, be transferred to her. The first respondent said, at the end of the conversation, "It sounds all right. Get your solicitor to put something in writing".

[3] On 16 August 2007, just before 5pm, an acceptance purporting on its face to be an acceptance of an offer to settle was sent, containing the following paragraphs:

"Your client's Offer to Settle is accepted, on the basis of the discussion held between (K and A) this afternoon, namely, that the sum of $4 million is to be paid as follows:

1. [new paragraph 1] That (the first respondent) pay to (the applicant):

(a) The sum of $3,760,000.00 on or before 1 June 2008; and

(b) Within 7 days of the date this order issues from the Supreme Court, Brisbane in terms of this Offer and Acceptance, the Fourth Respondent do all such things and sign all such documents to cause 2 million unencumbered shares in A Limited to be transferred to (A).

We await receipt of the draft Orders to give effect to the settlement of this matter."

[4] This caused the first respondent to send a text message to the applicant as a result of which the amount included in paragraph (a) was disputed by him. It was not explained why the larger sum was included in the letter. However, the correspondence between it, and the original sum less the value of the shares, is obvious. The applicant said she would get her solicitor to send a letter including the amount of $3.5m in lieu of the larger amount. Soon after, she confirmed that she had spoken to her solicitor and that a letter would be sent the following day. The

first respondent sent a text message saying "I hope your *(sic)* happy and we can put all this behind us now for all our sakes."

[5] Later that evening, the applicant deposes, she began to have second thoughts that the first respondent may be concealing things that would stop him from making good on the deal. She sent him a text message to that effect. According to the applicant, the first respondent telephoned her and said "Why are you reconsidering our agreement. I think you should stick to it. Do you have issues with the amount of money being offered?". She then sent him a further text message saying "Its *(sic)* not the amount. I'm happy for you to make billions over this. I am just so scared that you have hidden debts that will make it impossible for you to make good on your promise. That's all".

[6] The following morning she sent text messages to the first respondent who phoned her and said "… the deal is good for you. You should take the deal.".

[7] Later that morning, 17 August 2006, she instructed her solicitor to send a follow up letter to the first respondent's solicitor in relation to her acceptance of his offer to settle. That letter was as follows:

> "(A) has notified us regarding an error in our letter. (K) and (A) have had discussion about the following:
>
> 1. The response should have contained the amount of $3,500,000.00 instead of $3,760,000.00. In all other respects (A's) acceptance is in accordance with our letter to you yesterday.
>
> We apologise to (K) and (A) for any confusion that this has created.
>
> We understand from (A) discussion with (K) last night that the above is acceptable.
>
> Accordingly we look forward to receipt of the Minutes of Consent Order."

[8] Soon afterwards, the respondent sent a text message saying "Thanks … . Its *(sic)* up to me now to make it work". The only significant disagreement between the applicant's version of the conversations and the first respondent's is that he says the applicant promised that there would be no problem about access to the child of their relationship and that it was his understanding that the settlement of their property and financial matters was premised upon the applicant's promise to him that the child and he would be spending time together. He said that that was what he meant in his text message about putting everything behind them. He said that his willingness and, indeed, eagerness to proceed with the settlement was because of the applicant's promise to him that he could see the child whenever he wanted and he was anxious to preserve and not lose that opportunity.

[9] He accepted that this aspect of the matter was not reflected in any of the text messages or in the correspondence from his solicitors. It may also be said that there is nothing in the affidavit of the first respondent's solicitor read before me that suggests that issues concerning access to the child were paramount or even involved in the discussions in August when acceptance of the offer to settle or the compromise was allegedly made. If it was more than a hope that settling the financial arrangement between the parties would be conducive to amicable

settlement of the issues with regard to the child, it is surprising that it was not mentioned overtly in any of the communications or correspondence. I am not persuaded, on the evidence before me, that such issues were an essential premise upon which the August discussions proceeded although it seems to be the case that they became an issue later.

[10] The August discussions concerning the proposal to settle the financial issues culminated in the respondents' solicitors sending a letter to the applicant in the following terms:

> "Thank you for your facsimile this morning. We confirm that (K) accepts the proposal to pay $3.5m in cash and to transfer 2m A shares to (A). We will prepare Minutes of Consent Orders and forward them to you promptly."

[11] Subsequently, discussions ensued between the solicitors about the terms of the orders to be made. In the end, the only disagreement was as to one proposed sub-paragraph, 5(b), concerning replacement security if the K property was sold before payment of the moneys due to be paid to the applicant in 2008. Essentially, the applicant's version sought independent valuations of the other properties for the purpose of the parties determining sufficient replacement security. The respondent contended for a clause to the effect that the first respondent would be required to advise the applicant of the sufficient replacement security to be provided, based on a schedule of properties and agreed values to be annexed to the order.

[12] The concept of providing sufficient security if the K property were to be sold before the payments to the applicant were made was never controversial. It would have been surprising if it had. It is, as is apparent, only the method of establishing sufficiency that is in dispute. The terms of paragraph 6(b) of the letter from the respondents' solicitor to the applicant's solicitors is not uncertain in any way. The sufficiency or otherwise of replacement security is a question of fact and could be determined without any formal machinery provisions. Such a mechanism is inessential in determining the sufficiency of replacement security under the terms of the offer which was accepted.

[13] The issue before me is whether there was an enforceable compromise of the proceedings, either by the operation of *UCPR* r 365(a) or by way of agreement, following the letter of 17 August 2007 which purported to accept the applicant's terms, or whether the case falls within a category of a case where the intention of the parties was not to be bound until an apparent consensus was formally documented. The submission for the respondent was that the case was one in the third category in *Masters v Cameron* (1954) 91 CLR 353. (It was not part of either party's case that it fell into the "fourth category" identified in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622 at 628). Continuance of negotiations in September and October was strong evidence that the parties did not intend to be bound by any consensus reached, but rather reserved to themselves the right to withdraw from any consensus until it had been formally documented and executed by them or on their behalf. It was submitted that the subsequent negotiations did not involve merely adding terms to the alleged agreement. They involved alterations to significant aspects of it, such as the security to be provided and the amount and timing of the sum to be paid.

[14] It was common ground that it was necessary to be satisfied that the parties had intended to create legal relations. In so deciding, it is appropriate to have regard to

all the relevant circumstances. In some cases, subsequent conduct may be relevant circumstances. (*Barrier Wharfs Ltd v W. Scott Fell & Co Ltd* (1908) 5 CLR 647; *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 551; *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2002) 22 WAR 101). But if there is clear evidence that an agreement, intended to be binding, was reached at a particular moment, subsequent negotiations of a "without prejudice" kind to try to bypass an obstacle that has arisen are not of assistance in determining the intention of the parties at the time when agreement was reached. (It was no part of either side's case that an agreement that had been reached had been resiled from, as evidenced by the subsequent discussions).

[15] It was submitted that there were three further matters that supported the conclusion that no binding agreement had been reached. The first was that the correspondence and conduct of the parties demonstrated unequivocally that they contemplated a formal exchange of documentation despite reaching an apparent consensus on more than one occasion. It was conceded that while not conclusive, it was evidence that they did not intend to be bound until the formal document was drawn up and signed.

[16] The second was that the parties also contemplated the transaction being dealt with by their lawyers. It was conceded that this was not conclusive, but supported an inference that the parties intended to be bound only by a formal contract. The third was that the nature and magnitude of the transaction, involving many millions of dollars and the preparation of lengthy commercial documents, also supported an inference that the parties would not intend to be bound until settlement was formally documented.

[17] The first respondent particularly relied on correspondence on 18 and 20 September 2007 concerning cl 5(b). In that the applicant proposed that, "in order to proceed beyond the current impasse", cl 5(b) be removed. In response, the respondents indicated that the first respondent was prepared to settle the matter on the basis of the draft terms of settlement provided agreement was reached in relation to the terms of the Schedule Mortgage.

[18] The respondent also wished to lead evidence of subsequent negotiations of a "without prejudice" character when significant departures from the position as at the 17 August 2007 were discussed on two occasions, 24 September 2007 and 5 October 2007. These discussions ended without the wider matters in issue being finally resolved.

[19] On the evidence set out in detail above, my conclusion is that there was an agreement reached by the parties to settle their differences over property on 17 August 2007 and that they intended the agreement to bind them. While the dollar amounts involved are large, the terms of the agreement are clear and were treated by the parties as uncontroversial. The issue upon which implementation of one of them stalled was not whether sufficient substitute security should be provided, but how the sufficiency of it was to be established. Agreement that the security intended to be provided had to be in fact sufficient was reached. The disagreement is over a procedure for determining a question of fact that is easily determinable, if the applicant disputes sufficiency, by bringing appropriate proceedings. There is nothing in the discussions and correspondence that suggests that it was a point upon which agreement had to be reached to settle the dispute (*Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd* (1995) 7 BPR 14,551).

[20] It follows that I am satisfied that I should not receive evidence of the subsequent "without prejudice" negotiations, which, I have said, involved different possible ways of resolving the differences between the parties without reaching any conclusion. It is common ground that if an agreement was made between the parties it was a just and equitable adjustment of the property and interests of the parties for the purposes of Pt 19. It is a decision that is one for the court to make, but in view of the express agreement by the parties, it is not necessary to inquire further into it.

[21] The applicant has provided a draft order containing a cl 7(b) that reflects the terms of the letters which led to the agreement that I have found to exist. It also refers to *UCPR* r 365(a) which is concerned with acceptance of formal offers. It was not suggested that it was necessary for me to finally resolve whether the agreement should be considered as acceptance of a formal offer or a compromise reached after the time for acceptance had expired. Accordingly, I will delete the reference to that rule in paragraph 1 but otherwise make the order in terms of the draft which I will initial and place with the papers.

Orders

1. Evidence in the affidavit of Warwick Gerard Jones sworn 16 October 2007 be not admitted;

2. Orders in terms of the draft initialled by me and placed with the papers.