SUPREME COURT OF QUEENSLAND

CITATION:	*Abacus Funds Management Ltd v Nethurst Pty Ltd* [2002] QSC 401
PARTIES:	**ABACUS FUNDS MANAGEMENT LTD** (ACN 007 415 590) (plaintiff/applicant) **v** **NETHURST PTY LTD** (ACN 069 125 275) (first defendant/first respondent) **ANTOINE GHANEM and ADRIENNE GHANEM** (second defendant/second respondent)
FILE NO:	S10428 of 2001
DIVISION:	Trial Division
DELIVERED ON:	6 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2002
JUDGE:	Mullins J
ORDER:	**1. Upon the undertaking of the defendants to prosecute diligently their appeal against the judgment of Wilson J given on 20 November 2002 in the proceeding, the application filed on 12 November 2002 is adjourned to a date to be fixed.** **2. Liberty to either party to apply on 2 days' notice in writing to the other.**
CATCHWORDS:	PRACTICE – SUMMARY JUDGMENT FOR THE PLAINTIFF – R292 – defendants filed notice of appeal against decision which determined question of law about the relief defendants could seek against the plaintiff in a counterclaim – plaintiff sought summary judgment against defendants on basis of that decision while appeal pending – whether summary judgment should be entered where appeal pending which could result in a triable issue if appeal were allowed – defendants offered undertaking to prosecute appeal diligently – not appropriate to give summary judgment while appeal pending – application adjourned *Trade Practices Act* 1974 (Cth) *UCPR*, r 292 *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197

Foodco Management Pty Ltd v Go My Travel Pty Ltd [2002] 2 QdR 249

COUNSEL: SL Doyle SC for the plaintiff/applicant
JC Bell QC and DA Kelly for the defendants/respondents

SOLICITORS: McCullough Robertson for the plaintiff/applicant
Hopgood Ganim for the defendants/respondents

[1] **MULLINS J:** By application filed on 12 November 2002 the plaintiff seeks judgment against the first and second defendants for the sum of $548,364.59 together with interest under s 47 of the *Supreme Court Act* 1995 pursuant to r 292 of the *UCPR*.

[2] The application is opposed by the defendants.

[3] This application followed one that was determined by Wilson J on 20 November 2002. Her Honour dismissed the defendants' application filed on 6 November 2002 for an order that the time for service of a counterclaim provided for in r 179 of the *UCPR* be extended to 15 November 2003 *(sic)*.

[4] On 28 November 2002 the defendants filed a notice of appeal against the decision of Wilson J. The plaintiff wishes to obtain judgment against the defendants, notwithstanding the appeal.

[5] The issues that arose on the plaintiffs' application for judgment were whether the plaintiff could satisfy the court pursuant to r 292(1) of the *UCPR* that the defendants have no real prospect of successfully defending all or part of the plaintiff's claim and that there is no need for a trial of the claim or the part of the claim and, if so, whether, in the exercise of the discretion conferred by r 292, judgment should be given for the plaintiff, having regard to the pending appeal.

Relevant facts

[6] Petrie Point Pty Ltd ("the original lessor") was the developer of a complex called Central Brunswick in Fortitude Valley. On 16 May 1995 an agreement for lease was signed by the first defendant and the original lessor in respect of premises within the complex. On the same day the lease was signed, but to have effect when the complex was built. The agreement for lease and lease also contained a guarantee by the second defendants.

[7] On 14 August 1997 a variation of the agreement for lease was executed. That extended the practical completion date of the complex to 30 September 1997. The first defendant alleges that it was induced to refrain from taking steps to validly terminate the agreement for lease on 30 September 1997 by representations made by the original lessor and its director, Mr Angus William Johnson, on 19 August 1997. The first defendant commenced trading on or about 14 November 1997. Because of poor trading conditions, the first defendant ceased trading on or about 6 March 1998.

[8] On or about 5 March 1998 the original lessor assigned its right and interest in the lease and guarantee to IOOF Trustees Australia (NSW) Ltd ("IOOF") as trustee of

the Abacus Central Brunswick Trust. That Trust became a registered scheme under the *Corporations Law* on 10 May 2000. The responsible entity of the scheme on its registration was the plaintiff which as a result of the *Corporations Law* assumed the rights obligations and liabilities of IOOF in relation to the Trust.

[9] The first defendant's solicitors sent a letter dated 3 February 1998 to the original lessor claiming that misrepresentations had been made to it at various stages including in August 1997 and that, based on those representations, the defendant proceeded to fit out the premises. The claim was made that the defendant had spent in the order of $280,000 on the fit out and had lost in excess of $50,000 since opening for business. The letter claimed that the first defendant held the original lessor and Mr Johnson responsible for the losses and sought an early resolution to avoid unnecessary legal costs and litigation. In the contract entered into between the original lessor and IOOF, this letter dated 3 February 1998 and the claim made by the first defendant was disclosed by the original lessor.

[10] Although the first defendant had vacated the premises in March 1998, neither IOOF nor the plaintiff re-entered possession or terminated the lease, until the plaintiff terminated the lease on 30 June 2000. The plaintiff has subsequently re-let the premises at a lower rental. The lease was registered on 11 December 1998.

[11] The plaintiff claims for rent and other moneys due under the lease in the sum of $300,132.06 until 30 June 2000 and $248,232.53 for damages for the repudiation of the lease on the basis of the difference in the rental between that which would have been payable by the first defendant and that which the plaintiff will obtain under a new lease of the premises between 1 July 2000 and 12 October 2004.

[12] The claim and statement of claim seeking the sum of $300,132.06 and damages of $248,232.53 against the defendants was filed on 21 November 2001. The defendants' notice of intention to defend and defence were filed on 1 February 2002.

[13] On 12 February 2002 a third party notice and statement of claim was filed against the original lessor and Mr Johnson as third parties. Those third parties defended on 21 June 2002. By application filed 24 October 2002 the third parties made application to strike out the third party proceedings.

[14] On 6 November 2002 the third party proceedings were discontinued by consent. The defendants therefore brought the application to seek the extension of time for service of the counterclaim which named the original lessor as the first defendant by counterclaim, the plaintiff as the second defendant by counterclaim and Mr Johnson as the third defendant by counterclaim. The form of the defence and counterclaim that was considered by Wilson J was marked Exhibit 2 on the application heard by Wilson J and a copy of that defence and counterclaim is Exhibit AG11 to the affidavit of Mr A Ghanem (the male second defendant) filed on 29 November 2002.

[15] That counterclaim is critical to the defendants' defence of the proceeding. As the misleading or deceptive conduct on which the defendants rely as inducing the first defendant to refrain from terminating the agreement for lease was that of the original lessor and Mr Johnson, the defendants need to establish some basis on which they can use that conduct to prevent the plaintiff (who was not a party to the conduct) from enforcing the lease and guarantee.

[16] The means by which that was done in the counterclaim was for the plaintiff to rely on s 80(1) of the *Trade Practices Act* 1974 (Cth) ("*TPA*") to seek an injunction preventing the plaintiff from enforcing against the defendants the rights and liabilities alleged by the plaintiff in the proceeding to have arisen under the lease and guarantee or any other rights or entitlements against the defendants or an injunction preventing the plaintiff from asserting any rights against the defendants said to have arisen by virtue of the assignment of the benefit of the lease and the guarantee from the original lessor to IOOF.

[17] On the basis that the defendants did not allege that the plaintiff breached a provision of Pt V of the *TPA* or was knowingly concerned in such a breach, as the contravention was alleged to have been committed by the original lessor and Mr Johnson, Wilson J concluded that there was no real nexus between the grant of an injunction against the plaintiff and a contravention of Pt V of the *TPA*. Wilson J proceeded on the basis that there must be a nexus between the conduct alleged or found to constitute the relevant contravention of Pt V of the *TPA* and the injunction, relying on *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197, 202-203.

Effect of judgment of Wilson J

[18] The issue between the plaintiff and the defendants as to whether, as a matter of law, the defendants could obtain relief in the nature of an injunction pursuant to s 80(1) of the *TPA* has been determined by the judgment of Wilson J, subject to the judgment being reversed on appeal. It was submitted on behalf of the plaintiff that the finding of Wilson J binds the parties and unless and until the appeal is successful, the parties cannot adopt a position for the purpose of the proceeding which is different to that determined by Wilson J.

[19] Counsel for the defendants invited me on the hearing of this application to make a determination that there was a reasonable prospect of success demonstrated for the appeal by the defendants against the judgment of Wilson J and that I should proceed to consider the merits of the counterclaim against the plaintiff on the basis that the appeal were successful.

[20] If the decision of Wilson J was in the nature of a final judgment or order, then it is not possible on another application in the same proceeding to revisit the subject matter of Wilson J's judgment or consider the merits of a counterclaim which has been rejected by Wilson J. If it were not a final judgment, in view of the appeal which has been commenced against that decision, it is not appropriate for me to embark on a consideration of the correctness or otherwise of Wilson J's judgment. I have therefore concluded that this application should proceed on the basis that the issue of whether an injunction can be granted under s 80(1) of the *TPA* against the plaintiff has been determined by the judgment of Wilson J.

Whether the defendants have no real prospect of successfully defending the claim and whether there is no need for a trial

[21] On the basis of Wilson J's judgment, there are no prospects of the defendants successfully defending the claim against the plaintiff by seeking an injunction under s 80(1) of the *TPA*.

[22] There are other defences raised by the defence and counterclaim. It was not seriously argued on behalf of the defendants at the hearing of this application, that any of those defences raised a triable issue. The only one to which any reference was made was described by Mr Bell of Queen's Counsel on behalf of the defendant as a "weak estoppel case".

[23] It is alleged in the defence that upon being made aware of the first defendant's claims in the letter dated 3 February 1998 by that being disclosed in the contract of sale between the original lessor and IOOF, neither IOOF nor the plaintiff took any action in relation to the first defendant's surrender of the premises which resulted in the first defendant assuming that IOOF had agreed to a mutual surrender of the lease. It is further alleged that on the basis of that assumption the first defendant did not pursue a damages claim under the *TPA* against the original lessor and Mr Johnson and that IOOF knew that the first defendant intended to act upon the assumption and not pursue a claim against the original lessor and Mr Johnson. As no damages claim by the first defendant was pursued against the original lessor and Mr Johnson before it became time-barred, the first defendant alleges that the plaintiff, as successor in title to IOOF is estopped from pursuing its claim against the defendants.

[24] The difficulty with these claims is that subsequent to the abandonment of the premises by the first defendant correspondence was sent from the original lessor and then IOOF making demands for payment and reserving the lessor's rights, the registration of the lease on 11 December 1998 was inconsistent with an intention to surrender by IOOF and on 14 February 2000 a notice to remedy default was served. The defendants therefore have "no real prospect of succeeding" in respect of this defence: *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 QdR 249, 250 (para [8]).

[25] Another defence which is raised is that there was an alteration to the lease, after it was signed by the first defendant. The agreement for lease did authorise the insertion of information into the signed lease. There was no attempt made by the defendants to prove up this defence. It is also alleged that the original lessor and IOOF evidenced an intention not to be bound by the lease and repudiated it, by not attending to stamping and registration of the lease prior to 25 March 1998. In view of the fact that the lease commenced only on 13 October 1997 and that it was stamped on 3 February 1998, there is no substance to the defence that the original lessor had repudiated the lease prior to the first defendant's vacating the premises.

[26] I am therefore satisfied that the plaintiff has established an entitlement to summary judgment under r 292 of the *UCPR*.

Exercise of discretion as to whether judgment should be given

[27] Even though the plaintiff has shown that it has satisfied the conditions required before judgment can be given under r 292(1) of the *UCPR*, there remains the question of whether it is appropriate to enter judgment in all the circumstances pertaining at this stage of the proceeding.

[28] It was submitted on behalf of the defendants that if judgment were given against them at this stage, they would have to seek a stay of the enforcement of the judgment pending the determination of the appeal against the decision of Wilson J

and would also need to file a notice of appeal against the order giving judgment. This would involve the defendants in additional expense.

[29] It was submitted by Mr Doyle of Senior Counsel on behalf of the plaintiff that the decision of Wilson J was clearly correct and that the plaintiff was therefore entitled to judgment.

[30] The authorities on which each party relied to support that party's position on whether the decision of Wilson J was correct or not were canvassed in detail before me. What those arguments showed was that I cannot conclude that the defendants have no case which can be put on the appeal. The appeal must take its course.

[31] I am therefore in the position of determining whether to exercise the discretion to give judgment in favour of the plaintiff, when I know that there is a pending appeal which keeps open the possibility that the defendants may be able to obtain a reversal of the decision of Wilson J. If that were to happen after judgment had been entered at this stage, steps would need to be taken to have that judgment set aside.

[32] Mr Ghanem deposes to having instructed the solicitors for the defendants to prosecute the appeal against the decision of Wilson J diligently and during the hearing of this application an undertaking of the defendants to prosecute the appeal diligently was offered. Because of the timing of the hearing of this application after the appeal against the decision of Wilson J had been filed, it is not appropriate to give judgment to the plaintiff. That question should be finally determined, when the outcome of the appeal is known or, if it becomes apparent, that the defendants are not prosecuting the appeal diligently.

Orders

[33] I therefore will order in the following terms:

1. Upon the undertaking of the defendants to prosecute diligently their appeal against the judgment of Wilson J given on 20 November 2002 in the proceeding, the application filed on 12 November 2002 is adjourned to a date to be fixed.
2. Liberty to either party to apply on 2 days' notice in writing to the other.

[34] It is necessary to hear submissions from the parties on the question of costs.