SUPREME COURT OF QUEENSLAND

CITATION:	*Bennett & Ors v Stewart & Anor* [2008] QSC 20
PARTIES:	**Michael William Bennett and Pamela Margaret Bennett as Trustees for Bennett Superannuation Fund** (Plaintiffs) v **Douglas James Stewart and Pinjo Margetta Stewart** (Defendants)
FILE NO/S:	BS 1244/08 and BS 489/08
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	20 February 2008
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2008
JUDGE:	McMurdo J
ORDER:	**1. That the plaintiffs and defendants specifically perform the contract dated 13 October 2007; and** **2. That the application for the removal of the caveat over the property, lodged by Mr and Mrs Bennett, is dismissed.**
CATCHWORDS:	CONTRACT – INTERPRETATION – UNCERTAINTY – identification of parties – where purchaser named in contract not a legal entity – whether contract should be considered as a whole – whether signatures sufficiently identify purchaser CONTRACT – VOID CONTRACTS – uncertainty CONTRACT – RECTIFICATION – where contract names a superannuation trust but not the trustee as purchaser CONTRACT – PROPERTY – STATUTE OF FRAUDS – REQUIREMENT OF WRITING – what constitutes sufficient memorandum or note of contract s 59 *Property Law Act 1974* (Qld)

Craddock Bros Ltd v Hunt [1923] 2 Ch 135, cited

Di Biase v Rezek [1971] 1 NSWLR 735, applied

Gebauer Nominees Pty Ltd v Cole as Trustee for Hotrox Charcoal Unit Trust t/as Hotrox Charcoal Co [2006] WASCA 169, applied

Hillas & Co Ltd v Arcos Ltd (1932) 38 Com Cas 23, applied

Powercor Australia Ltd v Pacific Power [1999] VSC 110, applied

Prints For Pleasure Ltd v Oswald-Sealy (Overseas) Ltd [1968] 3 NSWR 761, applied

Rosser v Austral Wine and Spirit Co Pty Ltd [1980] VR 313, applied

Rossiter v Miller (1878) 3 App Cas 1124, applied

Sindel v Georgiou (1984) 154 CLR 661, cited

Whiting v Diver Plumbing & Heating Ltd [1992] 1 NZLR 560, cited

COUNSEL: Mr P Freeburn SC for the plaintiffs

Mr DJ Campbell SC and Mr M Johnson for the defendants

SOLICITORS: Quinn and Scattini on behalf of the plaintiffs

Hemming and Hart on behalf of the defendants

[1] The plaintiffs, Mr and Mrs Bennett, and the defendants, Mr and Mrs Stewart, signed a contract for the sale of the Stewarts' house and land at Mt Cotton last October. The price was $1,300,000 with settlement 90 days from the contract. The contract document is in the standard form approved by the REIQ and the Queensland Law Society.

[2] The Bennetts wish to enforce that contract, but the Stewarts say that the contract is void for uncertainty or that it is unenforceable because there is no sufficient memorandum or note of it[1].

---

1 s 59 of the *Property Law Act 1974* (Qld).

[3] The issue is whether the form of contract sufficiently identifies the buyer. The Bennetts each signed as buyers. But the schedule to the contract document contained these words next to the word "buyer":

"Bennett Superannuation Fund"

[4] The Stewarts say that because such a fund is not a legal entity, the document does not specify who is the buyer, so that the contract is uncertain. Similarly it is said that because the memorandum or note required by s 59 of the *Property Law Act 1974* (Qld) requires an identification of the parties, the contract (if any) is not enforceable. In response the Bennetts claim, in the alternative, rectification of the contract document so that next to "buyer" in the schedule, would be "Michael William Bennett and Margaret Bennett as trustees for the Bennett Superannuation Fund".

[5] The first question then is whether there is a sufficiently certain contract. For the Bennetts, it is accepted that the parties must be able to be identified. But they say that the contract document itself does identify them as the buyers. Alternatively they say that they can be identified as the buyers by evidence, which they have tendered and which is unchallenged, that at all times they have been the trustees of the Bennett Superannuation Fund.

[6] The Bennetts not surprisingly point to their signatures, which legibly show their names, on the line above the printed word "buyer". They also point to their signatures appearing on the attached warning statement under "Bennett Superannuation Fund" which is there named as the buyer. Thirdly, in the schedule to the contract document, below where the Fund is named as the buyer, there appears an address for the buyer which, as is unchallenged, is their residential address.

[7] As the Stewarts argue, a superannuation fund is a trust and not a distinct legal entity capable of making a contract[2]. So they argue that this contract document, by specifying as the buyer something which is not a distinct legal entity, is hopelessly uncertain. However, the document as a whole must be considered, and within proper bounds, some interpretation must be sought to give the document the legal effect which clearly it was intended to have.[3] The signatures of the Bennetts above the word "buyer" cannot be ignored, and they provide a strong indication that the Bennetts were indeed the buyers. The specification in the schedule of the Fund as the buyer would be consistent with their signing as buyers if they were its trustees. The reference to the Fund is a clear indication that the property was being purchased to be held as an asset of the trust which is that Fund. Ordinarily at least, such an acquisition would be made by the Fund's trustees, and they would make the required contract. On an objective reading of the contract document, and without the benefit of the evidence that the Bennetts are the trustees of the Fund and did intend to purchase in that capacity, it is sufficiently certain that the Bennetts were the buyers. Had the schedule specified as the buyer the name of a distinct legal entity, such as a company, then the Bennetts' signatures would have a different significance: they would probably be understood as the Bennetts signing on behalf of that company and not as parties. It is the fact that plainly the specified buyer in the schedule is not a distinct legal entity, but is a reference to a trust relationship, which indicates that when the Bennetts signed as the buyers, that is what they were.

[8] In theory at least, there could be another rational explanation for their signatures. It is that they were signing *on behalf* of the trustee of the Fund, such as a company

---

2 Halsbury's Laws of Australia [430-35]; *Gebauer Nominees Pty Ltd v Cole as Trustee for Hotrox Charcoal Unit Trust t/as Hotrox Charcoal Co* [2006] WASCA 169 at [17] per McLure JA.

of which they were the directors. If the document is thought to describe the buyer as whoever or whatever was the then trustee of the Fund, still the contract is sufficiently certain. On that interpretation the buyer or buyers, although not necessarily named in the contract document, would be sufficiently described. Both for the purpose of contractual certainty and for the existence of a note or memorandum of the contract to satisfy s 59, a party, although unnamed, may be sufficiently described in other ways. For example, in *Di Biase v Rezek*[4], an option was granted to "D. Bros 83 Mitchell Street, Enfield". It was held that evidence was admissible to show who constituted that firm at the time. Asprey JA (Holmes JA agreeing) said[5]:

> "… Both as regards the *Statute of Frauds* and any other statute which requires an instrument in writing and as regards the general law the naming of a party is sufficient if he is joined or nominated in the instrument by a sufficiently identifiable description (see the notes to s 40 of the *Law of Property Act*, 1925 (Eng.) in *Halsbury's Statutes of England*, 2nd ed., vol. 20, pp. 504-505 and in *Stonham's Vendor and Purchaser*, pp. 58-59)".

Asprey JA cited *Rossiter v Miller*[6] where Lord Blackburn said:

> "It is enough if the parties are sufficiently described to fix who they are without receiving any evidence of that character which Sir James Wigram in his Treatise calls evidence (*Wigram on Extrinsic Evidence*, Intr. Obs. p 10) 'to prove intention as an independent fact.'"

Asprey JA said[7]:

> "… For example, if an agent purported to contract (without binding himself personally) on behalf of his 'client' or 'clients', evidence as to who were the party or parties on whose behalf he intended to contract would be inadmissible because such evidence, if admitted, would only go to show which of his clients he intended to be the contracting party. The evidence would be proof only of the agent's intention. But if, on the other hand, he purported so to contract on

---

3 *Hillas & Co Ltd v Arcos Ltd* (1932) 38 Com Cas 23 at 29; *Prints For Pleasure Ltd v Oswald-Sealy (Overseas) Ltd* [1968] 3 NSWR 761 at 765-6; *Powercor Australia Ltd v Pacific Power* [1999] VSC 110 at [289].

4 [1971] 1 NSWLR 735.

5 [1971] 1 NSWLR 735 at 741-742.

6 (1878) 3 App. Cas 1124 at 1140-1141.

7 [1971] 1 NSWLR 735 at 742-743.

> behalf of the 'proprietor' of a given property the fact of the proprietorship can be determined independently of any intention entertained by the agent (see *Rossiter v Miller* (26)). And so it is, when a partner contracts in the firm-name, the persons who constitute the firm at the date of the contract may be ascertained as a fact, independently of any intention held by the partner who executes the document by the tribunal of fact despite a conflict in the evidence as to that fact".

Di Biase v Rezek was followed in the Full Court of the Supreme Court of Victoria in *Rosser v Austral Wine and Spirit Co Pty Ltd*[8], where Young CJ and O'Bryan J said[9]:

> "It thus appears that Lord Blackburn was concerned to point out in *Rossiter v Miller* that the parties will be sufficiently described in a writing for the purposes of the Statute of Frauds if the description used can be explained by extrinsic evidence without having to resort to evidence to prove the intention of the author".

[9] So if the present document is to be interpreted as a contract made by or on behalf of whoever or whatever was the trustee of the Fund, evidence can be received to identify that trustee. In this case, there is such evidence and it is unchallenged: the Bennetts were then and remain the trustees. And as was held in *Di Biase v Rezek* and *Rosser v Australian Wine and Spirit Co*, a challenge to such evidence does not make it inadmissible. What would be inadmissible is evidence of the actual intention of someone, or in other words, evidence as to who meant to contract[10]. Nor would an imprecise description of the contracting party, which might alternatively refer to one of several persons, constitute a sufficiently certain description. Accordingly, if this document is to be interpreted as effectively describing the buyer as the then trustee or trustees of the Fund, there is the same result: the trustees have been identified as the Bennetts and so they are the buyers.

---

8 [1980] VR 313.

9 [1980] VR 313 at 318.

10 Apart from on the alternative rectification case.

It follows also that they are sufficiently identified by the contract document for the purposes of s 59. The propositions from *Di Biase v Rezek* apply equally to s 59[11].

[10] These principles were not challenged, either in respect of the uncertainty question or that question under s 59. Instead the argument for the Stewarts was that this document did not describe a person or entity which could, with evidence, be identified; rather it described the buyer as something which had no legal existence for which therefore there could be no exercise of identification. But again that is an argument which looks only to one line of the document and does not consider the effect of other parts. Nor is it an argument which seeks to find some rational interpretation which would give the document the legal force which those signing it meant it to have.

[11] Accordingly it is unnecessary to consider the Bennetts' alternative claim for rectification, because the Bennetts are entitled to enforce their contract according to its present terms. However, some matters may be noted. The first is that I would reject the submission for the Stewarts that if the contract document does not record a concluded agreement because it is uncertain as to the identity of the buyers, then there could be no rectification because, it was said, only a contract could be rectified and in that event there would be no contract. But the remedy of rectification relates to the instrument, in this case the contract document. Rectification may be granted in order to make the contract document sufficiently certain, upon proof that it would then express the parties' true intention: *Sindel v Georgiou*[12]. And a contract may be rectified to be capable of becoming a memorandum in writing that is sufficient to

---

11 As Asprey JA said in the first passage I have cited; the issue in *Rosser* concerned a similar provision requiring a guarantee to be in writing.

12 (1984) 154 CLR 661, cited for this in Meagher Gummow & Lehane's *Equity, Doctrines and Remedies* (4th ed) at [26-035].

satisfy a provision such as s 59: *Craddock Bros Ltd v Hunt*[13]. Secondly, the material facts are not in dispute. There is no challenge to any of the evidence in this case, including that of the Bennetts that they intended to be the buyers. It does not matter that they further intended to purchase in their capacity as trustees, because that element is immaterial for the terms of the contract: as against their vendors, the Bennetts' rights and liabilities under the contract would be no different whether or not they were acting as trustees or were described as such in the contract document. Although the Stewarts do not say so in so many words, it is clear that they intended to contract with the Bennetts. Again it would be unnecessary for the Bennetts to prove that the Stewarts intended them to buy as trustees. That matter would be of no concern to the Stewarts who probably gave no thought to it. They intended to contract with Mr and Mrs Bennett, so that had the document not expressed that intention with sufficient certainty, it would have been appropriate to rectify it.

[12] There is no other argument advanced to resist specific performance. The Stewarts have made another contract, but it is conditional upon the removal of the Bennetts' caveat, which was lodged on 24 December last, prior to the making of this other contract.

[13] There will be an order for specific performance of the contract between the plaintiffs and the defendants dated 13 October 2007. The application for the removal of the caveat lodged by Mr and Mrs Bennett is dismissed. I will hear the parties as to costs.

---

13 [1923] 2 Ch 135, cited with *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560 for this in Meagher Gummow & Lehane at [26-080].