

# SUPREME COURT OF QUEENSLAND

CITATION: *Grace Buncle Pty Ltd v Ralph Lauren No 57 Pty Ltd; Grace Buncle Pty Ltd v Ralph Lauren No 57 Pty Ltd & Anor* [2019] QSC 270

PARTIES: **In BS No 4589 of 2016:**  
**GRACE BUNCLE PTY LTD as trustee for THE CINDY FLEMING TRUST**  
**ACN 605 600 959**  
(plaintiff)  
**v**  
**RAPLH LAUREN 57 PTY LTD as trustee for THE JOHN JAMES TRUST**  
**ACN 079 745 056**  
(defendant)

**In BS No 4849 of 2016:**  
**GRACE BUNCLE PTY LTD as trustee for THE CINDY FLEMING TRUST**  
**ACN 605 600 959**  
(plaintiff)  
**v**  
**RAPLH LAUREN 57 PTY LTD as trustee for THE JOHN JAMES TRUST**  
**ACN 079 745 056**  
(first defendant)

**ROBERT JOHN JAMES**  
(second defendant)

FILE NOS: BS No 4589 of 2016  
BS No 4849 of 2016

DIVISION: Trial Division

PROCEEDING: Applications

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 7 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 19 July 2019

JUDGE: Martin J

ORDERS:

- 1. The plaintiff is to answer the request for confirmation from Mr Lytras that it has monies available to meet one half of the costs of Lytras & Company.**
- 2. The applications (court document no 104 in BS No 4589 of 2016 and court document no 51 in BS No 4849 of 2016) are otherwise dismissed.**
- 3. The applications (court document no 103 in BS No 4589 of 2016 and court document no 50 in BS No 4849 of 2016) are dismissed.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where an interim compromise agreement was entered into between the parties – where the agreement provides that a certain independent forensic accountant be retained to consider, among other things, allegations concerning monetary transactions subject of the proceedings – where the agreement provides that the accountant is to be “retained by the parties jointly” – where the defendants contend that the plaintiff and first defendant are equally liable for payment of the accountant’s fees from their own funds – where the plaintiff contends that the fees should be paid from the joint bank accounts held in the names of the plaintiff and first defendant – where the plaintiff has not answered a request for confirmation from the accountant that it has monies available to pay its share of the fees – whether the accountant’s costs are to be equally borne by the plaintiff and first defendant from their own funds – whether the plaintiff must answer the accountant’s request

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where an interim compromise agreement was entered into between the parties – where the agreement provides that a certain solicitor is to be appointed as the parties’ agent for the purpose of selling certain specified properties – where the solicitor does not believe that he has any discretion to determine whether to sell or not sell any of the properties – where the plaintiff contends that he does have a discretion – whether the solicitor has a discretion to not sell the properties

*Butt v M’Donald* (1896) 7 QJ 68, cited

*Grace Buncl Pty Ltd v Ralph Lauren No 57 Pty Ltd* [2018] QSC 24, cited

*Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015)

256 CLR 104, cited

COUNSEL: A Morris QC with I Erskine for the plaintiff in each matter  
S Williams QC with M Eade for the defendant/s in each matter

SOLICITORS: Hawthorn Cuppaidge & Badgery for the plaintiff in each matter  
Wilson Lawyers for the defendant/s in each matter

- [1] On 9 March 2017 the parties in these two matters compromised part of the dispute between them and that resolution was recorded in a document entitled “Terms of interim compromise” (the compromise agreement). That happy state of affairs did not last long.
- [2] The parties now disagree (again) about the meaning of various parts of the compromise agreement. The defendants in each matter seek orders about the proper construction of parts of the compromise agreement concerning:
- (a) the terms of payment of Lytras & Company (an independent forensic accountant), and
  - (b) the powers of sale of Mr Sheehy (a solicitor).

#### **What led to this?**

- [3] An earlier disagreement about other terms of the compromise agreement was resolved by Bond J in *Grace Bunclie Pty Ltd v Ralph Lauren No 57 Pty Ltd*.<sup>1</sup> The relevant history of these matters was set out in his Honour’s reasons and, for convenience, I repeat part of them here:

“[4] The compromise agreement sought to achieve these matters:

- (a) first, by clause 1, to express agreement for the joint appointment of a named forensic accountant so that that person could –
  - (i) address certain issues raised in a proposed amended statement of claim in the first proceeding and in certain affidavits filed on behalf of the plaintiff in the first proceeding; and
  - (ii) conduct a peer review of an expert opinion expressed in relation to the fair value of certain property referred to in the second proceeding and if necessary, provide an alternate valuation report;
- (b) second, by clauses 2 to 9, to set out a mechanism by which an independent person, Mr Sheehy, would be appointed to sell certain

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<sup>1</sup> [2018] QSC 24.

identified real property referred to (or proposed to be referred to) in the first proceeding and to hold net proceeds of sale on trust pending further order or agreement concerning the distribution of the net proceeds;

...

[20] The plaintiff commenced the first proceeding by originating application filed on 9 May 2016. The plaintiff contended as follows:

- (a) The plaintiff and defendant are each the current trustees of certain discretionary trusts, namely, in the case of the plaintiff, the Cindy Fleming Trust (the CFT), and, in the case of the defendant, the John James Trust (the JJT).
- (b) Cindy Fleming (who was a former trustee of the CFT) and the defendant (represented by Mr James, then in a de facto relationship with Ms Fleming) had entered into a partnership to acquire and hold real property with a view to profit. That partnership was referred to as the CFT/JJT Partnership.
- (c) At the date of Ms Fleming's death, partnership property included seven commercial properties of which the plaintiff and the defendant were co-owners in equal shares as tenants in common, namely:
  - (i) two 344 Queen Street properties;
  - (ii) four Brickworks Annex properties;
  - (iii) the 12 McLachlan St property.
- (d) The plaintiff, having replaced Ms Fleming as trustee of the CFT consequent upon her death, contended that the books and records of the CFT/JJT Partnership did not adequately reflect a proper accounting of what was owed to each partner, and that the defendant was in breach of fiduciary obligations by the making of unsecured loans of partnership funds to itself.
- (e) Messrs Sheehy and Pearce should be appointed as statutory trustees for sale pursuant to s 38 of the *Property Law Act 1974 (Qld)* in respect of the seven commercial properties.
- (f) The following ancillary orders should be made:
  - (i) orders conferring specific powers upon the statutory trustees to deal with the properties and ultimately to pay the net proceeds of the sale to the receivers of the partnership;
  - (ii) a declaration as to the dissolution of the partnership or orders for its dissolution;

- (iii) the appointment of two other nominated individuals as receivers of the property of the partnership and ancillary orders conferring specific powers on them;
- (iv) the appointment of the same nominated individuals as special referees to take an account of the partnership and, after doing various tasks, to express the account as a certificate identifying the amounts to be paid to the plaintiff and the defendant; and
- (v) an order that the receivers or alternatively the statutory trustees, disburse the partnership funds in accordance with the special referees' certificate.

[21] The proceeding originally came before me on 16 May 2016 for listing on the commercial list and for consideration of the application for appointment of statutory trustees for sale. The defendant opposed the determination of the latter issue because it contended that there were disputed questions of fact which could not conveniently be dealt with on that day. I ordered the matter be placed on the commercial list, that it proceed as if commenced by claim, and set a timetable for pleadings.

[22] On 31 May 2016, the parties invited me to make a consent order which provided for the appointment of statutory trustees for the sale of the properties. I declined to make the proposed order without receiving further submissions as to whether the jurisdiction conferred by s 38 of the *Property Law Act* permitted the appointment of statutory trustees for sale without at the same time vesting the property in the trustees to hold on the statutory trust for sale (the proposed form of order having made no provision for vesting). No further submissions on that question were received and the proposed order was not made.

[23] The defendant by its defence in the first proceeding filed 12 July 2016:

- (a) denied the existence of a partnership, contending that references to a partnership in accounts and tax returns were only done for taxation purposes;
- (b) pleaded the terms of an alleged oral agreement between Ms Fleming and the defendant pursuant to which real property would be, and was, acquired, namely that:
  - (i) Ms Fleming would invest in commercial property to be acquired with Mr James;
  - (ii) Ms Fleming would have no role in the management or day to day business of any property so acquired;
  - (iii) such investments would be made for a fixed term of at least 10 years;
  - (iv) during that investment period Ms Fleming would not be able to withdraw the investment;

- (v) during that investment period Ms Fleming would have no entitlement to any distribution or return on the amount invested;
  - (vi) any surplus cashflow derived from the investments could be loaned to other group entities (and the converse was true); and
  - (vii) in the event of a sale of any property so acquired upon the expiry of the ten year term, each of the two trusts would have the right to purchase that property from the other;
- (c) further or alternatively, contended that the alleged 'partnership' was not dissolved by the death of Ms Fleming who, if there was a partnership, was a partner only in her capacity as the trustee of the CFT;
  - (d) denied the breach of any fiduciary obligations; and
  - (e) contended that a number of allegations of monies said to be owed to Ms Fleming by the partnership were premised upon personal entitlements of Ms Fleming, but that such entitlements or causes of action had been compromised in certain Family Court proceedings between Ms Fleming and Mr James such that such that [sic] the plaintiff was estopped from re-litigating those claims.

[24] The second proceeding was commenced by the plaintiff by a claim and statement of claim filed on 13 May 2016. The plaintiff contended as follows:

- (a) The defendant is the trustee of 13 unit trusts and trustee of three of the four unit holders in the unit trusts. The remaining unit holder was Ms Fleming as trustee of the CFT and, subsequent to her death on 3 September 2015, now the plaintiff as trustee of the CFT.
- (b) The 13 unit trusts are registered for GST and taxation purposes as the Centro 3 4 6 Partnership, which owns various real properties.
- (c) A partnership was formed of persons acting as trustee of the 4 discretionary trusts (and which are the unit holders, by their trustees, described above). The alleged partnership was dissolved upon Ms Fleming's death.
- (d) On 31 March 2016 the first defendant advised the plaintiff (as trustee) that the units it held in each of the 13 unit trusts had been redeemed. That redemption was invalid, and there were various breaches of duty by the first defendant (as trustee) and the second defendant as its director.
- (e) There should be relief comprising, inter alia, orders for the due administration of the 13 unit trusts, alternatively for the recovery of money or account of the (disputed) partnership, declaratory relief

that the alleged partnership was dissolved upon Ms Fleming's death or that it be dissolved pursuant to s 38 of the *Partnership Act 1891* (Qld), and for the appointment of receivers to wind up the partnership and as special referees to take account of the partnership.

- [25] The defendant, by its defence in the second proceeding, filed 12 July 2016, inter alia contended as follows:
- (a) the unit holders in the 13 unit trusts were not partners, which proposition in any event was a proposition disavowed by the trust deeds;
  - (b) the plaintiff as trustee was not a partner in the Centro 3 4 6 Partnership;
  - (c) further or alternatively, that if there was a partnership, Ms Fleming was not a partner in her personal capacity (as opposed to her capacity as trustee of the CFT) and her death did not effect a dissolution of the partnership; and the (denied) partnership was for a minimum fixed term, and that term had not expired;
  - (d) the redemption of the plaintiff's unit was valid;
  - (e) the trust deeds conferred a discretionary power on the first defendant (as trustee of the 13 unit trusts) to make loans and, further, that issue was compromised in the proceeding in the Family Court of Australia between Ms Fleming and the second defendant on 11 August 2015, in consequence of which the plaintiff was estopped from re-litigating that claim; and
  - (f) the alleged breach of any fiduciary obligations was denied."

#### **How should Lytras & Company be paid?**

- [4] The only clause concerning Lytras & Company in the compromise agreement is:
- "1. That Elia Lytras of Lytras & Company Forensic Accounting be retained by the parties jointly on a 'without prejudice' basis to:
- (a) consider the allegations concerning monetary transactions contained in paragraphs 16, 17, 18, 19, 20, 22C, 22D, 22P, 22Y, 22AC, 22AG, 22AK, 22AN, 22AP, 22AT, 22BI, 22BJ, 22BM, 22BQ & 22BX of the draft statement of claim exhibited to the affidavit of Mr Challen sworn 14 February 2017 in proceeding 4589/16 and report in writing on his findings;
  - (b) consider the content of the affidavit of Mr Battershill sworn 22 April 2016 (and accompanying report) and that of Mr Vile sworn 6 March 2017 (and accompanying report) and the issues and matters raised therein and review the relevant financial records and seek such instructions or directions from the parties as he may consider

necessary so as to report in writing on his findings regarding the correctness or otherwise of the content of those affidavits and accompanying reports;

- (c) conduct a peer review of Mr Calabro's determination of Fair Value of the units redeemed by the Defendant in proceeding 4849/16 and, if necessary, provide an alternate valuation report in writing."

[5] The defendants contend that, as Mr Lytras was jointly appointed by the parties, each party should be equally liable for the payment of his fees. The plaintiff has argued that Mr Lytras' fees should be paid from the joint bank accounts held in the names of the plaintiff and Ralph Lauren and that his costs should not be borne equally by each party separately.

[6] The steps which led to this disagreement are as follows:

- (a) Mr Lytras sent the parties a letter setting out the proposed terms and conditions of his engagement.

- (b) One of the terms was:

"We will invoice you for our services on either a monthly basis or upon completion of an identifiable milestone within the engagement task. Each party will be invoiced 50% of the total cost of the work undertaken recorded with each invoice."

- (c) The costs to be incurred in the investigation and report were estimated by Mr Lytras to be between \$55,000 and \$60,000.

- (d) The solicitors for Ralph Lauren accepted those terms.

- (e) The solicitors for Grace Buncler agreed to the terms but subject to the payments for the fees coming out of the joint bank account of the parties.

- (f) After some further correspondence, Grace Buncler changed its position and executed the engagement agreement without amendment, while reserving the right to apply to this court for "interim relief (in the nature of an interim distribution from that joint fund) should it become necessary to do so". The executed agreement was provided to Mr Lytras under cover of a letter which contained the following:

"... We have advised Wilson Lawyers that our client has reserved its right to bring an application to the Court to have your fees and outlays paid from the joint bank account held by the plaintiff and the defendant."

- (g) Following receipt of that letter, Mr Lytras sent an email to the plaintiff's solicitors in which he said:

"As discussed yesterday I will need confirmation that the funds exist to be paid – eg. I understand that your client does not/is unlikely to

have sufficient funds and that you are not personally guaranteeing payment. So this issue will need to be resolved if I receive instructions from the parties to commence further work on the matter.”

- (h) Ralph Lauren’s solicitors then called for the plaintiff to confirm it had funds available to pay Mr Lytras and to inform him of that fact.

[7] Mr Lytras has, not surprisingly, informed the parties that he requires that the issue regarding the source of funds for payment be resolved before he undertakes any further work. Mr Lytras has been paid about \$14,000 for the work he has done so far.

[8] In its application Ralph Lauren seeks this order:

“With respect to the interim compromise of the proceeding, the plaintiff do all things necessary and incidental to perform clause 1 of the terms of compromise agreement dated 9 March 2017 ... Including but not limited to responding to Mr Lytras’ request for confirmation that it has monies available to meet one half of the costs of Lytras & Company.”

[9] In other words, Ralph Lauren seeks a final mandatory injunction requiring that Grace Buncle perform some unidentified tasks and respond to a request from Mr Lytras to confirm that it has monies available to meet 50% of Lytras & Company’s fees.

[10] In his submissions Mr Williams QC (for the defendants) said that the appropriate orders would be to require that Grace Buncle:

- (a) confirm to Mr Lytras, in response to his request, that it has the funds available, and
- (b) pay 50% of Mr Lytras’ invoices as they are rendered.

[11] Mr Morris QC (for the plaintiff) contended that a declaration or an injunction of this kind should not be made. His client has now executed the agreement sought by Mr Lytras without any conditions being attached. The notation that Grace Buncle reserves its rights to seek an order about the use of the joint bank account can hardly be seen as inconsistent with the terms of the interim compromise.

[12] Mr Williams QC (for the defendants) argued that the obligation to give an answer to the question posed by Mr Lytras arises out of the well accepted rule about parties to a contract cooperating. It was described by Griffith CJ in *Butt v M’Donald*:<sup>2</sup>

“It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.”

[13] It was not argued that the rule should not apply in this case.

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<sup>2</sup> (1896) 7 QJ 68 at 70-71.

- [14] What is sought here is for Grace Buncle to answer a request made by the third party engaged pursuant to the agreement between the parties. The request is reasonable and relevant to the retention of Mr Lytras. It falls within the purview of the general rule set out above and the plaintiff should answer it. The content of the “answer”, though, cannot be dictated by the court in circumstances where there is insufficient evidence to support a finding that Grace Buncle has the necessary funds.
- [15] In any event, the answer may be obvious. In Mr Morris’ written submissions the following appears:
- “The real issue for the Plaintiff in this regard is that it finds itself in the invidious position of being impecunious – not in the sense that it has absolutely no funds, but that it has very limited funds with which to progress the litigation.
- The Plaintiff finds itself ... in that invidious position solely as a consequence of the conduct of the Defendant, as more particularly articulated in the Consolidated Amended Statement of Claim.”
- [16] Nevertheless, the plaintiff has, by executing the engagement agreement with Lytras & Company, agreed to pay 50% of that firm’s fees. It may be that there is money owing pursuant to that agreement but that was not made clear to me. It would be inappropriate to make an order which required the plaintiff to pay 50% of some undefined amount at some undefined time.
- [17] The plaintiff has committed itself to paying its share of the fee when it is due. But it did not commit to paying that from its own funds. It says that it cannot do that due to its impecuniosity which has been brought about by the defendant’s conduct. Therefore it is unlikely – and this is no criticism of him – that Mr Lytras will undertake any further work in these circumstances. The issue which arises at this point is the assertion by the plaintiff that its apparent inability to pay has been brought about by the defendant’s conduct as asserted in the plaintiff’s most recent pleading. That and the other issues raised are not suitable for disposition in an interlocutory, but effectively final, hearing such as this.
- [18] I am disposed to make an order requiring the plaintiff to answer the request by Mr Lytras. It is consistent with the general rule that it do so and it will provide certainty for the defendants about the plaintiff’s position. Otherwise, this part of the application is dismissed.

**What is Mr Sheehy required to do?**

- [19] The defendant seeks a declaration that the compromise agreement “does not vest a discretionary power in Mr Sheehy not to sell the Properties unless:
- (a) no tender is received for the Properties in clauses 2 (a) – (c); and/or
  - (b) neither party invokes clause 9 of the Agreement with respect to the Properties in clauses 2 (d) – (g).”
- [20] The clauses relevant to the appointment of Mr Sheehy are:

- “2. Peter Sheehy (Sheehy) is appointed, on the terms set out herein, the parties agent for the purpose of selling the following properties (the Properties):
- (a), (b) and (c) – [Three properties owned jointly by Grace Buncle and Ralph Lauren – “the first set of properties”]
- (d), (e), (f), and (g) – [“the second set of properties”]
4. Pursuant to the appointment in paragraph 2 and subject to paragraph 9 (if applicable):
- (a) subject to subparagraph (b) below, Sheehy may in his discretion appoint a real estate agent for the purpose of marketing the Properties;
- (b) Sheehy is to market each of the Properties for sale by a one stage tender;
- (c) on the occurrence of the tender, the Defendant shall be entitled to make offers on the Properties or any of them;
- (d) Sheehy is able to enter into a contract for the sale of the Properties, or any of them, on such terms and conditions as he determines.
5. In respect of any Property, in the event that Sheehy accepts an offer to purchase made by the Defendant, then:
- (a) there is deemed to be a contract between the Plaintiff and the Defendant for the purchase by Defendant of the Plaintiff’s interest in the relevant Property;
- (b) the purchase price of the contract (for the Plaintiff’s interest in the relevant Property) (Price) shall be:
- (i) 50% of the amount of the offer in the case of properties listed in subparagraphs 2(a)-(c);
- (ii) 16.67% of the amount of the offer in the case of the property listed in subparagraphs 2(d);
- (iii) 7.5% of the amount of the offer in the case of properties listed in subparagraphs 2(e)-(g);
- (c) Sheehy shall sign a Property Occupations Act real estate agency appointment which provides that in the event of a sale of a partial interest in a property between the disposing and acquiring parties, the agent’s commission is to remain constant as a percentage but be calculated by reference to the Price, and payable by the Plaintiff;
- (d) prior to, or with Sheehy’s agreement, at and in order to enable settlement of the sale to the acquiring party to occur, the registered proprietors shall pay in accordance with their interests in each respective property to Sheehy or otherwise secure or discharge the following costs:

- (A) all selling costs including (otherwise than real estate agent's commission), legal costs, marketing and advertising costs and all other necessary costs incurred by the Trustees in the sales;
  - (B) any liabilities secured against the Property by registered mortgages;
  - (C) Sheehy's remuneration and other costs and expenses (otherwise than real estate agent's commission) incurred in effecting the sale;
- (e) the Plaintiff shall pay the agent's commission calculated in accordance with clause 4(d);
  - (f) subject to subparagraph (d), the terms of the contract referred to in subparagraph (b) are to reflect the terms of the successful offer referred to in subparagraph (a) above; and
  - (g) the net sale proceeds after the deduction of the matters in subparagraph (e) shall be held by Sheehy pending further order or written agreement concerning the distribution of the said monies as between the parties;
  - (h) the sales are without prejudice to any final accounting between the parties as to their respective entitlements.
6. Otherwise at settlement of the sale of any of the Properties, Sheehy shall receive and deal with the proceeds as follows:
- (a) Firstly, in payment of all necessary selling costs including agent's commissions, legal costs, marketing and advertising costs and all other necessary costs incurred in the sales;
  - (b) Secondly, in discharge of any liabilities secured against the Properties by registered mortgages;
  - (c) Thirdly, in payment of Sheehy's costs and expenses incurred in effecting the sale and when the sale is settled; and
  - (d) Fourthly, to hold the remaining balance on trust by Sheehy pending further order or written agreement concerning the distribution of the said monies as between the parties.
7. Further:
- (a) Sheehy is authorised to expend money on the Properties in preparation for their sale and for their marketing or advertising and that the amount of such expenditure be paid from the respective joint Account of the parties owning the particular properties held with National Australia Bank Limited; and

(b) Sheehy may, but is not obliged to, obtain a valuation of any of the Properties if he deems that appropriate for the purposes of assistance in the determination value.

8. That Sheehy is entitled to charge all reasonable costs and disbursements incurred by him in performance of his obligations pursuant to these Terms and that his fees and expenses be a first charge on trust monies.
9. In relation to the properties listed in paragraphs 2(d) - (g) of these terms, after the tender process, the Defendant can elect, or the Plaintiff may require the Defendant, to purchase the Plaintiff's interests in the properties and in that event:
  - (a) Notice of an election or requirement must be given by 14 days after the tender process ends;
  - (b) The Defendant is to obtain a market value valuation of those real properties at the Defendant's cost (with the Plaintiff to choose a registered valuer from one of the then panel of registered valuers chosen from time to time by the NAB Property Brisbane office);
  - (c) there will be deemed to be a contract between the Plaintiff and the Defendant for the purchase by Defendant of the Plaintiff's interest in the Property in accordance with paragraph 5(b) as if the higher of the valuation of any such property or the highest unconditional tender offer was the offer accepted by Sheehy pursuant to paragraph 5."

[21] Mr Sheehy has concerns about the circumstances in which he can, or is obliged to, sell one or more of the properties. In a letter from him of 20 June 2019 he says that the tender documents will be drafted with the aim that "any difference between tenders submitted can be on price only". He goes on to say that he does not believe that he has any discretion to determine whether to sell or not sell any of the properties and on what terms and conditions including as to price.

[22] The defendants contend that Mr Sheehy has no discretion to exercise with the respect to the sale of the properties and that the compromise agreement compels him, on receipt of a tender, to sell the property the subject of the tender.

[23] The plaintiff argues that Mr Sheehy does have a discretion and points to a number of parts of the compromise agreement to support that.

[24] The principles applicable to this exercise in construction are set out in the reasons of Bond J in *Grace Bunclie Pty Ltd v Ralph Lauren No 57 Pty Ltd*:<sup>3</sup>

"[10] In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, French CJ and Nettle and Gordon JJ wrote (citations omitted):

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<sup>3</sup> [2018] QSC 24.

- [46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
- [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
- [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
- [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
- [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.
- [51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties ... intended to produce a commercial result'. Put another way, a commercial contract should be construed so as

to avoid it 'making commercial nonsense or working commercial inconvenience'.

[11] These principles of contractual construction were subsequently approved by the High Court in *Victoria v Tatts Group Limited* (2016) 328 ALR 564 per French CJ and Kiefel, Bell, Keane and Gordon JJ at [51]."

[25] Bond J went on to say that, in that case, the principles set out allowed him to have recourse to:

- (a) the text of the terms, the meaning of which was disputed;
- (b) the internal context within which that text occurred, namely the entire text of the compromise agreement as well as the particular documents referred to in the text of the contract; and
- (c) because it was common ground that the agreement was relevantly ambiguous, evidence of events, circumstances and things external to the contract which were known to the parties or which assisted in identifying the purpose or object of the transaction.

[26] In this case, I do not accept that the terms under consideration are ambiguous and, so, I will not have regard to extrinsic matters.

[27] The following matters may be drawn from the compromise agreement. Mr Sheehy:

- (a) is the agent of the parties for the purpose of selling the properties (cl 2),
- (b) may appoint a real estate agent for the purpose of marketing the properties (cl 4),
- (c) is to market each of the properties for sale at a one stage tender,
- (d) may ("is able to") enter a contract for the sale of a property or properties "on such terms and conditions as he determines",
- (e) may expend money on the properties in preparation for their sale, and for marketing/advertising and that money shall come from identified accounts, and
- (f) may obtain a valuation of any of the properties if he deems it appropriate "for the purposes of assistance in the determination value" [sic].

[28] The only aspect of Mr Sheehy's appointment over which he has no discretion is the requirement that the sale of the properties be by a one stage tender.

[29] There are other provisions which apply to an offer by the defendant to purchase any of the properties.

[30] Clause 5 provides that certain things follow "in the event that Sheehy accepts an offer to purchase" by the defendant of any of the properties. The words "in the event" comprehend the possibility that Mr Sheehy might not accept an offer by the defendant.

- [31] Clause 9 relates only to the second set of properties and allows the defendant to elect to purchase – or the plaintiff to compel the defendant to purchase – the plaintiff’s interests in those properties. If that occurs, then there is a formula for the price which requires (among other things) that the defendant obtain a market value valuation of the property. In the circumstances contemplated by cl 9 Mr Sheehy has no option but to arrange the sale in accordance with the terms of that clause.
- [32] Putting to one side the provisions of cl 9, the capacity to enter into a contract “on such terms and conditions as he determines” allows Mr Sheehy a power to decide whether to enter into a contract or not. A tender which did not conform to the terms of the invitation to tender could be rejected by Mr Sheehy if he wished. If he were to receive a number of complying tenders then he could determine which one to accept.
- [33] The construction contended for by the defendant would result in Mr Sheehy being compelled to accept a tender of \$10 if that was all that was offered. If the compromise agreement compelled that it would be a nonsense. As was said in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*:<sup>4</sup> “a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption ‘that the parties ... intended to produce a commercial result’. Put another way, a commercial contract should be construed so as to avoid it ‘making commercial nonsense or working commercial inconvenience’.”
- [34] Mr Sheehy has the power to obtain a valuation for each of the properties. The power in cl 7(b) to obtain a valuation is “for the purposes of assistance in the determination [of] value”. One might think that such a step would be an ordinary part of determining the terms and conditions upon which the tenders would be sought. This is consistent with the ordinary course of a tendering process in which the inviter may set a minimum price as part of the terms and conditions.
- [35] The “commercial result” which a court may assume the parties intended to produce would require that their agent would seek the highest price reasonably available in the market for the particular property. In setting the terms and conditions of the tender the agent would bear in mind the market and simply set a starting price. Thus, the agent would have a discretion, in the event that more than one complying tender was received, to choose among them. Similarly, should no tender comply with respect to a minimum price (set as part of the terms and conditions) then there would be no sale.
- [36] Mr Sheehy is not confined in the way set out in the application. The application is dismissed.

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<sup>4</sup> (2015) 256 CLR 104.