

# FEDERAL COURT OF AUSTRALIA

## MCG Quarries Pty Ltd v Beach [2017] FCA 1601

File number(s): VID 747 of 2017

Judge(s): DAVIES J

Date of judgment: 21 December 2017

Catchwords: **PRACTICE AND PROCEDURE** – Application for summary judgment; where leases included a term that was alleged to contravene the *Competition and Consumer Act 2010* (Cth) by preventing the applicant supplying stone to the leasee; where it was alleged that it would have been unlawful for the applicant to supply stone by reason of their planning permit and it was accordingly argued that no damage was suffered; whether utility to relief sought where respondent agreed not to enforce term in lease and amended lease to remove it; whether triable issues raised having regard to the conditions in the planning permit and leases

Legislation: *Competition and Consumer Act 2010* (Cth)  
*Federal Court of Australia Act 1976* (Cth)  
*Federal Court Rules 2011* (Cth)

Cases cited: *Spencer v Commonwealth* (2010) 241 CLR 118

Date of hearing: 1 December 2017

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Economic Regulatory, Competition and Access

Category: Catchwords

Number of paragraphs: 15

Counsel for the Applicant: Mr M Martin QC

Counsel for the Respondents: Mr D Hyde and Mr A Barraclough

Solicitor for the Applicant: Mills Oakley

Solicitor for the  
Respondents:

Rigby Cooke Lawyers

## ORDERS

VID 747 of 2017

**BETWEEN:**            **MCG QUARRIES PTY LTD**  
Applicant

**AND:**                **BARBERA ANN BEACH**  
First Respondent

**RODNEY JAMES BEACH**  
Second Respondent

**HAROLD RUSSELL BEACH** (and another named in the  
Schedule)  
Third Respondent

**JUDGE:**             **DAVIES J**

**DATE OF ORDER:**  **21 DECEMBER 2017**

### **THE COURT ORDERS THAT:**

1.     The respondents' application for summary judgment pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) and r 26.01 of the *Federal Court Rules 2011* (Cth) be dismissed.
2.     The respondents to pay the costs of the applicant, such costs to be taxed in default of an agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

DAVIES J:

### INTRODUCTION

1 The applicant (“**MCG Quarries**”) has sued the respondents for contravention of s 45 of the *Competition and Consumer Act 2010* (Cth) (the “*Consumer Act*”). The respondents own property which they have leased to Mt Gellibrand Wind Farm Pty Ltd (“**Mt Gellibrand**”) for the construction and operation of a wind farm. The alleged contravention relates to the inclusion of a term in those leases which, it was contended, prevented Mt Gellibrand from acquiring stone from MCG Quarries. It is also alleged that the respondents’ conduct was unconscionable within the meaning of s 21 of sch 2 to the *Consumer Act*. MCG Quarries has claimed that it has suffered loss and damage and seeks damages and an order that the term is void or unenforceable. The respondents have applied for the proceeding to be summarily dismissed pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) (“**the Federal Court Act**”) and r 26.01 of the *Federal Court Rules 2011* (Cth) (“**the Rules**”). The respondents contend that the proceeding should be summarily dismissed because:

- (a) MCG Quarries is not, and never has been, lawfully able to supply stone to Mt Gellibrand from the quarry at 320 Mooleric Road, Birregurra, Victoria (“**the quarry**”), as it has not satisfied various conditions that are attached to MCG Quarries’ planning permit for the quarry (“**the MCG Planning Permit**”). Accordingly, it was said, MCG Quarries cannot have suffered any loss or damage by reason of the term; and
- (b) The respondents have openly stated that they will not rely on the term and the leases have been varied to remove the term. Accordingly, they argued, there is no utility in any order that would render the term void or unenforceable.

### APPLICABLE PRINCIPLES

2 Section 31A of the *Federal Court Act* provides as follows:

31A Summary judgment

- (1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
  - (a) the first party is prosecuting the proceeding or that part of the proceeding; and

- (b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.
- (2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
  - (a) the first party is defending the proceeding or that part of the proceeding; and
  - (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.
- (3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:
  - (a) hopeless; or
  - (b) bound to fail;for it to have no reasonable prospect of success.
- (4) This section does not limit any powers that the Court has apart from this section.
- (5) This section does not apply to criminal proceedings.

3 The applicable principles for determining an application for summary judgment are set out in *Spencer v Commonwealth* (2010) 241 CLR 118; [2010] HCA 28. French CJ and Gummow J stated at [24]–[25]:

24. The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous or vexatious or an abuse of process. The same applies where such a disposition is sought in a summary judgment application supported by evidence. As to the latter, this Court in *Fancourt v Mercantile Credits Ltd* said:

“The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried”.

More recently, in *Batistatos v Roads and Traffic Authority (NSW)* Gleeson CJ, Gummow, Hayne and Crennan JJ repeated a statement by Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde* which included the following:

“Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.”

There would seem to be little distinction between those approaches and the requirement of a “real” as distinct from “fanciful” prospect of success contemplated by s 31A. That proposition, however, is not inconsistent with the proposition that the criterion in s 31A may be satisfied upon grounds wider than those contained in pre-existing Rules of Court authorising summary dispositions.

25. Section 31A(2) requires a practical judgment by the Federal Court as to whether the applicant has more than a “fanciful” prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law. But where the success of proceedings is critically dependent upon a proposition of law which would contradict a binding decision of this Court, the court hearing the application under s 31A could justifiably conclude that the proceedings had no reasonable prospect of success.

(footnotes omitted)

Thus, the Court should not grant summary judgment against an applicant if there are issues of fact or law which are arguable and on which the applicant has more than a “fanciful” prospect of success, even if the Court does not think that the applicant is likely to succeed on such issues. In applying s 31A of the *Federal Court Act*, the Court does not conduct fact finding but must assess the strength of the allegations made by reference to the pleadings, affidavits and any other evidence adduced in order to determine whether the claim is sufficiently strong to warrant a trial.

- 4 Rule 26.01(1)(a) of the Rules is in substantially the same terms. Rule 26.01(1)(b) additionally includes the ability to obtain judgment where a proceeding is “frivolous or vexatious or an abuse of process”. A proceeding is “frivolous” if it is “without substance or groundless or fanciful”. A proceeding is “vexatious” if it is pursued without any reasonable ground or if it is “without foundation, cannot succeed, or is brought for an ulterior and collateral purpose”: see the dictionary in sch 1 to the Rules.

## CONSIDERATION

- 5 MCG Quarries is in the business of resource development, civil construction, mining and quarrying. Its quarry projects include the quarry at 320 Mooleric Road, Birregurra, Victoria.
- 6 The respondents are owners of farming land in Birregurra. They leased part of their land to Mt Gellibrand for the purpose of the construction and operation of a wind farm.

Mt Gellibrand obtained a permit from Colac Otway Council to conduct the wind farm which includes conditions that require Mt Gellibrand to upgrade Mooleric Road (which it uses to access the leased property) and construct roads on the leased property (“**the Mt Gellibrand Permit**”). For the purpose of upgrading Mooleric Road and constructing roads on the leased property, Mt Gellibrand has acquired stone and, MCG Quarries has alleged, will in the future acquire stone.

7 The following term was included in the leases:

16 The rights [of Mt Gellibrand] do not extend to bringing onto the Land any rock or crushed rock sourced from any site on any other land (“off-site quarry”) except:

16.1 rock and crushed rock from an off-site quarry which:

(a) operates under an approved Department of Primary Industries Extractive Industry Work Authority; and

(A) is within 15 kilometres of the Land but only if its approved Department of Primary Industries Extractive Industry Work Authority has been operative at least since 28 February 2012; or

(B) the off-site quarry is located at least 15 kilometres from the Land.

8 The definition of “Land” in the leases covered the real property owned by the respondents.

9 It is common ground that the quarry did not satisfy the criteria in clause 16.1(a) and the term therefore prevented Mt Gellibrand from using stone from the quarry to construct roads on the leased land. However, it was contended for the respondents that as Mooleric Road was clearly outside the definition of “Land” in the leases, the term never prevented Mt Gellibrand from acquiring stone from the quarry to allow Mt Gellibrand to upgrade Mooleric Road. MCG Quarries’ pleaded case in reply however was that the express term had the effect of precluding MCG Quarries from supplying stone to Mt Gellibrand for the upgrade to Mooleric Road because that was how the term was understood by Mt Gellibrand and/or it was more efficient and therefore preferable to deal with only one supplier of stone for both the upgrade to Mooleric Road and the construction of the wind farm on the land. MCG Quarries’ pleaded case is supported by an affidavit of Adam Green, a project manager at MCG Quarries, which was filed in opposition to the summary judgment. Mr Green deposed to a conversation on 22 June 2017 between himself and a Mr Andrew Tshaikiwsky at Mt Gellibrand, in which Mr Tshaikiwsky was said to have told Mr Green that Mt Gellibrand had wished to purchase stone from MCG Quarries to upgrade Mooleric Road and the work required by Mt Gellibrand

for the construction of wind farms on the respondents' land but was unable to do so because the purchase of the stone from MCG Quarries would be in breach of the lease agreements between Mt Gellibrand and the respondents. Having regard to this evidence, there is a factual issue for determination as to whether Mt Gellibrand took the view that the term in the leases completely precluded it from purchasing rock from MCG Quarries, and contrary to the submissions for the respondents, the fact that Mooleric Road was not on the land does not provide a complete answer to the applicant's entitlement to relief by way of damages. I accept the submission for MCG Quarries that the reply pleading and affidavit evidence of Mr Green raises a causation issue for determination which may relevantly and probatively bear upon whether MCG Quarries is entitled to the relief that it seeks by way of damages.

10 The respondents, however, also put the argument that as MCG Quarries had not satisfied the conditions of the MCG Planning Permit which had to be met before it could operate the quarry, it is not, and never has been, able to sell stone from the quarry to Mt Gellibrand in any event and therefore cannot have suffered any loss or damage by reason of the express term.

11 The relevant conditions in the MCG Planning Permit were as follows:

21 Prior to the commencement of commercial quarry sales, the upgrades to Mooleric Road (as specified within the endorsed Road Improvement Design) must be constructed and completed to the satisfaction of the Responsible Authority (the upgrades to Mooleric Road may be constructed and completed with rock from the quarry).

...

85 Before the use and/or development approved by this permit commences, except to the extent required to provide rock for the purposes of the road works the subject of this condition, the following road works at Princes Highway/Mooleric Road intersection must be completed, to the satisfaction of and at no cost to, VicRoads:

- (a) right turn lane;
- (b) left turn lane/deceleration lane.

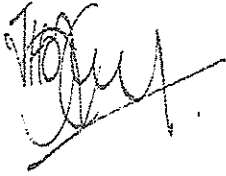
12 It is common ground that MCG Quarries did not undertake the upgrades to Mooleric Road. However, it is also common ground that Mt Gellibrand was also required to upgrade Mooleric Road as a condition of its permit to construct and operate a wind farm on the leased property. Senior counsel for MCG Quarries contended that it is clearly arguable on the construction of the conditions attaching to the MCG Planning Permit that MCG Quarries could have sold rock from the quarry to Mt Gellibrand to use in upgrading Mooleric Road as



MCG Quarries was expressly permitted to use rock from the quarry for the purpose of upgrading the road. The respondents argued that MCG Quarries having a right to use its own rock to comply with its obligation to upgrade Mooleric Road was not the same thing as having a right to sell rock to another entity that has a separate obligation to upgrade Mooleric Road. Further, it was submitted, selling stone from the quarry to Mt Gellibrand to upgrade Mooleric Road would be a commercial sale and the use of the quarry for commercial sales was not permitted unless or until the use and development conditions had been satisfied, and these conditions had not been satisfied. Accordingly, it was argued, MCG Quarries was not permitted to sell any stone from the quarry until the upgrade works that it was required to perform on Mooleric Road have been completed.

- 13 Whilst there is force in the respondents' contentions, there is nonetheless a triable issue on the proper construction of the conditions attaching to the MCG Planning Permit. As the authorities state, the Court should be cautious to dismiss a claim summarily where questions of fact or law arise and, in this case, it is possible to argue that the conditions attached to the MCG Planning Permit did not preclude the sale of rock or stone from the quarry to Mt Gellibrand for the purpose of the upgrade of Mooleric Road, given that it was also a condition of the Mt Gellibrand permit that it must upgrade Mooleric Road.
- 14 Finally, as MCG Quarries seeks damages/compensation as well as declaratory relief in relation to the validity and enforcement of the term, the fact that the term has now been removed from the lease does not mean that there is no utility in continuing the proceeding. The right to damages/compensation remains a live issue.
- 15 Accordingly the application for summary judgment should be dismissed.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

A handwritten signature in black ink, appearing to be 'M. J. Davies', written over a horizontal line.

Associate:

Dated: 21 December 2017

**SCHEDULE OF PARTIES**

**VID 747 of 2017**

**Respondents**

Fourth Respondent:

**MOOLERIC PASTORAL PTY LTD**