

CITATION: *Michael Tsangaris v Inner Red Shell & Katapodis* [2004] NTMC 040

PARTIES: MICHAEL TSANGARIS  
v  
INNER RED SHELL PTY LTD  
AND  
THEOPHANIS KATAPODIS

TITLE OF COURT: Local Court  
JURISDICTION: Local Court  
FILE NO(s): 20104985  
DELIVERED ON: 24 May 2004  
DELIVERED AT: Darwin  
HEARING DATE(s): 17<sup>th</sup> May 2004  
JUDGMENT OF: Judicial Registrar Fong Lim

**CATCHWORDS:**

Practice and Procedure – Discovery – reasonable enquires – Affidavit of Documents  
– Rule 16.01(2) & (3)

**REPRESENTATION:**

*Counsel:*

Plaintiff: Ms McClaren  
1<sup>st</sup> & 2<sup>nd</sup> Defendant: Mr Dearn

*Solicitors:*

Plaintiff: Asha McClaren  
1<sup>st</sup> & 2<sup>nd</sup> Defendant: Brian Johns

Judgment category classification: C  
Judgment ID number: [2004] NTMC 040  
Number of paragraphs: 23

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20104985

BETWEEN:

Micheal Tsangaris  
Plaintiff

AND:

Inner Red Shell Pty Ltd  
1<sup>st</sup> Defendant

Theophanis Katapodis  
2<sup>nd</sup> Defendant

REASONS FOR JUDGMENT

(Delivered 24 May 2004)

Judicial Registrar Fong Lim:

1. By Application dated the 18<sup>th</sup> March 2004 the Plaintiff has applied for leave to proceed as if a Defence had not been filed on the basis that the Defendants have not provided proper discovery. The Defendants have made a cross application for further and better discovery and further and better particulars. The application for further and better particulars was not pressed.
2. The Plaintiff filed his list of documents on the 24<sup>th</sup> October 2001 The Defendants filed and served a request for further and better discovery from the Plaintiff on the 13<sup>th</sup> March 2002 and a supplementary list of documents was filed by the Plaintiff on the 14<sup>th</sup> October 2002. The Plaintiff also filed a document headed "Further and Better Discovery" dated the 14<sup>th</sup> October 2002, Ms McClaren suggested that this document filed was an Affidavit of documents however that is not the case.

3. The First Defendant filed its list of documents on 27<sup>th</sup> November 2001 signed by the Second Defendant as director of the First Defendant. The First Defendant filed and served an Amended List of Documents on the 13<sup>th</sup> March 2002. The First Defendant does not seem to have filed and served any list of documents on his own behalf. The Plaintiff requested further and better discovery from the Defendants dated the 8<sup>th</sup> of January 2004.
4. Neither party has requested an affidavit of documents pursuant to Rule 16.01(2) of the Local Court Rules.
5. The Plaintiff complains that the Defendants have not discovered all relevant documents in their power, custody and control and have not provided an affidavit of when documents had left their possession, and what efforts they have made to find them. The Defendants argue that this is simply a vexatious claim by the Plaintiff and suggest that they are willing to provide the Plaintiff with an affidavit of documents. There is no concession by the Defendants that they should disclose the efforts they have made to obtain these documents.
6. The Plaintiff took me to several authorities which set out the obligations of a party in terms of discovery. It is trite to say that a party must discover all documents within their power custody and control which touch upon the issues between the parties or could lead to a line of enquiry regarding the issues between the parties. The documents must be discovered whether or not they help the party's case and whether or not they continue to be in the party's possession (see Local Court rule 16.01(1)(a)(i)).
7. Before deciding whether discovery provided is adequate it is necessary to look at the pleadings and determine the issues between the parties as they presently stand.
8. The Plaintiff relies on a Further Amended Statement of Claim filed on the 23<sup>rd</sup> May 2003 and the Defendants on an Amended Defence and

Counterclaim dated the 23<sup>rd</sup> June 2003. Both sets of pleadings are long and complicated showing that the parties do not agree on many things. However the major issue between the parties can be identified as what were the terms of the “partnership” and whether the parties abided by the terms. It is clear there was some type of agreement between the parties for the purchase and development of land and for the distribution of the income of that venture between the Plaintiff and the Second Defendant. There is also a dispute as to whether it was agreed that the Plaintiff become a shareholder of the First Defendant. The Counterclaim is basically for defective workmanship and rectification of that defective workmanship.

9. The Plaintiff’s request for further and better discovery is set out in a formal document dated the 8<sup>th</sup> of January 2004. The documents requested are:

- “1. Building contract on contracts entered into by, for or on behalf of the first and second defendant jointly or individually.
2. All building plans used for the construction of the above buildings that were attached to and formed part of the building contracts.
3. All final building plans relating each of the above properties at the time of issue of certificate of completion detailing all amendment made to the original building plans attached to the building contract
4. Provide a list of all building work undertaken pursuant to the amendments made to the original building plans for each of the above properties along with documentation to support such variations.
5. Copies of all certificates of inspection issued at various stages of construction for each of the above properties.
6. Copies of certificates of completion and occupancy for each of the above properties.
7. Copies of all progress payments
8. Details and documents for each and every progress payment received at various stages of the building for each of the above properties.

9. Details of payments received to carry out variations to the building plans with respect to each of the properties.
10. Details of all rectification work performed with respect to each of the above properties if any including expenditure after the plaintiff ceased partnership with the second defendant.
11. Copies of agreements entered with various subcontractors and employees into by the defendants (jointly or individually) including copies of payments made to them for the work performed with respect of each of the above properties.
12. Copies of all defects notices issued if any for each of the properties.
13. Copies of all or any Mortgage Deeds entered into with respect to 4 Bridelia Court Rosebery.
14. Copies of all rental receipts issued with respect to 4 Bridelia Court Rosebury.
15. Bank statements of all accounts in the name of or used for the business.
16. Documentation regarding all or any OD facility provided by a bank or financial institution for the business.
17. Copies of all documents relating to the purchase and finance of the land situated at Woolner.
18. Documents relating to the registration of Inner Red Shell as a trademark in the name of both the Plaintiff and the Second Defendant.
19. Copy of the book written by Theo Katapodis with Michael Tsangaris as co – author.
20. Copy of the agreement hand written by the second defendant between the Plaintiff and the second defendant regarding the Plaintiff's invention.”

10. It is clear that the request for particular items is not a proper request for discovery. Items 1-3,5-7,11-13, 17,18 & 20 are documents which ought to be discovered by the defendants and should they no longer be in the power custody and control of the Defendants then an explanation should be

provided as to why. Items 15 & 16 are properly discoverable documents except that they should be limited to the period of the “partnership”.

11. Item 4 as requested is a request for the Defendants to create a document and is therefore not a proper request for discovery.
12. Items 8,9,&10 are clearly requests for particulars and therefore not a proper request for discovery.
13. Item 14 is not a proper request for discovery there is no issue on the pleadings about rent collected on that property.
14. Item 19 is not relevant to any issue on the pleadings and therefore cannot be requested.
15. The First and Second Defendant’s request for Further and Better discovery dated the 13<sup>th</sup> March 2002 also has items which are inappropriately requested.
16. The Defendants request reads:

“1. The Plaintiff should discover all quotations, diagrams, plans and other paperwork (including copies) he has in his capacity as project manager of the First Defendant and in any other capacity thereof in relation to the construction projects under dispute.

2. The Plaintiff should discover all plans and copies of plans of the Engine

3. The Plaintiff should discover all documents (including copies) related to all tools and construction materials removed from the on site container or other premises of the First Defendant immediately prior to or upon cessation of building operations of the First Defendant

4. The Plaintiff should discover copies of his taxation documents relation to his income tax returns during the period of his engagement by the First Defendant.

5. The Plaintiff should discover office keys and container padlock keys (including copies thereof) belonging to the First Defendant which are still in the Plaintiff's possession.
  6. The Plaintiff should discover the original and copies of all invoices pertaining to university tuition fees paid by the First Defendant for and on behalf of the Plaintiff and all personal expenditures of the Plaintiff paid for by the First Defendant during the period of construction or the engagement of the Plaintiff by the First Defendant"
17. There are clearly examples of inappropriate requests contained in the Request for Further and Better Discovery. Item 5 is obviously not a proper request for discovery. Item 6 is not a proper request because it relates to payments made by the First Defendant yet there is no issue about payments by the First Defendants only a loan from the Second Defendant to the Plaintiff ( see para 19 (e) of the Amended Defence and Counterclaim). In a document headed "Further and Better Discovery" filed in the court on the 14<sup>th</sup> October 2002 and the Plaintiff attempted to answer the request however the Plaintiff's answers are inadequate.
18. The Plaintiff's solicitor was at pains to point out a party's obligation to give another party an affidavit to explain why they do not have in their possession particular discoverable documents. In this matter it is clear from submissions that the Plaintiff must have had in his possession at some time the construction plans of the buildings subject of the "partnership" and then says he returned all copies to the Second Defendant. It is his duty to discover those documents and offer an explanation as to where those documents have gone and where they may be. The Plaintiff has stated that he has never had the approved plans in his possession at all.
19. The statement of the Plaintiff that the course undertaken by the Plaintiff was irrelevant to the proceedings is a judgment statement which is not a proper response to a request for further discovery. However I do agree that the plans and diagrams of the Engine are not relevant in these proceedings as

there is no issue about the Engine except a monetary contribution to its development.

20. It is clear from the above that both the solicitor for the Plaintiff and the solicitor for the Defendant did not understand the process of discovery when issuing their requests for further and better discovery and I am surprised that Counsel for the Defendant's pressed the claim for further and better discovery based on the request of the 13<sup>th</sup> March 2002 given there had been some response to that request.
21. It is also clear that discovery made by both parties up to this date has been inadequate.
22. At the conclusion of the submissions I pointed both parties to Rule 16.01(2) & (3) of the Local Court Rules which provide that should a party not be satisfied with the List of Documents provided by the other side then an Affidavit of Documents can be requested and must be provided within 14 days. I also note that Rule 16.02 sets out what is required of a list of documents including an explanation of what the party believes has happened to the relevant documents no longer in his possession. The Affidavit should confirm all the contents of the list of documents and should be signed by the party themselves not the solicitor.
23. Clearly I am not satisfied with the state of discovery nor with how the solicitors have dealt with the issue of discovery my orders will be as follows:

23.1 The Parties file and serve Affidavits of Documents incorporating the further and better discovery of documents set out below within 28 days:

For the Plaintiff Items 1,3 & 6 of the Defendants Request for discovery

For the Defendant Items 1-3, 5-7, 11-13, 15- 18, & 20 of the Plaintiff's request for discovery.



23.2 The Affidavits of documents are to contain explanations as required pursuant to Rule 16.02(1)(c) and set out the reasonable enquires made to find those documents.

23.3 The hearing dates of the 5 days commencing the 8<sup>th</sup> of August 2004 are vacated.

23.4 No order as to costs

Dated this 19th day of May 2004

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Tanya Fong Lim  
JUDICIAL REGISTRAR