IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
BUILDING CASES LIST

Not Restricted

No. 7012 of 2006

McCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD (ACN 008 444 880) — Plaintiff

v

GAS TRANSMISSION SERVICES WA (OPERATIONS) PTY LTD (ACN 106 043 332) AND OTHERS (ACCORDING TO THE SCHEDULE) — Defendants

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JUDGE:	HABERSBERGER J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	2 MARCH 2007
DATE OF JUDGMENT:	24 AUGUST 2007
CASE MAY BE CITED AS:	McCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD v GAS TRANSMISSION SERVICES WA (OPERATIONS) PTY LTD
MEDIUM NEUTRAL CITATION:	[2007] VSC 301

PRACTICE AND PROCEDURE – Pleadings – Strike out application – Pleas of agency and common enterprise between subsidiary and parent company – Piercing the corporate veil – Whether pleas manifestly hopeless – *Supreme Court (General Civil Procedure) Rules* 2005 r.23.02.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr A. Neal SC with Mr N. Pane	Clayton Utz
For the Second Defendant	Mr H. Foxcroft SC with Mr P. Rompotis	Mallesons Stephen Jaques

HIS HONOUR:

1 This is an application by the second defendant, GasNet Australia Investments Limited ("GasNet"), pursuant to r.23.02 of the *Supreme Court (General Civil Procedure) Rules* 2005 ("the *Supreme Court Rules*"), to strike out paragraph 4 (and the particulars given under that paragraph) of the amended statement of claim dated 16 February 2007, and to make certain consequential amendments to the rest of the pleading.

2 In the amended statement of claim, the plaintiff, McConnell Dowell Constructors (Aust) Pty Ltd ("McConnell Dowell"), pleaded that:

(a) it was a company engaged in the provision of building construction and engineering services for reward;

(b) the first defendant, Gas Transmission Services WA (Operations) Pty Ltd ("OpCo") was a company carrying on business in the gas, fuel and energy industry in the State of Western Australia and elsewhere;

(c) GasNet was the ultimate holding company of OpCo and was carrying on business in the gas, fuel and energy industry in the State of Western Australia and elsewhere; and

(d) the third defendant, Newcrest Mining Limited ("Newcrest"), was a company carrying on business in the mining industry in the State of Western Australia and elsewhere.

3 It was further pleaded that:

(a) by a Gas Transportation Agreement made on 13 October 2003 between OpCo, GasNet Australia (Operations) Pty Ltd and Newcrest and other parties not presently relevant, OpCo agreed to engineer, procure and construct a buried gas pipeline from Port Hedland to Newcrest's Telfer goldmine ("the Pipeline") and to operate the Pipeline for a term of 15 years; and

(b) by an agreement made on 10 October 2003, effective as from 14 October 2003, between McConnell Dowell and OpCo, McConnell Dowell agreed to engineer, procure and construct the Pipeline for OpCo.

4 McConnell Dowell made a number of claims in contract against OpCo, alternatively against GasNet, in particular for extensions of time and damages for delay. It also claimed against OpCo, alternatively GasNet, and against Newcrest, under the *Trade Practices Act 1974* (Cth), and the *Fair Trading Act 1987* (WA) and in restitution.

5 Paragraph 4 of the amended statement of claim pleaded that "OpCo at all material times acted as agent for GasNet and/or conducted its business as a common enterprise with GasNet". The particulars given under paragraph 4 stated that the agency and/or common enterprise were to be implied from the following alleged facts:

(a) that GasNet was in the business of pipeline ownership, construction and operation and that OpCo was a vehicle through which GasNet carried on that business and that GasNet had represented that OpCo performed this function;

(b) that GasNet exercised complete dominion and control over OpCo, in particular by virtue of the following:

(i) the existence of a common board of directors for the GasNet Australia group of companies ("the Group"), which ensured that there was "streamlined management across the Group";

(ii) GasNet and OpCo having three directors in common and a corporate secretary in common;

(iii) there being common shareholdings for the Group and, ultimately, GasNet owning all of the shares in OpCo; and

(iv) the Group providing consolidated financial statements;

(c) that GasNet was involved in the day to day running of OpCo's business, in particular by virtue of:

(i) the Group having a policy of retaining its own specialist resources in engineering, operations maintenance, commercial pipelines and management, community liaison and finance, and retaining a flexible workforce; and

(ii) the OpCo personnel and the GasNet personnel that McConnell Dowell dealt with at all material times being one and the same.

6 Rule 23.02 provides that where a pleading or any part of a pleading:

(a) does not disclose a cause of action or defence;
(b) is scandalous, frivolous or vexatious;
(c) may prejudice, embarrass or delay the fair trial of the proceeding; or
(d) is otherwise an abuse of the process of the Court –

the Court may order that the whole or part of the pleading be struck out or amended. This rule is concerned only with the sufficiency of the pleading of the opposite party as distinct from the validity of that party's claim or defence.[1] Its only purpose is to secure compliance with the rules of pleading[2] not to enable a party to advance an argument that by no proper amendment of the pleading could the adversary raise a good cause of action or defence because it is so completely lacking a foundation in fact or law.[3] That situation is covered by r.23.01.

7 Contrary to this practice, it seemed to me that, on occasions, GasNet's argument strayed into the area covered by a r.23.01 application. Its submission was that if the strike out application were successful, the proceeding against it should be dismissed because there would be no claim remaining against it. Nevertheless, given the way in which it put the argument, it was perhaps not surprising that GasNet did not contemplate the possibility of an order striking out all or part of paragraph 4 but giving McConnell Dowell leave to replead.

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1 Williams: "*Civil Procedure Victoria*" para. 23.02.1.
2 *Meckiff v Simpson* [1968] VR 62 at 70 per Winneke CJ, Adam and Gowans JJ.
3 Williams: "*Civil Procedure Victoria*" para. 23.01.5.

8 The traditional statement of when a court can summarily determine a proceeding by, for example, staying the proceeding or a claim in the proceeding, under r.23.01, on the ground that it does not disclose a cause of action has been expressed in a variety of ways. In *General Steel Industries Inc v Commissioner for Railways (NSW)*,[4] Barwick CJ summarised past approaches. His Honour said:

> The test to be applied has been variously expressed; "so obviously untenable that it cannot possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed"; "under no possibility can there be a good cause of action"; "be manifest that to allow them' (the pleadings) 'to stand would involve useless expense"... "so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed"; or "so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument"; "so to speak apparent at a glance".

9 In *Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd*,[5] Byrne J stated the principles which apply to the exercise of the power under r.23.02 as follows:

> I am permitted to look at the terms of the pleading only. This includes requests for particulars and the particulars provided by the plaintiff in response to those requests. The power is, of course, subject to my overriding discretion to refuse to strike out an offending part, a discretion which has as its starting point the requirement that pleadings and particulars be sufficient to enable the defendants to know what it is they have to meet and the trial judge to conduct a trial which is fair to all parties. Insofar as it is contended that a particular paragraph or paragraphs does not disclose a cause of action I am not determining a demurrer. A plaintiff will be stopped from putting a claim forward only where, assuming the facts pleaded have been established, the claim is so manifestly hopeless that a trial would be a futility. In case of doubt I should refuse to exercise the power.

Reference was also made to the decision of the Privy Council in *Mutual Life & Citizens' Assurance Company Limited v Evatt*[6] where it was said that on an application to strike out a statement of claim as disclosing no reasonable cause of action, the question was whether it would be open to the plaintiff upon the pleadings to prove facts at the trial which would constitute a cause of action.

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4 (1964) 112 CLR 125 at 129

5 Unreported, 16 September 1994, BC9405102, at pp.4-5.

6 (1970) 122 CLR 628 at 631.

10 As mentioned by Byrne J, in an application under r.23.02 no affidavit or other extrinsic evidence can be used in support of the attack on the pleading (r.23.04(2) of the *Supreme Court Rules*). However, it was accepted that the Court is entitled to look at any of the documents referred to in the pleading.[7] Thus, I was referred to a market release dated 13 October 2003 and to the Annual Reports of the Group for the years ended 31 December 2003, 2004 and 2005, all of which had been referred to in the particulars to paragraph 4 of the amended statement of claim. Also, by consent, the Financial Report of GasNet and its Controlled Entities for the year ended 31 December 2005 was tendered into evidence.

11 As a result of the reference to the above material, it was common ground between the parties that:

(a) the Group comprised three stapled entities, the GasNet Australia Trust, the GasNet Australia Investments Trust and GasNet, and all of their controlled entities;

(b) GasNet Australia Limited was the responsible entity for both of the above Trusts and the appointed manager of GasNet;

(c) GasNet owned 100% of the shares in Gas Investments Australia (Holdings) Pty Ltd, which owned 100% of the shares in Gas Transmission Services WA (Holdings) Pty Ltd, which in turn owned 100% of the shares in OpCo; and

(d) the relevant Group personnel that McConnell Dowell dealt with were employed by neither OpCo nor GasNet but by GasNet Australia (Operations) Pty Ltd, which, as such, was a party to what was actually called the Gas Transport Agreement.

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7 *Day v William Hill (Park Lane) Ltd* [1949] 1 KB 632 at 639 per Singleton LJ; *Castlemaine Perkins Ltd v Queen Street Hotels Pty Ltd* [1968] Qd R 501 at 507 per WB Campbell J; *Galoo Ltd (in liq) v Bright Grahame Murray (a firm)* [1994] 1 WLR 1360 at 1382 per Glidewell LJ; *Hong Kong Bank of Australia Ltd v BPTC Ltd (in liq)* (1995) Aust Torts Reports 81-358 at 62,634 per Batt J.

12 It was, however, disputed by GasNet that it was "in the business of pipeline ownership, construction and operation" and/or that it was "involved in the day to day running of OpCo's business". In support of the submission that McConnell Dowell's pleading failed to make out its case, GasNet referred to three of the documents referred to above. The first was the market release dated 13 October 2003. This announced the making of the contract to build and operate the Pipeline. GasNet emphasised that the market release made it clear that the Pipeline would be built, owned and operated by OpCo and that up to $80 million of the anticipated cost of $114 million would be "provided directly to OpCo in the form of bank debt provided by Westpac and the Commonwealth Bank". The bank debt would be "non-recourse to the other entities in the GasNet Group". That meant that the lenders' rights would be limited to recourse against the Pipeline assets.

13 The second document referred to in the pleadings which GasNet relied on was the 2004 Annual Report for the GasNet Australia Group. That report included the statement that OpCo was incorporated on 27 August 2003, that it was controlled from that date by GasNet, that its principal activity was the ownership and maintenance of the Pipeline and that its operating results had been included in the Group's combined Statement of Financial Performance.

14 Finally, there was the Financial Report of GasNet and its Controlled Entities for the year ended 31 December 2005. The results were separated into those of the Parent Entity (GasNet) and the consolidated results, including the controlled entity, OpCo. The Financial Report showed that GasNet did not own any "property, plant and equipment" whereas the consolidated result showed "property, plant and equipment" valued at $114.464 million at the end of 2004 and $118 million at the end of 2005. The "property, plant and equipment" consisted largely of "transmission pipelines and associated easements", "compressor stations and other facilities" and "metering assets", suggesting that these assets were owned by OpCo. The Financial Report also showed that the amounts of the profits and losses of the Parent Entity and its Controlled Entities were quite different.

15 It was not clear to me whether GasNet also disputed that it exercised complete dominion and control over OpCo, although I did not understand it to disagree with any of the factual matters on which that plea was based, such as Group board, directors in common, ultimate ownership of OpCo by GasNet and Group consolidated financial statements. As will be seen, the argument appeared to proceed on the basis that this allegation had been established.

16 In summary, GasNet submitted that, given the factual situation set out above, neither of McConnell Dowell's grounds for alleging liability on the part of GasNet (an implied relationship of agency and/or OpCo conducting its business as a common enterprise with GasNet) was, as a matter of law, capable of succeeding and they should therefore be struck out. Mr Foxcroft SC, who appeared with Mr Rompotis of counsel on behalf of GasNet, submitted that it was a fundamental principle of Australian corporate law that a company or companies within a corporate group (including parent companies and their wholly owned subsidiaries) were separate legal entities, each with its own rights and duties, and that except in certain limited circumstances, the corporate veil would not be pierced. Thus, he submitted that, even where one company exercised complete dominance and control over another, it was irrelevant to establishing agency. Some further element was needed before the corporate veil would be pierced.

17 Authority for the proposition that an implied agency can exist between a parent and subsidiary company is to be found in the English decision of *Smith, Stone and Knight Ltd v Birmingham Corporation*.[8] In that case the Court held that an implied agency existed between a parent and subsidiary company with the effect that the parent was considered by the Court to own the business carried on by the subsidiary for the purposes of claiming compensation for disturbance caused to the subsidiary's business by the local council. In determining whether a subsidiary was an implied agent of the parent, Atkinson J formulated six relevant criteria, namely:

(a) Were the profits treated as profits of the parent?

[8] [1939] 4 All ER 116.

(b) Were the persons conducting the business appointed by the parent?

(c) Was the parent the head and brain of the trading venture?

(d) Did the parent govern the venture, decide what should be done and what capital should be embarked on the venture?

(e) Did the parent make the profits by its skill and direction?

(f) Was the parent in effectual and constant control?

18 Mr Foxcroft submitted, however, that *Smith, Stone and Knight* has found only limited acceptance in Australia. He acknowledged that in *Spreag v Paeson Pty Ltd*,[9] Sheppard J specifically applied *Smith, Stone and Knight* to hold a parent company liable for the misleading and deceptive conduct of its wholly-owned subsidiary. But in numerous other cases, Mr Foxcroft submitted, Australian courts have declined to expand the circumstances in which the corporate veil would be pierced.

19 In *Hobart Bridge Company Limited v Federal Commissioner of Taxation*,[10] Kitto J emphatically rejected an argument put on behalf of the taxpayer that the profit of a subsidiary company, 90% owned by the parent company, should be treated as the profits of the parent company on the basis of the degree of control that the parent exercised over the subsidiary. In holding that the subsidiary had a real existence and a valid reason for its incorporation (in this case, to reduce tax liability), Kitto J stated that the argument invited "the Court to blur distinctions which are real and significant".[11]

20 In *Industrial Equity Limited v Blackburn*,[12] Mason J (as he then was) stated:

> However, it can scarcely be contended that [the consolidation provisions of the *Companies Act*] operate to deny the separate legal personality of each company in a group. Thus, in the absence of contract creating some additional right, the creditors of company A, a subsidiary company within a

9 (1990) 94 ALR 679.
10 (1951) 82 CLR 372.
11 (1951) 82 CLR 372 at 386.
12 (1977) 137 CLR 567 at 577. Stephen, Jacobs, Murphy and Aickin JJ agreed with Mason J.

> group, can only look to that company for payment of their debts. They cannot look to company B, the holding company, for payment …

21 In *Pioneer Concrete Services Ltd v Yelnah Pty Ltd*[13] the issue before the Court was whether an agreement, which was made between a subsidiary and a third party could be construed as having been made also by the holding company. Young J (as he then was) held that:

> … it is only if the court can see that there is in fact or in law a partnership between companies in a group, or alternatively where there is a mere sham or façade that one lifts the veil. The principle does not apply in the instant case where it would appear that there is a good commercial purpose for having separate companies in the group performing different functions even though the ultimate controllers would very naturally lapse into speaking about the whole group as "us".[14]

22 In *Dennis Wilcox Pty Ltd v Federal Commissioner of Taxation*[15] Jenkinson J stated:

> Neither the circumstance that a company is completely subject to the ownership and the direction of another person nor the circumstance that the other person exercises directorial control of the activities of the company in ways which minimise the manifestations of the company's separate legal identity will justify, in my opinion, a conclusion that acts in the law formally done by the company are to be regarded, for the purposes of the kind here in question in relation to Australian income tax law, as acts in the law done by that other person.

23 *Briggs v James Hardie & Co Pty Ltd*[16] Rogers AJA said as follows:

> The proposition that a company has a separate legal personality from its corporators survived the coming into existence of the large numbers of fully owned subsidiaries of companies and their complete domination by their holding company: … There was continued adherence to the principle recognised by *Salomon*, notwithstanding that for a number of purposes, legislation recognised the existence of a group of companies as a single entity.
>
> …
>
> Although the *Companies Act* 1961 called for the bringing into existence of consolidated or group accounts and although for income tax purposes it was possible to look to some degree of recognition of the existence of a group of companies, absent legislation, the court maintained the strict separation between a subsidiary and a holding company. Thus, although the holding company had full and effective control over the funds of the subsidiary and the way that they could be dealt with, nonetheless, the High Court held that

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13 (1986) 5 NSWLR 254.
14 (1986) 5 NSWLR 254 at 267.
15 (1988) 79 ALR 267 at 274. Woodward and Foster JJ agreed with Jenkinson J.
16 (1989) 16 NSWLR 549 at 576C-577D.

> the profits to which it could look for the purposes of declaration of dividends were confined to those already within the holding company. …
>
> In the result, as the law presently stands, in my view the proposition advanced by the plaintiff that the corporate veil may be pierced where one company exercises complete dominion and control over another is entirely too simplistic. The law pays scant regard to the commercial reality that every holding company has the potential and, more often than not, in fact, does, exercise complete control over a subsidiary.

24 Another decision of the New South Wales Court of Appeal involving the James Hardie group of companies was *James Hardie & Co Pty Ltd v Hall*.[17] In that case an employee of a James Hardie subsidiary in New Zealand sought to recover damages for mesothelioma, not from that company but from two companies incorporated in New South Wales including the James Hardie holding company. The Court of Appeal allowed an appeal against the finding of the trial judge that the defendants had breached a duty of care owed to the New Zealand employee, who had by that stage died. Sheller JA, with whom Beazley and Stein JJA agreed, said that there was no finding that James Hardie & Co (NZ) was "a mere facade" which concealed the true fact that the plaintiff was an employee of the defendants or that the New Zealand company in employing the plaintiff or manufacturing products in New Zealand was the defendants' agent. His Honour continued:

> Ultimately the question was whether the control or influence which his Honour found to have existed was such as to impose a duty to the plaintiff of which there was a breach. None of the cases referred to supports such a conclusion. To suggest that such a duty existed is to ignore James Hardie & Co (NZ)'s separate legal identity and the absence of any evidence that this was a mere facade.[18]

25 In *Bray v F Hoffman-La Roche Ltd*[19] Merkel J stated:

> The difficulty with the sweeping assertion that the Australian subsidiaries, being directed and controlled by an overseas parent as part of the parent's global enterprise, carried on the business of the parent, is that that alone is not sufficient to pierce the corporate veil. Factors of the kind adverted to in *Smith, Stone* and *Adams v Cape* would usually be considered before a conclusion is arrived at that the subsidiary's business, assets and contracts are those of the parent. …

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17 (1998) 43 NSWLR 554.
18 (1998) 43 NSWLR 554 at 584.
19 (2002) 118 FCR 1 at [72] and [80].

> In my view something more than the indirect legal and commercial capacity of the parent companies to control and direct the subsidiaries, plus the parent's involvement in implementing the cartel arrangement, is required to lift the corporate veil between the subsidiaries and their parents or to find that each of the subsidiaries is carrying on its business as agent for the parent.

26 In *Idoport Pty Limited & Anor v National Australia Bank Limited & Ors*[20] Einstein J said that:

> There is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil. Although an *ad hoc* explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities: … ·
>
> The cases merely provide instances in which courts have on the facts refused to be bound by the form or fact of incorporation when justice requires the substance or reality to be investigated: … ·
>
> An agency relationship of this type may not be inferred from mere control of the company or ownership of shares. Rather, it will depend on an investigation of all aspects of the relationship between the parties: …

27 Finally, in *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron,*[21] Besanko J, having referred to the six questions formulated by Atkinson J, continued:

> In my opinion, the first question identifies an issue which is important to the question whether there is an agency. However, too much emphasis on the other five matters could lead to a result inconsistent with the decision in *Salomon v A Salomon and Co Ltd* … I say that because each of those five matters relates to control and control of itself cannot be a decisive indicator of agency. If it were otherwise there would often be an agency between a parent company and its subsidiary or a sole shareholder and his company. Such a result is not only inconsistent with *Salomon v A Salomon and Co Ltd* but also with High Court authority which recognises the separate legal existence of companies in a group (*Industrial Equity Ltd v Blackburn* …; *Walker v Wimborne* …per Mason J (as he then was) …
>
> Although *Smith, Stone and Knight* has been followed in Australia … the weight of authority in England and in this country is that it does not provide a definitive test of agency. In *Maclaine Watson & Co Ltd v Department of Trade and Industry* … Kerr LJ said … that the facts in *Smith, Stone and Knight* were so unusual that they cannot form any basis of principle. The tenor of authorities in this country is to similar effect … [Authorities and citations omitted]

28 GasNet contended that *Smith, Stone and Knight* represented an extremely limited example of the agency ground for lifting the corporate veil. It had been said in the

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20 [2004] NSWSC 695 at para. [144].

21 (2005) 54 ACSR 505 at [110]-[111].

Court of Appeal that it involved an unusual fact scenario which rendered it inappropriate for formulating general principles: *Maclaine Watson & Co Ltd v Department of Trade and Industry*.[22] This decision was referred to by Rogers AJA in *Briggs*[23], as spelling the "death knell of the usual arguments by which the effects of incorporation are sought to be displaced by application of agency principles by creditors of the subsidiary". Mr Foxcroft submitted that both *Smith, Stone and Knight* and *Spreag* could be explained "on the basis that the subsidiaries were not maintained as a distinct and separate entity because the parent had disregarded the corporate boundaries".[24]

29 GasNet's summary of the current situation in Australia with respect to the circumstances under which the corporate veil may be pierced was taken from the following statement of President Sharkey in *Old Ferry Company Pty Ltd v Bertelli*,[25] where it was said that:

> It is trite to observe that on and upon incorporation, a company is a separate legal entity from its members and controllers: … There has been a general reluctance both in Australia and the United Kingdom, for courts and tribunals to pierce the corporate veil, unless good reason is shown. Whilst it appears that in Australia there is not any discernible broad principle indicating the circumstances under which the corporate veil may be pierced, the preponderance of authority suggests that it occurs in circumstances including sham arrangements; where a company acts as trustee or agent for another; where a clear agency or partnership relationship is implied or imputed between companies; and where it is apparent that the corporate form is used to avoid an existing legal obligation …

30 The response by McConnell Dowell was relatively straightforward. Having submitted that GasNet had confused an application under r.23.01 (summary dismissal of a proceeding) with an application under r.23.02 (an attack on a pleading), Mr Neal SC, who appeared with Mr Pane of counsel for McConnell Dowell, further submitted that there had been no criticism of the pleading itself and that, in accordance with the approach of the Privy Council in *Evatt*,[26] it would be

22 [1988] 3 All ER 257 at 310-311 per Kerr LJ.
23 (1989) 16 NSWLR 549 at 575.
24 *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 at [69] per Merkel J.
25 [1999] WAIR Comm 268.
26 (1970) 122 CLR 628 at 631.

open to McConnell Dowell to prove facts at the trial which would constitute one or both of the pleaded causes of action. Mr Neal therefore submitted that, assuming as the Court must that the allegations in paragraph 4 would be established at trial, it could not be said that the two causes of action in question were "so manifestly hopeless that a trial would be a futility",[27] or that they were unarguable as a matter of law.

31 In developing his argument, Mr Neal first submitted that if an implied agency was established OpCo would attach legal liability to GasNet in the conventional way that an agent binds its principal,[28] without any need to rely on a piercing of the corporate veil. He referred to the observation of Einstein J in *Idoport* that:

> A finding that one party is the agent of another does not require a disregard of the separate entity. It merely imputes the acts of one party to another under normal agency principles.[29]

32 Besanko J expressed a similar view in *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron*, where his Honour stated that:

> Agency is a relationship well known to the common law. It recognises the existence of the agent and is a relationship between two legal entities. As will become clear, for an agency to arise the alleged agent must have consented to act on behalf of and subject to the control of another. Therefore, there would appear to be no need to lift the corporate veil where there is an agency relationship.[30]

33 Thus, Mr Neal submitted that whether there was an agency relationship between GasNet and OpCo was a question of fact.[31] Yet GasNet was seeking a final determination of this question before there could be a proper assessment of all of the relevant facts at a trial.

34 Secondly, Mr Neal drew attention to the fact that in its submissions, GasNet had adopted the proposition that the corporate veil could be pierced "where a company

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27 *Opat Decorating Service (Vic) Pty Ltd v Jennings Group Ltd*, unreported, 16 September 1994 per Byrne J at p.5.

28 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652 per Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ.

29 [2004] NSWSC 695 at [144].

30 (2005) 54 ACSR 505 at [96].

31 *Bird Cameron* (2005) 54 ACSR 505 at [119] per Besanko J.

acts as … agent for another; where a clear agency … is implied or imputed between companies". Thus, on any view of the law, there was no basis for striking out the allegation of agency on a pleading summons. Mr Neal referred to a passage from the judgment of Einstein J in *Idoport*, already quoted, namely:

> An agency relationship of this type may not be inferred from mere control of the company or ownership of shares. Rather, it will depend on an investigation of all aspects of the relationship between the parties: …

35 Mr Neal submitted that that investigation could only take place at a trial. He also submitted that it could not be said that the allegations of agency and common enterprise were "manifestly hopeless" where the relevant legal principles were still being developed. In this context he referred to the observations of Rogers AJA in *Briggs* that there was "no principled approach to be derived from the authorities" concerning when the courts will pierce the corporate veil,[32] and that "the law in Australia has not yet fully worked out answers to these and like questions".[33] Reference was also made to the comment of Meagher JA in the same case that "the existing case law" did not "clearly define the limits" of the lifting the corporate veil doctrine.[34]

36 In respect of the common enterprise argument, Mr Neal submitted that it was not sufficiently clear that GasNet was correct when it contended that the common enterprise principle was not part of the Australian law. He again relied on the authorities which indicated that the law was in a state of uncertainty. Even if the weight of authority in Australia was against the principle, this did not mean that the point was unarguable.

37 Mr Neal also referred to the acceptance by GasNet in its written submissions of the statement in *Yelnah* that "if the court can see that there is in fact or in law a partnership between companies in a group … then a court may pierce the corporate veil".[35] It was then submitted by counsel that the extent to which a "partnership"

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32 (1989) 16 NSWLR 549 at 567F.
33 (1989) 16 NSWLR 549 at 576B.
34 (1989) 16 NSWLR 549 at 556F.
35 (1986) 5 NSWLR 254 at 267 per Young J.

between companies in a group is to be distinguished from the "common enterprise" principle had not been explored.

38 Finally, Mr Neal submitted that the plea of agency and the plea of common enterprise relied on the same factual sub-stratum. He again submitted that GasNet was seeking, prematurely, to have the common enterprise question of fact finally determined on a pleading summons rather than at trial. He referred to the decision of Byrne J in *Premier Building & Consulting Pty Ltd v Spotless Group Limited (No. 4)*[36] where his Honour refused to strike out allegations of agency and common enterprise. In so doing, his Honour noted that because the common enterprise argument was alleged "to depend upon the same facts" as the agency argument, "little saving in terms of trial time would be obtained by striking it out". In any event, his Honour said that he was "not persuaded that the prospects of success are sufficiently remote to warrant that course".

39 In my opinion, the application to strike out the pleas of agency and common enterprise must fail. Both are questions of fact which should not be finally determined on an application under r.23.01, let alone a pleading summons under r.23.02. If McConnell Dowell were able to establish at trial that GasNet was "in the business of pipeline ownership, construction and operation" and that it was "involved in the day to day running of OpCo's business", then it would be a matter for argument at that time what legal consequences flowed. It is not appropriate for me to assess the strength or weakness of those claims so long as I am of the view, as I am, that they are not "manifestly hopeless".

40 In so holding, I am not deciding that the corporate veil should be pierced. I am simply allowing the plaintiff's pleading to stand. Whether or not McConnell Dowell will be able to establish facts which remove this case from the conventional parent and subsidiary company relationship is, in my opinion, a matter for the trial. Whilst the authorities referred to above would suggest that the agency argument is stronger than the common enterprise allegation, I consider that the approach of Byrne J in

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36 [2004] VSC 522 at [12].

Premier Building[37] has merit. There would really be no gain, and possible prejudice to McConnell Dowell, in striking out at this stage the plea of common enterprise when the allegation of agency must be allowed to stand. In saying that, I have not overlooked Mr Foxcroft's submission that the tort claims in *Premier Building* are significantly different from the contractual claims in this case.

41 Accordingly, there will be an order that the second defendant's application to strike out paragraph 4, and various other parts, of the amended statement of claim dated 16 February 2007 be refused.

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37 [2004] VSC 522.