



## Transcript of Proceedings

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Date 19/3/08

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No S5789 of 1999

ST GEORGE PARTNERSHIP FINANCE LIMITED  
ACN 001 094 471

First Plaintiff

and

ST GEORGE MOTOR FINANCE LIMITED  
ACN 007 656 555

Second Plaintiff

and

ST GEORGE WHOLESALE FINANCE PTY LTD  
ACN 001 834 886

Third Plaintiff

and

ST GEORGE MOTOR WHOLESALE PTY LTD  
ACN 007 664 217

Fourth Plaintiff

and

DASCAM PTY LTD  
ACN 010 758 335

Defendant

BRISBANE

..DATE 12/03/2002

JUDGMENT

12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

HER HONOUR: When this proceeding came on for trial yesterday, the defendant did not appear. Pursuant to Rule 476(1) of the Uniform Civil Procedure Rules I directed that the plaintiffs be permitted to establish their entitlement to judgment by affidavit evidence.

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The material before me consisted of the following:

- (a) Further Amended Statement of Claim filed 14 March 2000;
- (b) Further Amended Defence filed 1 June 2000;
- (c) Reply filed 16 March 2000;
- (d) Affidavit of Peter John Bell sworn 11 March 2002 (filed by leave);
- (e) Affidavit of Kevin Patrick Walsh sworn 11 March 2002 (filed by leave);
- (f) Affidavit of Dale Francis Cliff sworn 11 March 2002 (filed by leave).

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The plaintiffs are financiers, all of which are wholly owned subsidiaries of St George Bank Ltd. At all material times the defendant was a valuer trading as Cameron Bros. It was a corporation within the meaning of s 4(1) of the Trade Practices Act 1974.

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The proceeding concerns the valuation of 5634 square metres of land at 3364 Pacific Highway, Springwood. At all relevant times it was a caryard. Improvements comprised a workshop at the rear and a house converted to offices, together with fencing and hardstand paving.

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12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

In December 1992 the defendant valued the land for Nissan Finance Corporation Ltd. Its valuation as at 15 December 1992 was \$1,915,900, based on 5635 square metres at \$340 per square metre. On 31 January 1994 the defendant updated its valuation for Nissan Finance Corporation Limited to \$2,282,175 being 5635 square metres at \$405 per square metre.

On 22 November 1994 the defendant wrote to the first plaintiff assigning the letter of valuation. The defendant's letter provided (inter alia): -

"We have been instructed by Mr Mel Langley of Embac Pty Ltd [the borrower] to assign a letter of Valuation to you in order that you may rely on same for mortgage purposes.

This letter to be assigned was prepared subsequent to a Valuation carried out on behalf of Nissan Finance Corporation Limited and dated 16th December, 1992.

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We advise that we have reassessed the value of the property based on sales of properties considered comparable to the subject and with the same zoning and in that respect we attach a sales schedule hereto.

We have analysed these sales and based on information received we value the property at \$2,282,175 which is calculated as follows;

5635 m<sup>2</sup> at \$405 per m<sup>2</sup> \$2,282,175

For the purpose of this letter of Valuation, a value of \$2,280,000 has been adopted.

This letter is for the use only of the party to whom it is addressed and for no other purpose. No responsibility is accepted to any third party who may use or rely upon the whole or any part of the content of this letter.

We should also point out that our instructions were to assign our letter dated the 31st January, 1994 to Nissan Finance Corporation Limited and we advise that we have not searched any further sales and the sales

12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

schedule appended to this letter reflects the sales of properties approximately 12 months ago."

In early 1995 the plaintiffs advanced a total of \$1,561,000 to Mel Langley Group Pty Ltd upon the security of the land. The amount advanced was determined by applying the plaintiffs' required loan to value ratio to the value of the land as shown in the defendant's letter.

The borrower subsequently defaulted in its obligations under the plaintiffs' securities, and on 10 December 1998 the plaintiffs sold the land for \$1,050,000. The net proceeds of sale were \$1,006,313.

The plaintiffs allege that the valuation was negligently prepared and that it constituted misleading conduct in terms of the Trade Practices Act 1974.

Subject to the question of the disclaimer contained in the letter of 22 November 1994 (an issue to which I shall turn shortly), the defendant owed the plaintiffs a duty of care at common law. The prerequisites for liability for negligent misstatement in the absence of a contractual relationship between the parties are present - see

Interchase Corporation Limited v ACN 010 087 573 Pty Ltd & ors [2001] QCA 191 at paragraph 25, where McPherson JA summarised the relevant authorities. In particular, His Honour referred to the judgment of Brennan CJ in Esanda Finance Corporation Limited v Peat Marwick Hungerfords (1997) 188 CLR 241 that in every case it is necessary to

12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

establish that the maker of the statement knew or ought reasonably to have known that it would be communicated to the plaintiff, either individually or as a member of an identified class; that it would be "very likely" to lead the plaintiff to enter into a transaction of the kind in question; and "very likely" that the plaintiff would do so in reliance on the information or advice, and thereby risk incurring economic loss if the statement was untrue or the advice unsound.

Under s 52 of the Trade Practices Act a corporation such as the defendant is prohibited from engaging in misleading or deceptive conduct. I accept that the letter of 22 November 1994 contained an implied representation that it had been prepared with reasonable care and skill. If it had not been so prepared, then the conduct of the defendant in delivering that letter was misleading, and if the plaintiffs relied on the representation and thereby suffered loss, they may recover the amount of the loss from the defendant: TPA Section 82. That right would be unaffected by the disclaimer.

According to the valuer who gave evidence for the plaintiffs, Kevin Patrick Walsh, the value of the land in December 1994 was \$1,300,000 (calculated at the rate of \$230 per square metre). I accept his opinion.

In paragraphs 7 and 8 of the Amended Statement of Claim the plaintiffs allege -

12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

"7. The discrepancy between the actual value of the subject land and the value represented in the Defendant's letter was caused by the failure of the Defendant:

(a) to inspect the land it had relied upon as comparable with the subject land in preparing its valuation;

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(b) to ascertain the nature, extent and condition of the improvements on that land as at 31 January 1994;

(c) sufficiently or properly to take those improvements into account in assessing the value of the subject land;

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(d) to have regard or sufficient regard to the sale of:

(i) 3442 Pacific Highway, Springwood in March and November 1993;

(ii) 1 Shortland Street, Springwood in October 1989;

(iii) 3422 Pacific Highway, Springwood in December 1991;

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(iv) 3454 Pacific Highway in June 1990;

when a reasonably careful and skilful valuer would not have failed to so act.

8. In the premises:

(a) the discrepancy between the actual value of the subject land and the value represented in the Defendant's letter was caused by the Defendant's negligence and breach of contract;

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(b) the Defendant's conduct in delivering the letter to the Plaintiffs was engaged in trade and commerce and was misleading in contravention of section 52(1) of the Trade Practices Act 1974."

In his written submissions counsel for the plaintiffs said as follows: -

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"9. The valuation report which is exhibited to Mr Walsh's affidavit is critical of the defendant's valuation in the following respects:

(a) in having regard to the sale of 3382 Pacific Highway, the defendant failed to make proper allowance for the fact that it was a sale to the adjoining owner: page 3;

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- (b) in having regard to the sales of 1332 Logan Road, 3370 Pacific Highway, 3354 Pacific Highway and 21 Murrajong Street, the defendant failed to make proper allowance for the substantial improvements on the land: pages 3-4;
- (c) the defendant failed to have proper regard to the sales of: 10
  - (i) 3442 Pacific Highway in March and November 1993, the improvements referred to in paragraph 12(a) of the defence having been built after 1993 (page 5);
  - (ii) 1 Shortland Street in October 1989 (page 5);
  - (iii) 3422 Pacific Highway in December 1991, the "battle-axe shape" referred to in paragraph 12(c) of the defence having resulted from a subdivision effected in 1993: pages 5-6." 20

Although Mr Walsh's valuation was prepared on 31 May 2001, there is no evidence before the Court as to when, if at all, it was made available to the defendant. Those aspects of the report relied upon in paragraphs (9) (a) and (b) of the written submissions relate to properties not referred to in the particulars in paragraph 7 of the Statement of Claim. In circumstances where the defendant did not appear at trial, it would be wrong to decide the case by reference to valuations of properties not pleaded. 30

That said, there is sufficient evidence with respect to the properties referred to in paragraphs 7 (c) (i), (ii) and (iii) of the Amended Statement of Claim for me to find that the defendant was negligent. I shall deal with each of those properties in turn. 40

3442 Pacific Highway. In its defence the defendant said that sales of a 4,110 square metre property at 3442 Pacific 50

12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

Highway Springwood in March and November 1993 were not  
relied upon because they were not proximate enough in  
location, nature of improvements or suitable use. It is  
difficult to see why number 3442 was too remote in location  
from number 3364 to be relevant. The defendant went on to  
allege that the property at 3442 Pacific Highway contained a  
two storey commercial building with shops on the ground  
floor and a restaurant and offices on the upper level.  
However, according to Mr Walsh at the time of the sales in  
1993 it was virtually vacant land having been used as a  
caryard site. The two storey commercial building was  
developed after those sales and became known as Pentagon  
Business Centre. In 1988 the property at 3442 Pacific  
Highway was sold for a price based on \$146 per square metre;  
in March 1993 it was sold for \$113 per square metre and in  
November 1993 for \$132 per square metre.

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1 Shortland Street. This smaller parcel (of 1,267 square  
metres) was sold in October 1989 for a price based on \$237  
per square metre. In its defence the defendant said it did  
not rely on this sale as comparable because the property was  
relatively small, essentially an open air vehicle display  
and sales yard containing a mobile home as an office. Mr  
Walsh agrees that a smaller site could be expected to  
attract a higher rate per square metre but considers that  
that would be offset by the fact that the land in the  
precinct of Shortland Street is not as well positioned as  
the main commercial precinct where the subject land is

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12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

located. Being an open air display and sales yard, the land was virtually vacant and was a useful comparative property.

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3422 Pacific Highway. This property of 5,669 square metres was sold in December 1991 for \$750,000 (based on \$132 per square metre). The defendant said that it did not rely on that sale as comparable because it was a battle axe shaped allotment containing storage sheds. However, according to Mr Walsh as at December 1991 it had full frontage to the Pacific Highway service road and was vacant land purchased for development of a service station. In the process of eventual development, the service station was surveyed into a smaller area and the balance land, a battle-axe block, was sold off in March 1993. The storage sheds were subsequently developed on the battle-axe block. Accordingly, the sale in December 1991 was relevant to the defendant's valuation of the subject land in 1992.

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I am satisfied that the defendant's failure to consider those sales of 3442 Pacific Highway, 1 Shortland Street, and 3422 Pacific Highway was negligent. Further, I am satisfied that its conduct was misleading in terms of the Trade Practices Act.

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In its further amended defence the defendant relied on the disclaimer in the letter of 22 November 1994. It was in these terms -

"This letter is for the use only of the party to whom it is addressed and for no other purpose. No responsibility is accepted to any third party who

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12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

may use or rely upon the whole or any part of the content of this letter."

Similarly worded disclaimers were considered in Interchase at paragraphs 46 and following and in BT Australia Ltd v Raine & Horne Pty Ltd [1983] 3 NSWLR 221.

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It is necessary first to consider whether use by the addressee, the first plaintiff, for mortgage purposes included use as part of the St George Bank Group, and then whether the other plaintiffs were "third parties" within the meaning of the clause.

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In my view this case is distinguishable from Interchase and BT Australia Ltd. In Interchase the valuation was addressed to Mr G Burgess, Chase Corporation Australia Property Group. That Group included Interchase as well as PEQ, by whom the valuer had been retained. McPherson JA observed that it might well be regarded as being addressed to all companies in the Group. Both Interchase and PEQ knew that the valuation would fix, as between those two entities, the amount of what was described as "the adjusted Development Sum". In those circumstances it could not be said that Interchase "relied on" the valuation; rather the valuation operated of its own force to fix the amount in question. Hence the disclaimer did not absolve the valuer from liability to Interchase.

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In BT Australia Ltd the trustee of a trust used as an investment fund for the assets of superannuation funds of which the trustee was the investment manager engaged a

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12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

valuer to value certain units in the trust fund. The valuation was to be used and relied on by the trustee in the carrying out of its duties as investment manager of the fund and in ascertaining the value of certain trust property.

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The valuation was negligently prepared. Individual unit holders who were clients of the trust's superannuation fund suffered economic loss. Wootten J held that the disclaimer did not protect the valuer. The proposed use of the valuation was common knowledge to the trustee and the valuer. The second part of the disclaimer should be understood as disclaiming responsibility to any third party suffering damage by reason of the third party using the valuation, but not as disclaiming any responsibility for damage resulting to a third party by the very use of the valuation by the trustee for which the valuer in the first part of the clause impliedly accepted responsibility.

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Counsel for the plaintiffs submitted that the letter of 22 November 1994 should be read as permitting reliance by all or any members of the St George Bank Group, and that it would be unrealistic to treat the second, third and fourth plaintiffs as third parties within the meaning of the second part of the disclaimer. However, the valuation was not addressed to the St George Bank Group, and there is no evidence that the defendant knew that the various plaintiffs were members of such a group or that the first plaintiff would use the valuation for mortgage purposes in such a context. In these circumstances I cannot accept counsel's submission.

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12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

In the result, the disclaimer protects the defendant from liability in tort to the second, third and fourth plaintiffs. It does not protect it from liability for breach of s 52 of the TPA.

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I find that the plaintiffs relied on the defendant's valuation in deciding to lend \$1,561,000 to Mel Langley Group Pty Ltd. Had the defendant valued the land at \$1,300,000, the plaintiffs' required loan to value ratio would have limited the amount that could be advanced on the security to about \$900,000, which was substantially less than that sought. I infer that the plaintiffs would not have advanced money to the defendant in the circumstances.

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In the circumstances of this case, the measure of damages is the same in tort and under the Trade Practices Act. The primary loss resulting from the defendant's breach of duty and misleading conduct is the difference between the amount of the advance (\$1,561,000) and the net proceeds of sale (\$1,006,313): *Kenny & Good Pty Ltd v MGICA (1992) Ltd (1999)* 199 CLR 413 at 425, 440 and 449.

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I assess the plaintiffs' loss as follows: -

Amount advanced	\$1,561,000.00
less Net sale proceeds	<u>1,006,313.00</u>
	\$ 554,687.00
plus Receiver's fees	\$ 266,645.00
plus Legal fees	<u>\$ 23,501.00</u>
	\$ 844,833.00
less Received 24/9/01	<u>\$ 462,500.00</u>
	<u>\$ 382,333.00</u>

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12032002 T1-2/PB8 M/T 1/2002 (Wilson J)

I allow interest pursuant to Section 47 of the Supreme Court Act 1995, calculated at 9% per annum as follows:

Interest on \$844,833.00 from		10
10/12/98 to 21/09/01	\$211,439.00	
Interest on \$382,333.00 from		
22/09/01 to 12/03/02	<u>\$ 16,121.27</u>	
	<u>\$227,560.27</u>	

I give judgment for the plaintiffs for \$609,893.27.

I have before me a draft judgment which was handed up yesterday. I have amended that to make the amount of the judgment \$609,893.27, including \$227,560.27 interest and I note that it also provides for the defendant to pay the first, second, third and fourth plaintiffs' costs of the proceeding to be assessed.

I am prepared to make an order in terms of that draft.

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HER HONOUR: I will initial that and have it placed with the papers.

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