State Reporting Bureau
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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BYRNE J

No 5208 of 2002

BROOKMORE INVESTMENTS PTY LTD (ACN 087 364 547) Applicant

and

LEDDY SERGIACOMI & ASSOCIATES PTY LTD (ACN 010 855 697) Respondent

BRISBANE

..DATE 16/07/2002

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application to set aside a notice of statutory demand issued for small sums of money aggregating less than $8,000 in fees said to be payable by the applicant to the respondent in respect of engineering services, related expenses and interest. I can dispose immediately of the interest claim. There was never an agreement to pay it; and so it is a hopeless claim. That leaves a balance of $5,635.70. The quantum of this claim is not challenged. The claim for payment is resisted on the footing that there is a genuine dispute in respect of the liability to meet any of it.

The dispute is founded upon contentions in an affidavit of Mr Grimm, who controls the applicant. His affidavit is in material respects corroborated by evidence of Mr Ross. Mr Grimm swears that the essence of the retainer for engineering services was that they would be provided on a speculative basis initially in respect of a feasibility study, with the respondent to be paid in respect of works subsequently undertaken if, as a result of the feasibility study, the applicant choose to proceed with the works: mainly, dredging a lake.

The testimony of Mr Grimm and Mr Ross is challenged by reference to an item of correspondence and invoices subsequently delivered. But neither deponent has been cross-examined; and on the face of things, there is nothing so inherently probable in the suggestion of a speculative fee arrangement that their assertions must be dismissed out of hand. Indeed there is some material to suggest that the

office of the engineers in question may have been so anxious to do work that the speculative arrangement may have been entered into.

On the other hand, there is material to suggest that, at a trial, the applicant is unlikely to succeed in its contention that the arrangement was purely speculative.

By letter dated 20th March 2000, written by mistake to one of Mr Grimm's companies Zadtech but nonetheless acknowledged by Mr Grimm to have been received by him, the respondent set out a number of terms of the arrangements proposed for the engineering services the subject of the retainer. On the foot of page 2 of the document, under the heading "LSA fee structure", it is said:

> "To date the following fees have been incurred for organisation of material testing and survey. Meeting with client's representative, investigation of zoning approval, possible material sale and compilation of volumes etc ...".

And then figures were set in respect of work done and to be done. Mr Grimm could scarcely have regarded this letter as being consistent with the speculative fee arrangement which he says was agreed only days before. He says that, having received the letter, he simply "dismissed it as it was not in accordance with the agreement that I had on behalf of the applicant reached with Robert Sergiacomi".

His affidavit proceeds to assert that he did not telephone to dispute the details set out in the letter as the arrangement

between the parties was "clear that no fees would be payable...in relation to the feasibility study". The affidavit then proceeds to say that, in Mr Grimm's opinion, the works which were set out in some items of the fee schedule were an estimate of costs that would be incurred if the project was going to proceed beyond the feasibility investigation, adding "the project did not proceed beyond the feasibility stage".

The improbability of this as a true explanation for the omission to respond to the letter of 20th March needs to be viewed in the light of the fact that the project did proceed beyond the feasibility stage. An affidavit recently filed contains a document from the respondent to the applicant referring to project works. Mr Grimm has made a notation discussing it above his signature on 31st March 2000 which appears upon this document referred to in paragraph 4 of the affidavit of Mr Stanworth filed by leave today. This appears to be a distinct acknowledgment that project works were to proceed.

Also, several invoices were delivered by the respondent to the applicant without any written response. Mr Grimm deposes that to some of these invoices he responded by telephoning Mr Sergiacomi and denying any liability to pay them, or by extracting from Mr Sergiacomi an assurance that the matter would be investigated. Mr Sergiacomi's evidence denies these things. However that may be, it is plain that a large number of writings emanated from the respondent making these claims

and that, before the notice of statutory demand was served, no writing emerged from the applicant denying any of them.

It must be concluded that there is a genuine dispute within the meaning of the relevant statutory provision. But, although there is a case fit for investigation, there are certainly circumstances - and I have mentioned them - which suggest that the defence presently appears as very unlikely to succeed.

In these circumstances, the question arises whether, although the notice of statutory demand must be set aside, conditions ought to be imposed requiring payment into Court of the, or part of the, amount claimed.

As I have said, the quantum in respect of the $5,635.70 is not in dispute.

Mr Pyle points out that the respondent ought not to be in a better position than it would have been had proceedings been instituted in the Magistrates Court to recover on this money claim. I would have been inclined to regard that as a more substantial argument against the imposition of conditions had there been a written denial of liability emerging from the applicant before the notice of statutory demand was served. There were many occasions upon which written demands for payment were made. Not one provoked a written response until after the notice of statutory demand was served.

On balance, I consider that the case is an appropriate one for the imposition of a condition which requires the payment (or otherwise securing) of the $5,635.70 into Court to abide the result of the litigation which must now be commenced.

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HIS HONOUR: In the unlikely event that the claim is not prosecuted diligently, Mr Pyle, you can always apply to the Court for a variation of the conditions. I will give you liberty to apply with respect to it, in case the matter is not interlocutory.

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HIS HONOUR: Order as per draft to be provided.

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