[2003] QSC 016

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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MACKENZIE J

No 11040 of 2002

DIRECT MONEY CORPORATION PTY LTD
(ACN 099 404 378) Plaintiff

and

R & C ENTERPRISES PTY LTD
(ACN 010 318 998) Defendant

BRISBANE

..DATE 07/01/03

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 statutory notice of demand dated 11 November 2002. The principles applicable are not really in dispute. The applicant states them in terms of whether there is a genuine dispute about the existence or the amount of the debt to which the demands relates does not involve an extended inquiry. It involves the determination of the perception of genuineness. The respondent states the propositions as that the Court should not try the case and that the mere assertion of a defence is not sufficient.

The authorities of Re Morris Catering (Australia) Pty Ltd (1993) 11 ACLC 919, Mibor Investments Pty Ltd v. Commonwealth Bank of Australia (1993) 11 ACSR 361 and Louisbridge Pty Ltd (1994) 2 QdR 145 are common to both sets of submissions. There is also particular reliance placed by the respondent on WEC Pty Ltd v. Cypriot Community of Queensland Inc (2002) QCA 506 in which a passage from Spencer Construction Pty Ltd v. G & M Aldridge (1997) 24 ACSR 353 at 363 to 365 is relied on. I do not think that WEC was intended to state any new law. It is rather a succinct statement of what one would have thought was always the situation. In any event, the law, as I say, is not really controversial.

The matter is involved with the rather shadowy world of

money lending. The applicant is a money-lending company which aims to produce high rates of interest for investors for short-term investments.

Mrs Stumer is a director. Mr Stumer, who at the time of swearing at least one affidavit was, and possibly still is, a resident of Palen Creek, described himself in his affidavit as an employee of the company.

In early June 2002 there was a meeting involving Mr and Mrs Brose, directors of the respondent, Mr Robert Miller and Mr John Miller, who are brothers.

One of the disputed issues in the matter is the relationship between Robert Miller and the applicant. According to Mr Brose he was told by Robert Miller that he was agent for the applicant and that he was raising funds for re-investment. There is other evidence from Mr Miller and from Mr Stumer that there was no relationship of that kind.

On 11 June 2002 there was a meeting attended by Mr Stumer, the two Millers and Mr Brose at the applicant's office. Mr Stumer explained the modus operandi of the scheme to John Miller and Mr Brose. According to Robert Miller, he told those present that he was not connected with the applicant, but was an investor. It appears that this was done with a

view to establishing his bona fides. He said that Mr Stumer told Mr Brose in answer to an inquiry from him that Robert Miller was not connected with the applicant, but that he supplied advice and services to it. Mr Brose said that Mr Stumer, however, did not indicate that Robert Miller did not have authority to act on behalf of the applicant, nor that funds would be advanced to him, not directly to the company.

In any event, Mr Brose decided not to invest at that time, but on the 17th of June 2002 he says that Robert Miller contacted him and advised him that an opportunity had arisen to invest $230,000 for a short time. Security would be given to the lender and subsequently a deed of mortgage naming a woman with whom the respondent had had no dealings as mortgagor, and the respondent as mortgagee, arrived together with a caveat over the property which was registered in the name of the woman. This set of documents was never executed.

Prior to that date Mr Brose says that he received through Mr John Miller an information sheet purporting to record the applicant's modus operandi and naming Mr Stumer as principal and Robert Miller as advisor.

In any event, on the 18th of June 2002 a deposit was made on

account of the applicant by the respondent. On the 13th of July 2002 $55,000 was paid to the Broses with advice that Robert Miller would speak the following day about repayment of the principal. The next day he told them that the money had been re-invested.

The applicant's case is that Robert Miller was not an agent; that the arrangement with Robert Miller was that the applicant would deal only with him and that any advances made by his friends, associates or family would be treated by it as an investment by Robert Miller. It was also the respondent's case that all moneys due and owing to Robert Miller under this arrangement had been repaid to him. There is some evidence also that this conforms with the applicant's accounting procedures.

On the 3rd of December 2002 Mr Stumer deposed that in accordance with the broad propositions that Miller was not an agent of the applicant and that all moneys due and owing to him had been repaid. Mr Stumer also deposed that he had only become aware of problems when he was contacted by investors who had invested through Robert Miller.

A meeting was held at the Broses' residence following receipt of that information at which the conversation was substantially tape-recorded. Amongst other things,

Mr Stumer offered to repay moneys. He explained that there had been problems because of, amongst other things, assets being frozen and there was an allusion to the possibility of those who had been, in his view, dealing through Robert Miller dealing directly with him.

The transcript of the meeting, which was, as I have said, substantially tape-recorded, is not easy to reconcile in places with the allegation that the debt had been discharged. I also note that the evidence relating to the discharge of the debt does not relate to one large lump sum, but to a series of payments amounting to an amount which was said to be due and owing paid in smaller amounts over a period of about three months, some of which postdated July.

In one passage of the tape-recording there is an allusion to those at the meeting investing through Miller and suggesting that they might deal directly with Stumer instead. There is also, on the other hand, evidence that the documents prepared for security purposes showed the respondent as mortgagee with the implication that it was to have the benefit of the security for the money advanced through the applicant to the mortgagor.

It is somewhat difficult, one would have thought, in the circumstances to maintain that the applicant through Stumer,

who described himself as principal and as the point of reference for the applicant, was not aware that the moneys had been invested by the respondent. Indeed, there is evidence that Mr Stumer had been told by Robert Miller that the moneys were forthcoming, although he says that that came as a surprise to him.

The reality of the situation, however, seems to be that Stumer was aware that moneys were being invested by the respondent even though the investment was recorded in a particular way in the books. Pursuant to the undertakings made at the meeting to which I have referred, a cheque, which was not met on presentation, was given to the respondent.

The explanation for all of this conduct is that when they were on the way to the meeting, that is to say Stumer and Robert Miller, Miller confessed to him that he had not repaid all of the money to those who had had moneys advanced through him and in those circumstances, Stumer thought, rather than have his company involved in litigation, he would make the offer to repay the money.

The situation is, therefore, one where there is a considerable amount of allegation and counter allegation. However, the reality of the situation, it seems to me, is that the statutory demand should not be set aside.

I am unpersuaded that there is a serious question to be tried that the money was not invested by the respondent with the applicant and that the issue of agency in the particular circumstances of the case having regard to the matters that I have mentioned is rather a side issue. I do not think that the internal accounting arrangement imposed within the company is critical and does not in my view compel a contrary conclusion. I, therefore, propose to refuse the application with costs.

MR DAVIS: There are some reserved costs. I ask for the reserved costs.

HIS HONOUR: No, you can't dispute that, I suppose. Reserved costs of what date?

MR DAVIS: 12 December 2002.

HIS HONOUR: You don't want to say anything about it?

MR MATIC: No.

HIS HONOUR: Those are the orders that I make including reserved costs will be added to the costs order.
