[2003] QSC 071

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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No 1514 of 2003

RUSHTON (QLD) PTY LTD (ACN 079 140 364)	First Applicant
and	
SENMEAD PTY LTD (ACN 053 308 008)	Second Applicant
and	
APADA INVESTMENTS PTY LTD (ACN 079 985 272)	Third Applicant
and	
PHILLIP MICHAEL HOLZBERGER	Fourth Applicant
and	
RUSHTON (NSW) PTY LTD (ACN 079 164 202)	First Respondent
and	
RUSHTON (VIC) PTY LTD (ACN 079 140 419)	Second Respondent

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

and

RUSHTON (SA) PTY LTD
(ACN 079 164 177) Third Respondent

and

PETER GEORGE ROGAN Fourth Respondent

BRISBANE

..DATE 05/03/2003

JUDGMENT

HER HONOUR: This is an application for an interlocutory injunction by originating application which, as an aside I should say Mr Martin will seek leave to amend if necessary to seek specific performance of an agreement, as final relief.

The applicants, whom Mr Martin represents, apply for an interlocutory injunction to restrain the respondents for whom Mr Doyle SC and Mr Beacham appear from disposing of their interest in certain intellectual property rights associated with a valuation business.

It is, I think, necessary to give some background information about this matter and I take that substantially from the reasons for decision of Mr Justice Muir in two actions, in which two judgments were given by his Honour on the 24th of January 2003 concerning some, at least, of these parties.

The Rushton valuation business was acquired by interests associated with Mr Holzberger whose interests are represented by Mr Martin and Mr Rogan whose interests are represented by Mr Doyle and Mr Beacham.

That occurred when each group of interests acquired shares in the Rushton valuation business. The Holzberger interests were given the right to use the Rushton name in connection with valuation business in Queensland and Papua New Guinea and the Rogan interests were given similar rights in respect of Western Australia, Tasmania, Victoria and South Australia.

Both the Rogan and the Holzberger interests were to participate in the valuation business carried on in New South Wales under the Rushton name.

The assets of the valuation business were distributed between the Holzberger and Rogan interests and the shared entity which was to carry on the New South Wales business. Under an agreement in 1999 the Holzberger interests sold their interests in the New South Wales business and other interests to the Rogan interests.

That agreement contemplated that nonetheless the Rushton business would be presented as a national one with operations in near countries.

In June 2000 proceedings were commenced in Victoria for alleged breaches of the sales agreement. Prior to the proceedings coming on the dispute was compromised and a memorandum of understanding was signed between the parties and according to his Honour's statement of the facts it set out in some detail a new regime for the manner in which referral work was to be carried out and remunerated.

Subsequent Victorian proceedings were transferred to Queensland and were heard together with proceedings commenced in the Supreme Court of Queensland between similar or the same parties. Those actions were heard together by Muir J.

The memorandum of understanding binds the New South Wales entity to observe the interstate trading terms contained in the sale agreement and it was the construction of that agreement as against the sales agreement which was the subject of one of his Honour's judgments.

The Rogan interests sought a declaration that the Holzberger interests were obliged by the sale agreement to execute a deed of option executed by OAMPS Limited and for an order that it be executed. The relief for specific performance was abandoned in the course of the hearing.

There are further details about those two claims in his Honour's reasons for judgment and for further elaboration those reasons should be consulted.

The contention by the Rogan interests if I can state it without doing injustice to it briefly, was that certain clauses in the agreement and schedule about the interstate referral work were unenforceable as a covenant in restraint of trade or a breach of Section 45(2) of the Trade Practices Act.

Prior to trial evidence was received by statement from two witnesses of conduct by the Rogan interests which directed some work in a way which caused the Holzberger interests damage and loss. His Honour found in favour of the Holzberger interests on this matter with damages to be assessed. His Honour also ordered or declared that the Holzberger interests were obliged to execute the OAMPS agreement tendered by the

Rogan interests, the subject of the other litigation. That agreement has not proceeded. It would appear from the material that OAMPS has become disenchanted with the acquisition by virtue of this extensive litigation. However, the Rogan interests have another buyer ready to purchase the Rogan interests' share and it is that which has activated this application, although the injunctive relief is to restrain any sale to any party and is not directed to any particular buyer. The Holzberger interests wish to purchase the Rogan interests' share of the valuation business.

The sales agreement provides a method whereby one or other of the Rogan or Holzberger interests may acquire the other's naming rights in respect of the Rushton valuation business. Since the Holzberger interests wish to purchase cl.13 may be considered:

> "13. Holzberger Group Option
>
> 13.1 Option to acquire name
> The Rogan Group irrevocably grants an option to the Holzberger Group to acquire the Rogan Name Rights for the Option Price.
>
> 13.2 Exercise of Option
> The option may be exercisable by the Holzberger Group by notice in writing to the Rogan Group within 30 days of the happening of a Trigger Event.
>
> 13.3 Option Price
> The Option Price will be payable by the Holzberger Group within 14 days of its determination.
>
> 13.4 Do all things necessary
> The Rogan Group agrees to do all things necessary to assist in the transfer of the Rogan Name Rights to the Holzberger Group upon payment of the Option Price, including signing all necessary consents and documentation reasonably required by the Holzberger Group.
>
> 13.5 Consent

The Holzberger Group must provide to the Rogan Group its written consent to a sale or transfer of any legal or beneficial interest in the Rogan Name Rights provided that the transferee enters into a deed of option on substantially the same terms as the option contained in this clause 13.

13.6 Definitions
For the purpose of this clause 13, the following words have the following meanings:

Trigger Event means:
(a) where any member of the Rogan Group:
(1) becomes bankrupt, insolvent under administration or an externally administered body corporate;
(2) voluntarily abandons its business;
(3) is fraudulent in connection with the operation of its business;

(b) a finding by the arbitrator pursuant to clause 11.5 that the defaulting party has failed to remedy a breach of the rules and regulations;

(c) The Rogan Group sells or transfers any legal or beneficial interest in the Rogan Name Rights without the prior written consent of the Holzberger Group.

Option Price means the price as determined by a valuer;

Rogan Name Rights means all or any rights associated with the Business Names including goodwill and any intellectual property rights used in connection with the business conducted by the Rogan Group in Victoria, South Australia, Northern Territory, Tasmania, New South Wales, Australian Capital Territory, Western Australia, New Zealand and Fiji."

The Holzberger interests gave notices that they proposed to refer questions relating to breaches pursuant to clause 11 of the sales agreement to an arbitrator. Since the matter was then before the Supreme Court those references have been in abeyance.

Mr Doyle submits that there is no serious question to be tried. It would appear that the injunctive relief sought against the Rushton New South Wales company, which is not

bound by clause 13 of the sales agreement, could not, in any event, be sustained and I think it is unnecessary to say anything further about it.

The clause which allows the Holzberger interests to exercise the option to purchase the Rogan interests are set out in clause 13.6 of the sales agreement and are described in that clause as "trigger events". There are two which are relied upon by the Holzberger interests which are said to entitle it to exercise the option, namely, that in clause 13.6(a)(iii), if any member of the Rogan Group "is fraudulent in connection with the operation of its business". Holzberger points to the conduct by the Rogan interests in the nondirection of referrals to the Holzberger interests in Queensland. Mr Rogan has deposed, in paragraph 17 of his affidavit, "I deny any fraud on my part and say that the actions in question were based on an interpretation of the effect of agreements between the parties which Justice Muir has since determined to be erroneous."

It is clear from Mr Justice Muir's reasons that he considered issues of lack of clean hands which related to the alleged fraudulent conduct when considering the Holzberger interests' submissions in the action in which the Rogan interests sought declaratory relief. His Honour doubted whether it had application to a claim for mere declaratory relief but the tone of his Honour's reasons make it clear that he accepted the explanation given by Mr Rogan, namely, that there was an erroneous construction of the obligations under the sales

agreement. That in no way could it be said to come near to a claim in fraud.

It is submitted by Mr Doyle that these matters give rise to an estoppel against the Holzberger interests, that they are matters which have already been decided or, in the alternative, that the Holzberger interests are precluded by the principles found in Port of Melbourne Authority v. Anshun Pty Ltd to be precluded from raising the matter again. These were issues which were clearly in the arena before Mr Justice Muir. The explanation given by Mr Holzberger for failure to canvass the issues of fraud in his affidavit in these proceedings is not compelling. His view that it was inappropriate to raise issues of fraud until the legality or otherwise of the agreement relating to the various obligations interstate were settled is difficult to accept. He was not an amateur and had experienced solicitors and counsel: it was a matter that was simply chosen not to be run, it would appear.

The other basis upon which it is submitted there is no serious question to be tried is that the option can be exercisable by notice in writing to the Rogan interests only within 30 days of the happening of a trigger event as set out in clause 13.2. It is very difficult to see any argument which would support a view that the notice has been given within time, the notice was given in February this year. The statements were provided prior to trial in accordance with the orders of the Court and at the very latest the Holzberger interests were aware of the conduct which they maintain is fraudulent at the commencement

of the trial on 20 November 2002 when a schedule was tendered to his Honour. Option clauses are strictly construed.

Mr Martin contends that the other trigger event nonetheless is operative. That is a finding by the arbitrator, pursuant to clause 11.5, that the defaulting party has failed to remedy a breach of the rules and regulations of the agreement. There was some suggestion by Mr Martin that the parties had agreed to substitute the findings that the trial Judge might make for those of the arbitrator in respect of the notices of referral which had earlier been given, but a consideration of the correspondence between the parties suggests that this is far from the case and that the Holzberger interests reserved their rights over the question of referral to the arbitrator. Until there is a finding by an arbitrator there has been no triggering event.

I am not persuaded that even though the proposed present sale is with a party other than OAMPS Proprietary Limited that there is a serious question to be tried. The balance of convenience I should deal with as well. Mr Martin has submitted that there will be damages which will be extremely difficult to quantify if the intellectual property rights are lost to the Holzberger interests, by virtue of a sale to another entity by the Rogan interests.

I cannot accept that the evidence would suggest that is the case. It is a question of calculating profits, lost sales, lost valuations, and computing that into some reasonable

period into the future. That seems to me to be a fairly standard exercise in assessing damages. The applicant has been aware of the decision by the Rogan interests to sell its interests to another party at least since the middle of last year, when the agreement was tendered pursuant to clause 13 for the Holzberger interests to sign.

It may be thought that the loss of the naming rights is something that has become more important since the outcome of the decisions before Mr Justice Muir, rather than inherently of themselves. The Rogan interests have challenged the value of the undertaking as to damages by Mr Holzberger. I am not persuaded that Mr Holzberger would not be good for significant sums in damages. It is the case that his affidavit is light on particularity, he attests to the value of his business, but Mr Doyle has submitted he (Holzberger) is somewhat tongue in cheek, as it is in the context of a sense of disbelief about the alleged value of the Rogan interests.

Nonetheless his business is clearly a valuable asset and is worth a significant sum. Mr Holzberger also deposes that he controls some $1,500,000 in assets, and whilst its true that he does not say that he owns those assets, nonetheless, had I been disposed to grant the injunction I would not have been unduly troubled by that matter. The application for injunctive relief is dismissed.

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HIS HONOUR: I dismiss the originating application and I order that the applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.

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