



Transcript of Proceedings

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Date: 6 May, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

No 136 of 2004

AUSTRALIA ESTATES PTY LTD

Applicant

and

ROBERT SMITH AUSTRALIAN REAL ESTATE
CO PTY LTD TRADING AS AUSTRALIAN
FIRST REALTY

Respondent

CAIRNS

..DATE 27/04/2004

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for the setting aside of a statutory demand which was served on the applicant company on the 9th of March 2004.

The demand itself was undated and it sought the payment of \$50,655.10 being claimed for commission pursuant to the sale of residential property as it is defined within the meaning of section 17 of the Property Agents and Motor Dealers Act 2000.

There was also a contract of sale for the management rights associated with the residential unit development coupled with the sale of unit 103. The calculation of the commission claimed was in error since the percentage of commission agreed between the parties was outside that permitted by the Property Agents and Motor Dealers Act. On a recalculation the amount claimable was calculated to be \$46,667.70. Notwithstanding that fact the basis of the application to set aside the demand is that there does exist a genuine dispute based on whether the respondent had the right to claim commission at all.

The respondent's claim for commission depends upon the construction of principally two documents, the first document being the appointment of the agent which sets out in clause 2.1 the circumstances in which there is a right to claim commission and the second, a document which is entitled "The Agreed Exclusive Irrevocable Authority" which the respondent contends, when properly construed, impacts upon the right to commission set out in clause 2.1.

Further to that there are arguments which flow from whatever the construction of those two documents are as to whether the triggering factors for the payment condition has arisen.

With respect to the management rights the applicant argues that no such rights have come into existence yet because there is no building, nothing to manage and that therefore there is nothing to sell. The same applies to the units.

The completing construction argument is to the effect that those paragraphs of the agreed exclusive irrevocable authority are designed to vary clause 2.1(1) to provide for commission to be payable prior to completion of the sales.

I am satisfied, having heard from both counsel, that there is a genuine and substantial dispute arising in these arguments. It is not a matter which I should determine finally in the context of an application to set aside the statutory demand. The determination of that dispute must await other proceedings.

The parties were in litigation over the dispute as to the right to claim the commission in the Magistrates Court proceedings instituted by the respondent in the latter part of 2003. The respondent, on legal advice, discontinued those claims relevant to these proceedings but that was not before affidavits had been filed in the Magistrates Court indicating the nature of the applicant's objection to the respondent's

claim there made. The statutory demand was in fact served whilst those proceedings were still current.

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All of these circumstances indicate to me that the dispute has existed between the parties. It has been litigated in another forum and it is one that will call for additional proceedings for its final determination.

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I therefore will order that the application be allowed and that the statutory demand be set aside.

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On the question of costs Mr Wilkins appearing on behalf of the respondent has undertaken that proceedings will be commenced to determine the issue in dispute and he argues that the question of costs of these proceedings should be determined as part of those proceedings yet to be commenced.

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Mr Morzone, appearing for the applicant, argues that these are discrete proceedings, that the circumstances are that the statutory demand was made in context of there being an ongoing dispute and that it ought not to have been issued at that time. He seeks costs of these proceedings.

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In my view it is appropriate to finalise this application and that should include dealing with the question of costs. The nature of the dispute which was partially litigated in the Magistrates Court before its withdrawal did identify the substance of the dispute. There has no doubt been refinement in the argument as it has been outlined to me but the

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circumstances were such that the dispute between the parties
ought to have been determined before the step of issuing a
statutory demand was made.

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In those circumstance I will order that the respondent pay the
costs of and incidental to this application to be assessed on
the standard basis.

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