[2004] QSC 203

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Date: 22 June, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No BS3584 of 2004

KERRY MICHAEL FINN	First Applicant
and	
ACACIA HOLDINGS PTY LTD (ACN 010 859 793)	Second Applicant
and	
FIREFAST PTY LIMITED (ACN 010 305 889)	First Respondent
and	
ARUNDEL HOMES PTY LTD (ACN 074 299 424	Second Respondent
and	
ALTO CONSTRUCTIONS (QLD) PTY LTD (ACN 083 231 172)	Third Respondent
and	

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

ALTO DEVELOPMENT & CONSTRUCTION PTY LTD (ACN 074 175 974)	Fourth Respondent
and	
WATERFAST PTY LTD (ACN 092 445 871)	Fifth Respondent
and	
STRATHDALE MEWS PTY LTD (CAN 091 186 864)	Sixth Respondent

BRISBANE

..DATE 02/06/2004

JUDGMENT

HIS HONOUR: The applicants made by way of originating application filed on 21 April 2004 applications under the Corporations Act 2001. The first applicant, who was until on or about 15 December 2003 the general manager of the Gold Coast operations of the Galli Developments group of companies, of which the respondents are all members, initially sought orders in the following terms:

> "(a) the first applicant and his solicitors have access to the books of the first respondent and be entitled to inspect those books in relation to the legal proceedings the first respondent has brought against the first applicant;
>
> (b) the first applicant and his solicitors have access to the books of the second to sixth respondents (inclusive) and be entitled to inspect those books in relation to legal proceedings the first applicant has reason to believe the second to sixth respondents will bring against the first applicant."

The companies in the Galli Developments group are property developers carrying on business in Melbourne and at the Gold Coast. The first respondent is the main trading property-development company.

The first applicant is a former director of the first four respondents, having been removed by resolution at meetings of members held on 12 January 2004, but he remains a director of the fifth and sixth respondents. He brings his application under s.1303 of the Corporations Act, and relies on s.198F(2)(a) (or alternatively 198F(2)(c)) and s.198F(4) in seeking an order against the first respondent, and no longer seeks orders against the other respondents. Those provisions are as follows:

"198F Right of access to company books

...

Right during 7 years after ceasing to be a director

(2) A person who has ceased to be a director of a company may inspect the books of the company (including its financial records) at all reasonable times for the purposes of a legal proceeding:

(a) to which the person is a party; or

(b) that the person proposes in good faith to bring; or

(c) that the person has reason to believe will be brought against them.

This right continues for 7 years after the person ceased to be a director of the company.

...

Company not to refuse access

(4) A company must allow a person to exercise their rights to inspect or take copies of the books under this section.

...

1303 Court may compel compliance

If any person in contravention of this Act refuses to permit the inspection of any book or to supply a copy of any book, the Court may by order compel an immediate inspection of the book or order the copy to be supplied."

The first respondent began a proceeding by claim against the applicants and a company called Watershed Properties Pty Ltd on 7 May 2004. The applicants have not been formally served with the claim, although they have notice of it. There being no suggestion that the first respondent will not continue with its claim, the inference may safely be drawn that the first applicant has reason to believe a legal proceeding will be brought against him.

The second applicant, a shareholder of each of the first four respondents, seeks an order in the following terms:

> "the second applicant and its solicitors and accountants have access to the books of the first to fourth respondents (inclusive) and is entitled to inspect those books"

The first applicant and his wife are the only directors and shareholders of the second applicant, which brings its application under s.247A(1) of the Corporations Act. That provision is as follows:

> "247A Order for inspection of books of company or registered managed investment scheme
>
> (1) On application by a member of a company or registered managed investment scheme, the Court may make an order:
>
> (a) authorising the applicant to inspect books of the company or scheme; or
>
> (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.
>
> The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose."

Beginning on 15 December 2003 there was correspondence between solicitors retained by members of the Galli Developments group and the first applicant and his solicitors.

In a letter dated 15 December 2003 to the first applicant from the solicitors then retained by the second respondent, it was asserted on behalf of the second respondent that the first applicant had breached, or may have breached, ss. 180, 181, 182, and 183 of the Corporations Act "and the common law relating to the duties of a director, in particular, the duty

not to divert corporate opportunities". At the heart of that grievance against the first applicant was the allegation of his active involvement in projects undertaken by a number of private companies unrelated to the Galli Developments group, of which unrelated companies he was a director and shareholder. That involvement was, it was asserted, in direct violation of a resolution of the second respondent and other Galli Developments group companies passed at a combined directors' meeting on 28 February 2001:

> "Any business arrangements that could be to the personal benefit of staff or directors must be approved by the Board of Directors. No private development is to be undertaken by working directors unless approved by the Board of Directors."

It was also asserted that the first applicant's conduct had resulted in the second respondent's suffering "significant loss and damage" and that the second respondent was considering its solicitors' advice that it could sue the first applicant for breach of director's duties, seek declarations of trust, and make an official complaint concerning the first applicant to the Australian Securities and Investments Commission. The first applicant was further advised that the second respondent reserved the right to apply for "a Mareva (or other form of) injunction" against the first applicant and his associated companies.

The first applicant responded to the second respondent's solicitors' letter in a letter dated 22 December 2003 under the second applicant's letterhead. He denied he was guilty of any breach of duty in having "private investments" and

"private projects" and asserted that other Galli Developments group directors and "the company secretary" had such investments. A letter dated 7 January 2004 in reply to the first applicant's letter from the second respondent's solicitors concluded with the advice that the second respondent reserved all its rights to institute proceedings against the first applicant and his interests "in the absence of an acceptable proposition for restitution".

The correspondence continued, and in it other questions were dealt with. Chief among them were: claims by the second applicant that it was entitled to repayment by the first respondent of money lent by way of alleged unsecured shareholder's loans ($300,530 and $361,000); a claim by the second applicant to an unpaid dividend of $247,000 from the first respondent; the value of the second applicant's shares in the respondents, which the respondents assert they are not obliged to purchase but are "interested" in purchasing to rid themselves of any further involvement with the first applicant; the possibility of resolution of the differences between the applicants and the respondents by mediation; off-setting claims for benefits wrongly diverted to Watershed Properties Pty Ltd and another company called Genesis 5 Property Developments Pty Ltd against any claims by the applicants; the removal of files which may have been the property of the respondents by the first applicant after his employment was terminated; and compensation for the alleged unfair dismissal of the first applicant.

In a letter dated 7 April 2004 from the applicants' solicitors to the respondents' solicitors, further progress towards a solution of mediation was declined, although perhaps not for all time because the withdrawal from the process was expressed to be "at this stage" because of the lack of equal access to information. The "information" sought was specified in paragraph (d) of the letter as follows:

> "(i) Financial statements (statement of financial position and statement of financial performance) for each of the six companies comprising the Galli Developments Group (Arundel Homes Pty Ltd, Firefast Pty Ltd, Waterfast Pty Ltd, Strathdale Mews Pty Ltd, Alto Developments and Construction Pty Ltd and Alto Construction (Qld) Pty Ltd) for the six months ended 31 December 2003.
>
> (ii) If financial statements as requested have not or will not be prepared:
>
> A. whatever other form of financial and management accounts have been prepared for the companies for the six months ended 31 December 2003;
>
> B. financial records or financial reports relating to the operations of the six companies comprising the Group in the six months ended 31 December 2003 including, asset registers, valuations (including directors' valuations), cashflows, debt ledgers, creditors' ledgers, bank account details and expense ledgers; and
>
> C. supporting documentation and vouchers from which the documents referred to in (b) hereof have been compiled, including contracts for sale or purchase of land, feasibility studies, finance proposals, plans, consultants' reports and other documents and records relating to the general activities of the Group including its property development activities;
>
> (iii) In respect of Firefast Pty Ltd:
>
> A. in respect of inventory land, full details of costs and works by project and stage as at 31 December 2003; and
>
> B. debts and loans in respect of each project.

(iv) In respect of Alto Developments and Constructions, a full listing of hire purchase assets and liabilities remaining as at 31 December 2003.

(v) Documents relating to the formation and conduct of joint ventures between L Galli Group (or its constituent companies) and Galli Developments Group (or its constituent companies) including financial records or financial reports relating to joint venture activities including documents relating to the distribution of profits from such joint ventures."

Responding to the applicants' solicitors' letters of 7 April 2004 in a letter dated 19 April 2004, the respondents' solicitors advised that the respondents refuse to permit the sought-after inspections by the applicants. Referring to the second applicant's stated purpose for seeking inspection to enable it to value its shares in the first four respondents, the respondents' solicitors asserted first that there was no point in such a valuation, there being "no legislative or contractual provision entitling Acacia to demand the valuation, much less require any other shareholder to buy at valuation". In any event, the solicitors continued, as they had pointed out none of the documents sought "are relevant to either of the two well-known and conventional methods of valuation of shares in proprietary companies": capitalization of maintainable earnings, or an assets-based assessment. Further, the solicitors asserted, no explanation of the basis of the valuation the second applicant's accountant was pursuing had been provided. Although the respondents were not obliged to purchase the second applicant's shares, they were interested in buying them because they wished "to rid themselves of any further involvement with [the first applicant]". An offer to purchase the shares for 2,850,000

was accordingly made in the letter. That figure was reached after arriving at $4,275,665 as the second applicant's "(notional) proportionate share of the net assets of the companies" adjusted downwards by one-third for four principal reasons: the holdings were of minority interests in proprietary companies in which the shares are very closely held; a "relatively trifling" dividend-payment history; the second applicant had paid nothing for the shares; and the circumstances of the first applicant's dismissal rendering the shares liable to cancellation.

The first respondent's claim against the first applicant begun on 7 May 2004 and is for compensation under s.1317H of the Corporations Act for breach of his statutory duties as a director and officer of the first respondent and for damages and/or equitable compensation for breach of his fiduciary duties as a director of the first respondent. The claims against the other two defendants are based on allegations of their involvement in the first applicant's breaches of duty.

Mr Stephen Russell, solicitor acting for the respondents, swore in an affidavit filed by leave at the hearing of these applications that the only other proceedings which he holds current instructions to institute if necessary are proceedings against the first applicant to recover possession of the documents, which, according to Mr Russell's instructions, are the property of the first respondent and which the first applicant removed from its premises when his employment came to an end. Mr Russell also holds instructions to investigate

the private dealings of the applicants which were the subjects of complaints in the correspondence to which I have referred.

According to Ms Gayle Johnson (exhibit 2), financial controller of the Galli Developments group, although allegations were made in the correspondence against the applicants on behalf of both first and second respondents, the second respondent does not propose to bring any proceedings against either of the applicants.

Mr Lorenzo Galli, chairman and cofounder of the Galli Developments group of companies and director of the sixth respondent, has had "principal carriage" of the dispute with the first applicant on behalf of the group, assisted by Ms Johnson. According to Mr Galli (exhibit 1), save for the matters identified by Mr Russell in his affidavit, none of the respondents intends to bring any proceedings against the applicants.

Ms Johnson has explained in exhibit 2 the Galli Developments group response to the request for information specified in paragraph (d) of the applicants' solicitors' letter dated 7 April 2004. She has, she says, provided to the first applicant's accountant management accounts for the six months to 31 December 2003 for the first and second respondents. No such documents exist for the other respondents. Profit and loss details for the third and fourth respondents have been provided to the first applicant's accountant. The first applicant had told her in the course of negotiations she had

with him after December 2003 concerning the termination of the association between the applicants and the respondents that he had copies of the financial statements for all companies in the Galli Developments group in which the applicants were interested for the year ended 30 June 2003.

The accounts and numerous other documents requested, particularly those in paragraph (d)(ii)C of the letter would require Ms Johnson's presence, causing her daily work to be interrupted significantly - "potentially" for weeks. The inspection of the documents referred to in paragraph (d)(iii)A is potentially a massive undertaking, involving hundreds of man-hours. Access to books of the first four respondents would require access to hundreds of thousands of such documents in Melbourne and at the Gold Coast in the hands of many employees, etc.

For the first applicant to succeed on his application, he must establish that the inspection he seeks is "for the purposes of a legal proceeding". On behalf of the first respondent it was pointed out that there is no affidavit from the first applicant, the only affidavits relied on by the first applicant being those of Mr Gareth Jenkins, his solicitor: "There has not been any attempt on behalf of the applicant to swear up the required purpose". It is, however, open to the first applicant to rely on the inference that whatever may have been his purpose in making his application when it was instituted on 21 April, he now seeks to make it for the purposes of the claim begun against him on 7 May.

It is said further on behalf of the first respondent that the width of the inspection sought - "oppressively wide" it was submitted - indicates that the purpose is other than one to invoke section 198F(2). I am not persuaded that that is now so in respect of the first applicant's application.

Another obstacle in the way of the first applicant's application was, it was said on behalf of the first respondent, the possible effect of permitting inspection of documents in respect of which the first respondent claims legal professional privilege. In the course of the hearing of the application, it became clear, however, that that difficulty could be satisfactorily overcome by an order appropriately formulated to preserve that immunity.

Section 1303 of the Corporations Act reposes in the court a discretion to refuse relief of the kind sought by the first applicant, and on behalf of the first respondent it was argued that that discretion should be exercised against him for a number of reasons: first, because many of the documents are confidential and commercially important; secondly, there will be documents in respect of which legal professional privilege may properly be claimed; thirdly and fourthly, the width of the inspection sought; fifthly, lack of utility; and sixthly, the availability of disclosure in the ordinary course of the proceeding instituted 7 May under the Uniform Civil Procedure Rules 1999.

The first two of those considerations are not decisive in my

view since any order could, if necessary, be framed to overcome any difficulty of the kind referred to. The width of the inspection does not present a difficulty because any inspection permitted on the first applicant's application should be restricted to documents directly relevant to the issues in the proceeding. The fifth argument was that the orders sought would lack utility: either the documents that might be relevant which exist have been given to the first applicant or they are privileged. I am not persuaded that that is so. The first applicant has some documents but not all relevant to the issues in the proceeding.

The first respondent's sixth point appears to be the one of greatest weight. Why should inspection not wait until the close of pleadings in the proceeding and then, when the issues are defined, take place in the process of disclosure in the ordinary way, thus avoiding unnecessary time and effort in making disclosure on matters not in issue? At the hearing Mr Keane gave to my mind a convincing answer to that proposition: that s.198F(2) provides an extra right to former directors that would be abrogated if the proposition were accepted as correct.

The applicant should, then, in my view, have an order permitting him to inspect such of the first respondent's books as are directly relevant to the issues in the first respondent's proceeding, subject to inclusion in the order of proper safeguards with respect to the matters I have mentioned.

The first four respondents resisted the second applicant's application on a number of grounds: that the second applicant had failed to show that it is acting in good faith and that the inspection is to be made for a proper purpose, and other, discretionary, grounds similar to those advanced against the first applicant on his application.

The stated purpose of the inspection is to enable a valuation of the second applicant's shares to be made. It was conceded on behalf of the first four respondents that that can be a proper purpose, and I see no reason to doubt that that is indeed the main purpose. It is said on behalf of the first four respondents that the width of the demand for inspection suggests other than a genuine desire to obtain relevant information. While there is some weight in that proposition, I am not persuaded of it, but I am persuaded that the width of the demand, taken with the absence of a convincing explanation for that width, is a proper discretionary ground for refusing the application. If the order were to be made, the disruption to the business of the first four respondents would be oppressive, in my view. That would not of itself be a reason for refusing the second applicant's application, if that disruption were shown to be necessary and so unavoidable. But in this case no such necessity has been shown.

It was asserted on behalf of the second applicant by its solicitors in a letter dated 16 April 2004 to the respondents' solicitors that the value of the second applicant's shares "will depend upon a number of factors including the trading

history of the group and its future prospects as well as the value of its assets and liabilities", but beyond that, no clear explanation as to why such comprehensive disruption to the business of the first four respondents was justified was given. Where, as in this case, the second applicant had relevant financial statements, management accounts, and profit and loss statements it is necessary, I think, for the court to have before it a compelling reason, beyond the brief explanation in the letter of 16 April, justifying such comprehensive and disruptive access to the respondent companies' books.

While it is possible to overcome the difficulty presented by the width of the first applicant's application by confining the order to the inspection of directly relevant documents, on what is before me it is not possible to adopt a similar course on the second applicant's application to overcome the difficulty presented by the width of its application. In the absence of any elaboration of the method of valuation of the second applicant's shares it proposes to adopt and so explaining the necessity for the exhaustive inspection it seeks, it is not possible to assess what aspects of its application may be regarded as justified and what may not. As Byrne J. observed in Re D.G. Brims and Sons Pty Ltd (1995) 16 ACSR 559 at p.589, "[t]he usual methods of valuing a shareholding in a closely held corporation are an asset-based assessment, capitalisation of maintainable earnings, dividends return valuation, and a combination of those approaches". The second applicant has, I think, enough information at its

disposal to value its shareholding for the purpose of negotiating, if it sees fit, with the respondents for the sale of its shares.

Further, it is not without significance in this context that the first application has a hardly out-of-date and substantial knowledge of the affairs of the first four respondents including their plans for future projects arising from his recently-terminated employment.

The second applicant's application will be dismissed.

...

HIS HONOUR: I can summarize my conclusion on costs by saying I accept Mr Kelly's submissions on costs. So the order should be what he sought on behalf of his clients.

...

HIS HONOUR: Yes, Mr Schulte.

MR SCHULTE: Your Honour, might I hand up the terms of the order?

HIS HONOUR: You have agreed on them, have you?

MR SCHULTE: We have agreed on them.

HIS HONOUR: I see. Well, there is nothing really more to be said, is there?

MR SCHULTE: No, your Honour.

HIS HONOUR: I make the order as in the initialled draft.

MR SCHULTE: Thank you, your Honour.
