



Transcript of Proceedings

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State Reporting Bureau
Date: 22 June, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HOLMES J

No S6217 of 1999

PHILLIP BIRD AND BEVERLEY BIRD

Plaintiff

and

HTW VALUERS (BRISBANE) PTY LTD
(ACN 052 004 672)

First Defendant

and

HTW VALUERS (AUSTRALIA) PTY LTD
(ACN 060 480 962)
T/A HTW VALUERS QUEENSLAND

Second Defendant

BRISBANE

..DATE 11/06/2004

JUDGMENT

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HER HONOUR: The applicant plaintiffs have proceeded against the defendants in respect of an alleged failure to provide a timely valuation of property, as a result of which it is said that an opportunity to purchase it, and make a profit on its resale, was lost.

The two plaintiffs sued personally. They now seek to join a family company as plaintiff. That would require reinstatement of the company, which in itself does not present any difficulty, and they also seek leave to deliver a consequent amended Statement of Claim. The cause of action arises in contract and in tort. The contractual claims arose in June and July 1993 and the negligence claim in August 1993. The writ was issued on the 30th of June 1999. It was not served until the 22nd of June 2000. The Statement of Claim was filed and served on the 24th of August 2000.

The Statement of Claim pleaded that in May 1993 the plaintiffs entered negotiations to buy the property; that, as a result of those negotiations, they sought to finance its purchase with Barclays Bank, which required a written valuation by a registered valuer before it would provide finance and which indicated that a valuation from the defendants would be a suitable basis for a lending decision. It is then pleaded that the written valuation was supposed to be provided within ten to fourteen days, and was not. The defence, as originally filed and served, denied that time frame but said nothing as to the identity of the client for the valuation or the purchaser for the property.

The availability of finance for the purchase was, not surprisingly, of considerable interest. On the 3rd of April 2002, the defendant's solicitors wrote to St George Bank, which took over Barclays, asking for any documents in relation to the finance application. They were told that documents were held for seven years and then destroyed. That would have happened, then, in about June 2000, around the time the writ was served but before the Statement of Claim was served. A Third Party Notice, delivered on the 16th of May 2003, was equally unsuccessful.

In further and better particulars provided in March 2003, the plaintiffs indicated that they had lodged an application for finance with Barclays Bank, that they had not retained it and were unable to get a copy. It was said that the negotiations were partly oral and partly written, the written part being comprised of the application. The oral negotiations were said to involve conversations with a Mr Symoni, the Loans Manager for Barclays Bank and a Mr Ramsay, the State Manager.

However, the contemporary documents suggest that, contrary to the pleadings, the proposed purchasers may not have been the plaintiffs but Maanjo Proprietary Limited. There is a letter of the 19th of April 1993 to the vendors, which makes a formal offer in which the purchaser is identified as Maanjo. There is a file note of the 14th of April 1993 by Mr Colville, a solicitor for the plaintiffs which sets out some details of the purchase and contains these words, "Maanjo Proprietary Limited is purchaser".

The valuation report on its cover sheet shows that it was prepared on behalf of Maanjo. A letter of the 29th of July 1993 to the vendor's solicitors refers to a sale to Maanjo. A letter of the 30th of July 1993 from the vendor's solicitors is headed "Sale to Maanjo"; it declines to enter a contract subject to finance. A letter of the 14th of August 1993 from the male plaintiff to the Council is written on Maanjo letterhead. It refers to the frustration of negotiations which Maanjo had conducted to buy the property and asks instead that Maanjo might lease it from the Council, which had bought it. That last letter came on disclosure by the defendants. The other documents were disclosed to the defendants, as was a search of Maanjo, which apparently was made on the 30th of June 1999. It is suggested by the defendants that that was obtained in connection with the commencement of proceedings.

In June of 2003 an amended defence was filed and served. It pleads that any negotiation by the plaintiffs was undertaken on behalf of Maanjo. On the 7th of October 2003 a reply was filed and served which maintains that the plaintiffs were acting on their own behalf, that they had not decided whether they or the company would be the purchaser, and that if they did use the company they would "assume all rights, duties, liabilities and obligations arising out of the negotiations and the intention to purchase".

There matters seemed to have rested until the 23rd of April this year, when the plaintiffs advised that they proposed this

application. It was filed in May. A further amended Statement of Claim was drawn, putting as an alternative that the company entered the negotiations for purchase. Mrs Bird, one of the two plaintiffs, has put in an affidavit saying that Maanjo was a shelf company that she and her husband had acquired. They were its only directors and shareholders. It was an option for them to buy the property in the name of Maanjo. They had no further use for the company once the purchase fell through and they allowed it to become de-registered.

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In a recently filed affidavit, filed on the 9th of June 2004, she deposes that she had told the fourth defendant, who was the individual valuer, that she and her husband might use the company, that there had been no final decision. She says in that affidavit that she and her husband did not distinguish between the company and its assets and losses and themselves as individuals and their financial affairs. In that affidavit she says there were no documents exchanged with Barclays and that it had never been said that there was a formal application to them, which is a difficult assertion to reconcile with the particulars.

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It seems that neither Mr Symoni nor Mr Ramsay were actually spoken to by either side until 2003 when the defendant's solicitors approached them; and there have been more recent approaches coming up to the hearing of this application. Mr Trim, the defendant's solicitor, says that he has spoken to Mr Symoni who could recall discussing the matter with Mrs Bird

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but not specific details. It was his practise to make notes but he would have left them with the bank. To Mr Jiear, the plaintiff's solicitors, he appears to have communicated that he had, in some respects, a detailed recollection but those respects are not identified. Mr Ramsay has been interviewed. He has indicated he has a very poor recollection of the discussions. It is likely that there would have been documents made at the time that could have assisted his recollection.

Rule 69(2) permits joinder, after the limitation period, where the proceeding is started in the name of the wrong person. The parties accept that the essential question is whether it is just to do so; that that in turn involves consideration of delay and explanation for it, and prejudice to the defendants.

Here there is simply no rational explanation for the failure to make Maanjo Proprietary Limited a plaintiff in the action in the first instance. Nothing is offered except that the plaintiffs did not distinguish between themselves and the company and did not appreciate the need for it to be a party until the amended defence was served.

Certainly the male plaintiff at least understood enough about the company and its status as an entity to write describing it as the prospective purchaser of the property and seeking a lease of it on its behalf. The plaintiffs presumably had the material, which was disclosed by them, which pointed to Maanjo

as the purchaser. One assumes that they provided it to their
solicitors at some stage; at least by the time disclosure was
undertaken in 2001, one would have expected them to have
provided the solicitor's letters of July 1993. Although I
doubt that there is a sinister explanation for the delay in
seeking to join Maanjo, the fact is, it is not just
unexplained; it is entirely baffling.

This is not one of those cases where the plaintiff seeks to
join a defendant because they did not get round to
investigating who the real tortfeasor was. The relevant
information here was always in the hands of the plaintiffs.

There is also a delay of close on a year after the amended
defence was delivered and the identity of the proposed
purchaser was put in issue, and that, again, is entirely
unexplained.

The fact is that it is now 11 years since the events in
question took place, and that is significant in terms of
prejudice. The defendants were already put at a disadvantage
by the plaintiffs' very late commencement of proceedings just
before the end of the limitation period and by the delay in
service of the writ by another year, so that recovery of
relevant documents was almost certainly impossible by then.

Apart from the obvious prejudice of losing the limitation
defence if the joinder is permitted, they point to specific
prejudice in the fading of the recollections of the officers
of Barclays Bank, which is exacerbated by the loss of
documentation to refresh memories. And that question of the
availability of finance, I should say, does seem to me an
important issue for the purposes of the trial.

The plaintiffs have pointed to nothing positive which would
warrant an exercise of a discretion in their favour. The
defendants have identified particular prejudice to them. I
accept the defendants' contention that a fair trial is not now
possible of any action as brought against them by Maanjo
Proprietary Limited, and I dismiss the application for
joinder.

It follows that the application for reinstatement is without
any purpose and is also dismissed as is the application to
amend.

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HER HONOUR: I will order that the plaintiffs pay the
defendants' costs of the application of and incidental to the
application including reserved costs to be assessed on a
standard basis.
