

SUPREME COURT OF QUEENSLAND

CITATION: *Access Group International Ltd v Dreamfield Pty Ltd & Ors; Dreamfield Pty Ltd v Access Group International Ltd* [2017] QSC 298

PARTIES: **ACCESS GROUP INTERNATIONAL LIMITED**
ACN 616 478 267
(applicant)
v
DREAMFIELD PTY LTD ACN 615 065 248
(first respondent)
NINE PLUS SOME PTY LTD ACN 092 348 573 AS TRUSTEE FOR TFZ TRUST
(second respondent)
NINE PLUS SOME PTY LTD ACN 092 348 573 AS TRUSTEE FOR THE NOSIVAD FAMILY TRUST
(third respondent)
NINE PLUS SOME PTY LTD ACN 092 348 573 AS TRUSTEE FOR LARKHILL TRUST
(fourth respondent)
CAD ASSETS PTY LTD ACN 618 645 711
(fifth respondent)

FILE NO/S: No 10297 of 2017

PARTIES: **DREAMFIELD PTY LTD ACN 615 065 248**
(applicant)
v
ACCESS GROUP INTERNATIONAL LIMITED ACN 616 478 267
(respondent)

FILE NO/S: No 10902 of 2017

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 8 December 2017

DELIVERED AT: Brisbane

HEARING DATE: Application on the papers

JUDGE: Davis J

ORDER: **That Access Group International Limited ACN 616 478 267 pay 75 per cent of the costs of Dreamfield Pty Ltd ACN 615 065 248 of both applications, assessed on the standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE:

COSTS FOLLOW EVENT – PARTIAL SUCCESS – where two cross-applications were heard together – where those two applications were part of the same dispute – where the second application was the corollary of the relief sought in the first application – where the respondent in the first application successfully resisted the application but failed to succeed on the second application – whether costs should lie with the applicant in the unsuccessful first application

Uniform Civil Procedure Rules 1999, ch 13 pt 6

Access Group International Ltd v Dreamfield Pty Ltd & Ors; Dreamfield Pty Ltd v Access Group International Ltd [2017] QSC 276

COUNSEL: **No 10297 of 2017**
M Trim for the applicant
C Johnstone for the respondent

No 10902 of 2017
C Johnstone for the applicant
M Trim for the respondent

SOLICITORS: **No 10297 of 2017**
McCullough Robertson for the applicant
Russells for the respondent

No 10902 of 2017
Russells for the applicant
McCullough Robertson for the respondent

- [1] On 23 November 2017, I delivered judgment on an application brought by Access Group International Limited against Dreamfield Pty Ltd (Access’ application) and on a cross-application made by Dreamfield against Access (Dreamfield’s application).¹
- [2] I gave the parties leave to deliver submissions on costs, and each have done so. The issue of costs is to be decided without oral hearing.²
- [3] Access’ application had two parts. Firstly, Access sought declarations as to the proper construction of the Subscription Agreement which was one of two relevant contracts.³ Access submitted that if their contention as to the construction of the Subscription Agreement was correct then money said by Dreamfield to be owing to it by Access was

¹ *Access Group International Limited v Dreamfield Pty Ltd & Ors; Dreamfield Pty Ltd v Access Group International Ltd [2017] QSC 276.*

² *Uniform Civil Procedure Rules 1999 ch 13 pt 6.*

³ Originating Application in 10297/17, filed 5 October 2017 at [1]–[2].

not owing. Secondly, Access sought specific performance of provisions in the Shareholders Agreement (which was the other relevant contract) which obliged Dreamfield to provide certain information to its directors.⁴ That was significant because Access is represented on the Board of Dreamfield.

- [4] Dreamfield's application sought judgment for the money it said was owing under the Subscription Agreement. While Dreamfield's application was strictly a separate proceeding, it was properly described by Mr Trim for Access as '[e]ssentially the corollary of the relief sought by paragraphs 1 and 2 of [Access'] application'.⁵
- [5] On Access' application, I refused to make the declarations as I found that Access' contentions as to the proper construction of the Subscription Agreement were incorrect. I also refused to make an order for specific performance of the relevant provisions in the Shareholders' Agreement as there is a mechanism within the Shareholders' Agreement which provides for expert resolution of such disputes. I stayed that part of the application pending compliance with that mechanism.
- [6] I dismissed Dreamfield's application as I found that a condition precedent to the debt arising had not been fulfilled.
- [7] In order to understand the parties' respective submissions on costs it is necessary to set out the declaratory relief sought in Access' application. The application stated:

“1. Declarations that, on a proper construction of the Subscription Agreement ... and Shareholders' Agreement ...:

- (a) the requirement to pay a 'Funding Notice' under clause 4.1 of the Subscription Agreement is dependent upon the existence of a compliant 'Annual Program' and does not exist without such a compliant 'Annual Program';
- (b) to be 'compliant', an 'Annual Program' must comply with the definition set out in clause 1.1 of the Shareholders' Agreement and must be both:

⁴ Originating Application in 10297/17, filed 5 October 2017 at [3].

⁵ Outline of submissions of Access on the two applications, filed 26 October 2017, 10927/17 CFI 13 at [11].

- (i) a business plan setting out proposed marketing plans, finance arrangements, capital expenditures and activities for carrying on the 'Business' during that 'Financial Year'; and
 - (ii) a budget setting out an estimate of the income to be received and the expenses to be incurred in carrying out that business plan; and that
 - (c) the First Respondent presently does not have a compliant 'Annual Program' which has been approved pursuant to clauses 5 and 10.5 of the Shareholders' Agreement;
2. Declarations that, on a proper construction of the Subscription Agreement and the Shareholders' Agreement:
- (a) the 'Funding Notice' dated 31 August 2017 purportedly requiring a 'Progress Payment' is not valid as there was no compliant 'Annual Program' when the 'Funding Notice' was purportedly issued;
 - (b) there is no obligation upon the Applicant to pay any monies as a consequence of the 'Funding Notice' dated 31 August 2017; and,
 - (c) the First Respondent cannot validly issue a valid 'Funding Notice', or validly call for a 'Progress Payment', until a compliant 'Annual Program' is produced and approved pursuant to clauses 5 and 10.5 of the Shareholders' Agreement;”

[8] Mr Johnstone, in written submissions for Dreamfield, submits that Dreamfield has been completely successful on Access' application. While accepting defeat on Dreamfield's application, Mr Johnstone submits that application did not consume court time and, in any event, was won by Access on grounds not previously raised. Mr Johnstone seeks the costs of both applications.

[9] Mr Trim on the other hand, in written submissions for Access, submits that Access has been partially successful on its application. He points to the declaration sought in para

2(b) of Access' application. He submits that while that relief was not granted, the dismissal of Dreamfield's application is vindication of Access' position that no money was payable by Access to Dreamfield, consistently with paragraph 2(b) of Access' application.

- [10] Paragraph 2 of Access' application, on its face, sought a series of declarations clearly dependent upon the success of the application for relief sought in paragraph 1. As already observed, paragraph 1 of Access' application sought declarations as to the proper construction of the contract. If those declarations were made, then it would flow as a matter of course that the funding notice that had been purportedly issued under the Subscription Agreement was invalid and that there would be no obligation to pay money to Dreamfield.
- [11] Mr Trim points to paragraphs in his written submissions relied upon at the hearing of the principal application. These do make it clear that the relief in paragraph 2(b) of Access' application was sought to be supported, not only upon Access' proposed construction of the Subscription Agreement, but alternatively on the basis that the Funds Notice did not comply with the Annual Program in the Subscription Agreement. The non-compliance alleged was the non-compliance with a condition precedent to the issuing of a Funds Notice within the Subscription Agreement. I found the condition precedent had not been fulfilled. However, I dealt with that issue by dismissing Dreamfield's application. I did not make the declarations sought in paragraph 2 of Access' application as it was not necessary to do so.
- [12] The main dispute between the parties was in relation to the construction of the Subscription Agreement and how the Subscription Agreement and the Shareholders' Agreement operated both individually and together. Access' application was not just about whether a particular sum of money was due and payable under the Funds Notices which had been issued. Had Access' contended construction been accepted, that would have impacted significantly upon the entire arrangement between the parties as governed by the two contracts.

[13] Not only did Access fail on the construction issue, but it also failed to obtain orders for specific performance of the covenants concerning the provision of information to the directors of Dreamfield.

[14] Access did, though, have some success in that it resisted judgment for the sums claimed by Dreamfield.

[15] Mr Trim submits:

Neither party has had success in their Applications. The question of whether information needs to be provided pursuant to the Shareholders' Agreement has been stayed pending an expert determination. Although its Application for declarations in proceeding 10297 of 2017 has been dismissed, Access submits that it has still successfully resisted the calls for payments on funding notices which the Court has found were not valid.⁶

[16] While "[n]either party has had success in their Applications", Dreamfield had significant success in Access' application. It successfully resisted Access' application and, importantly, its proposed construction of the Subscription Agreement has prevailed. Access did successfully resist judgment for the sums claimed by Dreamfield, notwithstanding its failure on the main point regarding the construction of the Subscription Agreement.

[17] I had contemplated ordering Access to pay Dreamfield's costs of Access' application, and ordering Dreamfield to pay Access' costs of Dreamfield's application. However, that could lead to complicated and expensive arguments as to the apportionment of costs between the two applications. The two applications are different proceedings in form, but in substance they are both part of the same dispute.

[18] Dreamfield was successful in Access' application and its submissions have been substantially accepted.

[19] In order to reflect those facts but also recognise Access' partial success, I order that Access pay Dreamfield 75 per cent of its costs of both applications, assessed on the standard basis.

⁶ Access' submission on costs at [2].