[2002] QSC 155

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BYRNE J

No 2896 of 2000

SUNDALE ENTERPRISES PTY LTD	Plaintiff
and	
BRUCE JAMES CHRISTIE	First Defendant
and	
MARGARET TERESA CHRISTIE	Second Defendant

2951 of 2000

BRUCE JAMES CHRISTIE AND MARGARET TERESA CHRISTIE	Applicants
and	
SUNDALE ENTERPRISES PTY LTD ACN 062 804 737	Respondent

BRISBANE

..DATE 31/05/2002

ORDER

HIS HONOUR: The plaintiff and the defendants were once in partnership. The partnership has been dissolved and wound up. The assets have been realised and the creditors paid. Approximately $46,000 remains to be distributed. The former partners, however, cannot agree on the destination of the fund. The plaintiff claims to be entitled to all the money. The defendants say it should first be used to pay the costs of the dissolution litigation.

A Judge has ordered that the costs incurred on both sides be assessed on an indemnity basis and paid out of the assets of the former partnership. The defendants say that the fund constitutes the residue of those assets and should be used to defray the costs.

Under the partnership agreement, the plaintiff on the one hand and the defendants on the other were obliged to contribute equally to capital. As things happened, however, the plaintiff made contributions to be treated as being about $70,000 more than the value of the defendants' capital contributions. By reason of this additional contribution to the assets, the plaintiff claims an entitlement to the whole of the fund.

Section 47 of the Partnership Act 1891 does not in terms dictate the outcome of the contest. The regime it prescribes assumes that the former partners would have provided, and the partnership would have retained as its assets, the capital contributions required under the

agreement. This is implicit in Ross v. White [1894] 3 Ch 326. When Ross v. White was decided, s.44 of the Partnership Act 1890 (UK) stipulated for the distribution of the partnership assets on dissolution in terms soon after adopted in Queensland by s.47 of our Partnership Act.

In Ross v. White the former partners had initially made equal capital contributions. During the subsistence of the partnership venture, however, one partner obtained a greater return of part of his contribution than the other. This meant that at dissolution the capital contributions of the partners were unequal, contrary to the basis upon which the partnership was agreed to be conducted.

A unanimous English Court of Appeal, affirming Kekewich J., rejected the contention that the costs of the dissolution proceedings ought to be paid out of the surplus assets before the capital contributions were rendered equal again by an adjustment allowing the partner who had contributed more to take the difference from the assets.

Lord Herschell LC said (at pp 335-336):

> "the Defendant ... claims that he shall take his costs out of the fund in Court without making good to the assets of the partnership that which he has taken out in excess of the sum taken out by the Plaintiff. I think he cannot do so. Before he can claim to take his costs out of the assets, he would have to make good to the assets the sum which is found due from him."

Lord Justice Lindley said (at p 336):

> "Before he can take his costs out of the assets, he must make good what is due to the assets; otherwise obvious injustice will be done."

Lord Justice Davey was of the same opinion, saying (at p 337):

ORDER

> "The defendant cannot take his costs until in fact or in account he has made good his obligations to the assets of the partnership.
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> ...
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> The right form of order ... would have been, 'To pay the plaintiff's costs out of the fund in Court; to let the Defendant deduct his costs out of the £600 which he owed to the assets; pay the balance into Court, and then divide between them the balance that then remained in Court."

In the present case, the inequality of capital contributions at dissolution does not result from one partner's taking more capital out of initially equal capital contributions. Rather, it arises because one has contributed more than the other in circumstances where both had promised to contribute equally.

The facts of this case are therefore different from those considered in Ross v. White; but not materially so. True it is that Kekewich J. mentioned that he was not considering a question that might arise if the claim was by the partnership against any one partner to make him bring in capital which he had agreed to, but had not, contributed. The Judge added (at p 332):

> "Whether that would be a different case or not, I do not pause to inquire, because it is not the case with which I have to deal."

But it is the inequality of the capital contributions in circumstances where the arrangements between the partners required such equality that supplies the reason for the rule Ross v. White propounds. So it is immaterial that here the contributions are unequal for the reason that the defendants did not advance the money needed to match the

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value of the plaintiff's contributions despite being obliged under the partnership agreement to do so. See also Lindley & Banks, On Partnership, 17th edition, at p 753.

The defendants ought therefore to provide the deficiency. If they paid the aggregate of that sum to add to the approximately $46,000 fund presently retained, that amount could then be applied to pay the costs. The balance, if any, could then be distributed in accordance with section 47.

As it happens, however, there appears to be no prospect that the $70,000-odd, which the defendants ought to have, but have not, contributed by way of capital, can be paid. I will entertain submissions as to the forms of order that ought to be made in these circumstances.

...

I declare that the plaintiff is entitled in priority to the defendants to the whole of the sum of $46,784.58 held in the trust account of Carvosso & Winship to the credit of the plaintiff.

ORDER