SUPREME COURT OF QUEENSLAND

CITATION:	*Smith & Ors v FAI Leasing Finance P/L (in liq) & Anor* [2003] QCA 205
PARTIES:	**LAWRENCE KEITH SMITH** (first plaintiff/first appellant) **ANN LESLEY SMITH** (second plaintiff/second appellant) **SHIPCAVE PTY LTD (IN LIQUIDATION)** ACN 056 208 578 (third plaintiff/third appellant) **v** **FAI LEASING FINANCE PTY LTD (IN LIQUIDATION)** ACN 002 027 214 (first defendant/first respondent) **FAI GENERAL INSURANCE CO LTD (IN LIQUIDATION)** ACN 000 327 855 (second defendant/second respondent)
FILE NO/S:	Appeal No 9163 of 2002 SC No 68 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	23 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2003
JUDGES:	de Jersey CJ, Davies JA and Wilson J Judgment of the Court
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	CONTRACTS – PARTICULAR PARTIES – VENDOR AND PURCHASER – DISCLOSURE OF MATERIAL FACTS – HOW FAR CAVEAT EMPTOR APPLIES – where appellants purchased half interest in resort from second respondent and entered into joint venture agreement with second respondent – where respondents in possession or control of unfavourable valuation report – where respondents failed to disclose valuation report to appellants – whether respondents in a fiduciary relationship with appellants – whether respondents bound to have disclosed valuation report to appellants *Boardman v Phipps* [1967] 2 AC 46, considered

Hill v Rose [1990] VR 129, considered
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, considered
United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1, distinguished

COUNSEL: D F Jackson QC, with P O Land, for the appellants
H B Fraser QC, with D P O'Brien, for the respondents

SOLICITORS: Clewett Corser & Drummond for the appellants
W T Purcell Chadwick & Skelly for the respondents

[1] **THE COURT:** The appellants appeal against a learned Judge's dismissal of their action against the respondents. His Honour went on to enter judgment against the appellants on the first respondent's counter claim, in the sum of approximately $4 million plus interest. The only ground of appeal which has been pursued challenges the Judge's refusal to find that the respondents owed fiduciary duties to the appellants.

[2] The appellants' claim arose out of negotiations with the respondents in May and June 1992 culminating in agreements of 11 July 1992 by which the appellants purchased a one half interest in the Dolphin Heads Resort near Mackay, from the second respondent, for $2.5 million, and entered into a joint venture agreement with the second respondent. There were other ancillary agreements. During the negotiations, the respondents had in their possession or control, but did not disclose to the appellants, a valuation report which, if reliable, may have suggested that $2.5 million was substantially too much to pay for that interest. In fact the respondents had two reports, one of 22 August 1988 by HTW Valuers prospectively valuing the resort at $6.05 million, and another, also from HTW, dated 25 July 1991, putting the value at $3.99 million. The appellants' essential contention is that, standing in a fiduciary relationship towards the appellants, the respondents should have disclosed that material.

[3] The negotiations between the parties envisaged their possibly entering into a partnership arrangement in relation to the resort. The learned Judge acknowledged the point made in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 12, that "a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled"; but at the relevant time the parties had not yet embarked upon a joint venture, and having regard to a raft of considerations to which he later referred his Honour went on to characterize their relationship as that of parties involved in commercial negotiation, prospective lender and borrower. His Honour should not be thought to have excluded the existence of a fiduciary relationship simply because the parties had not, by the relevant time, entered upon a joint venture.

[4] Mr D F Jackson QC who appeared for the appellant, referred to *Hill v Rose* [1990] VR 129, where Tadgell J helpfully collected relevant authorities. He mentioned *United Dominions*, then continued:

> "Gibbs CJ, at p 5, referred to an analogy between the position of company promoters and that of persons who invite others to join in a partnership, and referred to the well known statement by Lord Chelmsford LC in *Directors of Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99, at p 113 that: "It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of *persons who have no other information on the subject than that which they choose to convey*, that the utmost candour and honesty ought to characterize their published statements."
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> Lord Chelmsford's speech continued by citing a *dictum* of Kindersley V-C in *New Brunswick and Canada Railway Co v Muggeridge* (1860) 1 Dr & Sm 363, at p 381 that: "…those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and *inviting them to take shares on the faith of the representations therein contained*, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."
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> Both *Kisch's Case* and *Muggeridge's Case* concerned company prospectuses issued to the public but the reference to the former by Gibbs CJ indicates that the principle for which they stand, requiring an attitude of utmost good faith, is not confined to the case of a company prospectus or to the case of an invitation or inducement made to the public." (emphasis added)

[5] The insurmountable difficulty facing the appellants in seeking to rely on those passages is his Honour's findings, supported by evidence, that the appellants were not, in Lord Chelmsford's terms, "persons who [had] no other information on the subject than that which [FAI chose] to convey"; and were not, in the words of Kindersley VC, invited into the venture "on the faith of…representations" made by FAI.

[6] The Judge correctly addressed the requirements which must be met before a fiduciary relationship will be held to have arisen, as discussed, for example, in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-7 and *Boardman v Phipps* [1967] 2 AC 46, 127. But he held that the circumstances relied on by the appellants did not, in the particular factual circumstances of this case, give rise to the requisite relationship of trust and confidence.

[7] The Judge summarized the circumstances on which the appellants relied as follows:

> "• FAI paid too much for the resort;
> • The resort had always run at a loss since opening in May 1990;

- The loss was in excess of $500,000.00 as at June 1992;
- FAI had listed the resort for sale at $6,000,000.00 with the Professionals at Mudgeeraba;
- FAI had caused valuations to be carried out of the Smiths' properties;
- FAI formed the view that the Smiths were likely to be good operators;
- It should be inferred that once FAI formed this view and were aware of the Smiths' equity in their properties they became anxious for the Smiths to become equal joint venturers with them in the resort;
- It should be inferred that FAI formed the view that the Smiths had sufficient equity to take a half share in the resort at its true market value;
- FAI through Mr Klevansky introduced the Smiths to the idea of a joint venture;
- FAI did nothing to verify that the Smiths had the capacity to pay the interest that would become due. They did not take the steps that one would expect a financier to take had the first defendant been a normal commercial lender;
- FAI was delighted that the Smiths became equal joint venturers in the resort especially at the price paid."

[8] On the other hand, as the Judge emphasized, the appellants were given the information they sought, including accurate and comprehensive profit and loss figures, and were properly informed on behalf of the respondents that the resort had been trading at a substantial loss; the appellants were advised throughout by an independent solicitor and independent accountant, and could have commissioned their own valuation of the property; the appellants indicated to the respondents that they had extensive experience in managing resorts and businesses and had derived a value for the resort based on their own assessment of its trading figures; and the appellants were effectively placed on notice they should form their independent judgment, when the respondents expressly refused to warrant the truth of any information provided to the appellants in the course of the negotiations.

[9] His Honour was entitled to reach the ultimate factual conclusion that circumstances warranting the existence of a fiduciary relationship did not arise. He applied the correct test, and the appellants' contention (in their written material) that he misapplied the *United Dominions Corporation* case simply cannot be sustained: as said above, the Judge is not to be taken to have said that because the parties had not yet embarked upon a joint venture, then ipso facto they could not have been in a fiduciary relationship. While that circumstance was, and rightly, an aspect of some significance, the Judge assessed the question whether such a relationship arose by addressing the circumstances more broadly, as the above analysis reveals.

[10] Through their written material, the appellants effectively sought to undermine the factual basis for his Honour's ultimate conclusion, but there is no basis for a contention that his intermediate findings of fact were not reasonably open.

[11] The ground of appeal which has been pursued cannot be sustained. The appeal should be dismissed, with costs to be assessed.