SUPREME COURT OF QUEENSLAND

CITATION:	*Dromahair P/L v Garms & Anor* [2003] QCA 250
PARTIES:	**DROMAHAIR PTY LTD** ACN 003 052 864 (plaintiff/respondent/appellant) v **ANN MARY GARMS** and **HARRY WILLIAM GARMS** (defendants/applicants/respondents) **PHILLIPS FOX** (third party)
FILE NO/S:	Appeal No 5572 of 2002 SC No 4935 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	11 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2003
JUDGES:	Davies JA and Fryberg and Atkinson JJ Separate reasons for judgment of each member of the Court, Davies JA and Atkinson J agreeing as to the orders made, Fryberg J dissenting in part
ORDER:	**1. Appeal allowed** **2. Set aside orders made below**
CATCHWORDS:	PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - PLEADING - where part of appellant's pleadings were struck out by learned primary judge - where obvious defects in pleadings on both sides which needed to be rectified - whether orders made by learned primary judge should be set aside
COUNSEL:	A E Lyons for the appellant E J P F Lennon QC for the respondents
SOLICITORS:	Ellison Moschella & Co for the appellant Rostron Carlyle Solicitors for the respondents

DAVIES JA: This is an appeal from an order made by a judge in the Trial Division of the Supreme Court on 23 May 2002. The order was that paragraph 17(b) of the appellant's reply in answer be struck out and that the respondent, the present appellant, pay the costs of and incidental to the application.

The question sought to be argued here, and that which was decided by the learned primary judge, namely whether clause 13.2(b) of the lease constitutes a penalty, is in my opinion hypothetical in the sense that it does not arise unless and until the question of the reconciliation of clause 14.6 of the lease and clause 13.2 has been resolved.

It may be that in the way in which it is resolved, that question will never need to be decided. Accordingly, and notwithstanding obvious defects in the pleadings on both sides which plainly need to be rectified, it seems to me that the proper course is to allow the appeal and set aside the orders made below. I should add that nothing in what I say should be construed as any final opinion on the question whether clause 13.2 as pleaded constitutes a penalty.

The order I would make, therefore, is allow the appeal and set aside the orders made by the learned primary judge.

FRYBERG J: Save in respect of the issue of costs, I agree with the Presiding Judge. As regards the question of costs, we were informed by counsel who appeared below that the question embodied in the application heard below was on his

submission one which ought to have been resolved at the hearing in relation to the matters the subject of the pleading which had already been directed.

That submission had been made a week or so before the hearing below at a directions hearing. Had that submission not been opposed by the present respondent, the matter would not have proceeded to a hearing below and this appeal would not have become necessary. That would ordinarily in my view entitle the appellant to its costs both here and below. However, as the Presiding Judge has observed, there are defects in the pleadings on both sides.

The defects in the appellant's pleading are such that I would not think it right to order that the appellant have its costs in any event. The right order for costs in my view is that the appellant's costs both below and of appeal should be its costs in the action.

ATKINSON J: I agree with the reasons of Justice Davies and with the order he proposes.

I only wish to say in addition that the progress of this matter has not been in accordance with Rule 5 of the Uniform Civil Procedure Rules, and the order made by the Senior Judge Administrator on the 7th of September 2001 should be complied with without further delay.