SUPREME COURT OF QUEENSLAND

CITATION:	*Ringwell Pty Ltd & Ors v Kumali Holdings Pty Ltd* [2004] QCA 48
PARTIES:	**RINGWELL PTY LTD** ACN 056 068 949 **SHEMARIAH PTY LTD** ACN 010 773 387 **SELAE PTY LTD** ACN 011 076 047 **FYLPANE PTY LTD** ACN 010 735 305 (appellants/applicants) **v** **KUMALI HOLDINGS P TY LTD** ACN 067 525 357 (respondent/respondent)
FILE NO/S:	Appeal No 7487 of 2003 DC No 82 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	26 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2004
JUDGES:	McMurdo P, Davies JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where application for leave to appeal from District Court – where issue as to construction of deed – where view that decision in Court below wrong – whether decision below likely to continue to affect relationship between parties – whether applicants able to demonstrate sufficient reason to warrant grant of leave *District Court of Queensland Act* 1967 (Qld), s 118
COUNSEL:	G A Thompson SC for the applicants S Kelly *(sol)* for the respondent
SOLICITORS:	Suthers Taylor for the applicants

Boulton Cleary & Kern for the respondent

THE PRESIDENT: On 18 March 1999 the applicants filed a writ of summons in the Supreme Court of Townsville seeking orders including damages from the respondent for breach of an agreement contained in the deed on 25 March 1997. The parties to this application are the parties to the deed. They were owners of adjoining land who signed the deed in settling their planning and development disputes. Clause 5(a) of the deed was to the following effect:

> "[The respondent] will not object to any further application to [Thuringawa City Council] by [the applicant] in respect to [the land] and warrants that the principals of [the respondent] will not object and indemnifies [the applicant] in respect to any such action on the part of those principals."

It is common ground that there was a subsequent objection by the respondent in a letter to the Thuringawa City Council on 16 March 1999 but that the applicant suffered no significant damage because the Council did not act on the objection.

On 13 September 2001 the applicants' claim was remitted to the Magistrates Court at Townsville. In September 2002 the respondents applied for a number of orders including judgment against the applicants on the basis that they had no arguable case against the respondents.

On 3 February 2003 the Townsville Magistrates Court rejected the applicants' contention that, although the pleaded damages

of $13,482 could not be established, the respondent had breached the terms of the deed and the applicants were entitled to receive nominal damages, and gave judgment for the respondent against the applicants with an order for costs.

That decision seems to have been plainly wrong. Ultimately whether there was in fact a breach of contract resulting in nominal damages was a question of fact to be made at trial in the Magistrates Court.

On 3 March 2003 the applicants filed a notice of appeal in the District Court at Townsville appealing against that decision. The learned District Court judge dismissed the appeal and ordered that the applicants pay the respondent's cost of and incidental to the appeal. The applicants now seek leave to appeal from that decision contending that the learned primary judge erred in his interpretation of clause 5(a) of the deed.

The applicants submitted to the primary judge and contend here that clause 5(a) included, first, a promise by the respondent not to object and that if that promise were breached damages would flow from that breach. This arises from the words in clause 5(a) that the respondent will not object to any further application to the Council by the respondent in respect to the land. They submit the second limb with respect to clause 5(a) is, in addition, a promise by the respondent that its principals will not object and will indemnify the applicants in respect of the objection made by the respondent's principals.

The learned District Court judge rejected that argument and determined that the words at the beginning of clause 5(a) that the respondent "will not object", are otiose or at least coloured by the words which follow it so that the meaning of the clause is solely promising an indemnity for its principals' objection; no loss arises under the indemnity of the clause until a loss has arisen, and because no loss has arisen there is no current action. This construction of the clause does seem flawed and the contention made by the applicants during the appeal to the District Court appears to be plainly right.

But that is not sufficient for the applicants to be successful in applying for leave to appeal. An applicant for leave to appeal in circumstances such as this must demonstrate a reason warranting a grant of leave, for example some important point of law or principle of wider application than to this immediate case, or at least some real point in the granting of leave. Leave will not be granted just because there appears to be an arguable error in fact or law so as to raise doubt about the correctness of the judgment below if there is not otherwise some reason justifying or point in granting leave.

The applicants contend that leave should be granted because the proper construction of clause 5(a) could be a matter of ongoing importance to the parties as it continues to govern their respective obligations in relation to further change of

use applications which may be made in respect of the property to which the clause refers.

The respondent has placed information before this Court which throws doubt on that contention in that one of the two parcels of land referred to in clause 5(a) has been transferred to a company not a party to these proceedings; the second parcel of land is no longer owned solely by the applicant companies; and both pieces of land are currently fully developed and unlikely to be subject to a material change of use application in the foreseeable future.

The applicants emphasise that leases of premises on the land referred to in clause 5(a) will shortly expire and contend there is a real possibility that change of use applications may arise and that the applicants' rights under the deed may be affected by the interpretation given to clause 5(a) by the learned primary judge. The applicants also point out that rights under the deed may be assigned.

The applicants have not, however, demonstrated any likelihood of there being live issues between the parties which will require an interpretation of clause 5(a) in the future. Even accepting the applicants' contention that their interpretation of clause 5(a) is correct, any damages that might arise would, on the material before this Court at this stage, appear to be nominal under the first limb of clause 5(a) and seem unlikely to arise under the second limb.

In the circumstances the applicants have not demonstrated that this is a proper case in which to grant leave to appeal. I would refuse the application for leave to appeal. As to the appropriate costs order, because the applicants should have been successful in the past and yet have had costs orders made against them, I would be inclined to make no costs order in respect of this application.

DAVIES JA: The learned District Court judge found against the applicants on the basis of his construction of clause 5(a) of the deed which the President has just set out. The learned District Court judge thought that the phrase, "Kumali will not object to any further application to COT by Ringwell..." was surplusage and that the clause provided only for a warranty by Kumali, supported by an indemnity, that its principals would not object to the applications referred to in that clause.

I do not agree with his Honour's construction. In my opinion the clause contains a promise by Kumali that it will not object to any further applications to the council in respect of those lots and a warranty by Kumali that its principals will not so object and an indemnity by Kumali in respect of such action by its principals. I also think that breaches of either the promise by Kumali not to object or the warranty that its principals would not object would have entitled Kumali to damages on proof of damage during the period in which those clauses operated, as well as in the second of those cases, entitling Ringwell to be indemnified by Kumali.

The magistrate had concluded that although Kumali had objected to a relevant application by Ringwell its objection had no relevant bearing on the result of that application. He arrived at that conclusion on the basis of an affidavit by Robert Arthur Henwood sworn 24 September 2002. Mr Henwood was director of planning services for Thuringowa Shire Council.

He swore that he was opposed to the application objected to and recommended against its approval. His opposition was not influenced by Kumali's objection. In those circumstances the magistrate concluded that the objection had not caused the applicant any loss, but that was not a reason in my opinion for dismissing the claim because the applicant would still have been entitled to nominal damage on proof of breach.

So as the President has indicated already the applicant has unfortunately lost both in the Magistrates Court and the District Court when it ought to have won. However, the difficulty which I have is in seeing that these errors could now have any meaningful consequences to the applicants. The principal reason for that it seems to me is the difficulty facing the applicant as to the proper construction of clause 5 so far as its term is concerned.

It seems unlikely to me that clause 5 was intended to have an indefinite operation and I understood Mr Thompson for the applicant to concede the correctness of that. It is more likely, in my view, that it was intended to relate only to

applications which were within the reasonable contemplation of the parties at the time they executed the deed.

However, it is impossible to resolve the question of the length of the term of that agreement without some evidence of the background facts known to the parties when they entered into this deed. These facts were not, it seems, the subject of evidence either in the Magistrates Court or the District Court. They could not now be litigated on this application or appeal.

Unless the contract has the somewhat unusual construction which the applicants would like to put on it, there can be no utility in a grant of leave other than to reverse errors made in the Magistrates Court and in the District Court.
Mr Thompson referred us to a case of *Crawford Fitting v Sydney Valve*, a decision of the New South Wales Court of Appeal (1988) 14 NSWLR 438.

That was a case involving a contract for supply of goods and a contract which was, on its face, to supply over an unlimited period. In the end Justice McHugh expressed the view that there was a presumption in the contract of that kind ordinarily that the agreement is terminable upon reasonable notice by one side to the other and he referred before he reached that conclusion to a statement by Lord Selborne in *Llanelly Railway and Dock Company v London and North Western Railway Co* to the effect that,

> "an agreement *de futuro* extending over a tract of time which, on the face of the instrument, is indefinite and unlimited must (in general) throw upon anyone alleging that it is not perpetual, the burden of proving that allegation...".

In my opinion presumptions of this kind are solutions of last resort. The first resort in a case of this kind where the meaning of the clause is uncertain is to look at the context in which the contract was entered into, the background facts or as Mr Thompson put it, the matrix of facts in which the contract was made.

It is impossible to do that now and for that reason it seems to me it is impossible to do any further justice to this case on an application to leave other than to refuse the application but not to order costs against the applicant.

WHITE J: Even though I am inclined to the view that both the Magistrate and the learned District Court Judge erred in their different approaches to this matter, there is no apparent utility in giving leave to appeal for the reasons which have just been given by Justice Davies and I would agree with the orders proposed by the President.

THE PRESIDENT: Those are the orders of the Court. Adjourn the Court, thank you.