SUPREME COURT OF QUEENSLAND

CITATION:	*Atlantis Properties P/L v Cameron* [2005] QCA 297
PARTIES:	**ATLANTIS PROPERTIES PTY LTD** ACN 086 305 259 (plaintiff/appellant) v **DAVID ALAN STUART CAMERON** (defendant/respondent)
FILE NO/S:	Appeal No 2900 of 2005 DC No 3150 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2005
JUDGES:	de Jersey CJ, Jerrard and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellant to pay the respondent's costs of, and incidental to, the appeal to be assessed on the standard basis**
CATCHWORDS:	TORTS - NEGLIGENCE - ESSENTIALS OF ACTION FOR NEGLIGENCE - STANDARD OF CARE - PARTICULAR PERSONS AND SITUATIONS - OTHER CASES - where appellant was the manager of an apartment building - where the terms of the appellant's employment were contained in a service agreement between the appellant and the body corporate - where one of the terms of the service agreement provided for the appointment of a registered valuer to determine the 'fair market remuneration' of the appellant - where the respondent, a registered valuer, was appointed by the parties to the service agreement to undertake this valuation - where appellant brought an action for damages against the respondent alleging that the respondent had been negligent in the choice and application of the valuation methodology that had been used to value the appellant's remuneration - where the approach taken by the respondent was contrasted at trial with the approach taken by an expert called on behalf of the appellant - where this expert was not a

registered valuer - whether the appellant could point to any evidence that a registered valuer with the other qualifications required by the service agreement would have carried out the valuation any differently from the respondent - whether the evidence given by the appellant's witness could be taken to cast any doubt on the propriety of the valuation methodology employed by the respondent

Rogers v Whitaker (1992) 175 CLR 479, cited

COUNSEL: P W Hackett for appellant
P J Roney for respondent

SOLICITORS: Walters & Co for appellant
Macfie Curlewis Spiro for respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **JERRARD JA:** In this appeal I have read the reasons for judgment and orders proposed by Keane JA, and respectfully agree with those.

[3] **KEANE JA:** The appellant was the manager under a service and maintenance agreement ("the service agreement") with the body corporate of a building known as the Royal Albert Hotel. The respondent, a registered valuer, was appointed by the parties to the service agreement to determine "the fair market remuneration" of the appellant as manager on the occasion of a market adjustment at 30 June 2001. The respondent determined the appellant's "fair market remuneration" at $87,000 per annum. The appellant brought an action for damages for negligence against the respondent contending, in substance, that the remuneration determined by the respondent was less, by approximately $18,000 per annum, than it would have been had the respondent carried out his determination with due care and skill.

[4] The appellant's principal contention at trial was that the respondent had been negligent in determining the "fair market remuneration" of the appellant because the respondent had used a valuation methodology different to that employed by Mr Linkhorn, a witness called at trial by the appellant. Mr Linkhorn's approach was to analyse the duties to be performed by the manager and to cost those duties. He then cross-checked the result so obtained by comparing it with remuneration payable to the managers of other apartment buildings.

[5] The learned trial judge was not satisfied that the respondent had discharged his appointment without due skill and care. The learned trial judge found that the methodology employed by the respondent, which was a procedure similar to that used to value management agreements for apartment buildings and involved a comparison between the appellant's remuneration and the remuneration received by managers of other apartment buildings, was "entirely appropriate in the circumstances to what was contemplated as the review for the manager's services". Accordingly, his Honour dismissed the appellant's action.

[6] The appellant contends in this Court that the learned trial judge erred in accepting that the methodology employed by the respondent was consistent with due care and skill on his part ("the methodology issue") and that, in any event, the respondent

erred in applying that methodology ("the application issue"). Before addressing these arguments directly, it is necessary to set out the terms of the service agreement relevant to the task performed by the respondent.

[7] By clause 4.2 of Appendix One to the service agreement it was provided that:

> "The Fair Market Remuneration at the relevant Market Adjustment Date shall be such sum as:-
>
> …
>
> 4.2.3 determined by a Registered Valuer …"

[8] By clause 1.1 of Appendix One to the service agreement:

(a) the term "Registered Valuer" was defined to mean an individual having certain prescribed qualifications including "current … registration to practice as a valuer" and "at least five (5) years experience in the valuation of management agreements in South East Queensland";

(b) the term "Fair Market Remuneration" was defined to mean "the remuneration that would be reasonably expected to be paid at the relevant Market Adjustment Date for the provision of the Manager's duties as specified in Appendix 2".

The methodology issue

[9] At trial, the appellant led no evidence from any registered valuer, much less one qualified in accordance with the requirements of the service agreement. Whether or not Mr Linkhorn was qualified to give evidence as an expert in relation to the remuneration of managers of apartment buildings, as the learned trial judge concluded he was, it is clear that he was not qualified to carry out the task required by the respondent under the management agreement. Thus, importantly, the appellant's case did not include evidence that any registered valuer qualified to carry out the task which the service agreement contemplated would not have adopted the methodology adopted by the respondent or would have arrived at a conclusion different from that reached by the respondent. In a case such as the present, which is concerned with the processes of evaluation and the expert judgments of a registered valuer, that deficit alone is serious. Indeed, as the standard of reasonable care and skill to be expected of the respondent is usually to be deduced from evidence as to what the ordinary skilled person professing to have the special skills of the respondent would have done,[1] it would usually be fatal. There is nothing in the present case which is apt to rescue the appellant from that result.

[10] Mr Linkhorn, as the learned trial judge observed, conceded that there was no single, or universally accepted methodology in relation to such valuations. This concession tends to undermine any reliance that might be placed on Mr Linkhorn's evidence and, by extension, the appellant's case as a whole. The appellant also sought to rely in its argument on the appeal on the evidence of Mr Wright, a business broker, who was called as a witness at the trial by the respondent. But Mr Wright's evidence confirmed that the methodology used by the respondent was employed by valuers engaged in the task of reviewing the remuneration of managers of apartment buildings. Mr Wright was not cross-examined at trial. His unchallenged evidence would seem to be destructive of the appellant's case.

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1 *Rogers v Whitaker* (1992) 175 CLR 479 at 483.

[11] Next, it is necessary to observe that Mr Cameron could not have applied the methodology used by Mr Linkhorn since it depended upon access to a database privately held by Mr Linkhorn and not otherwise available. The respondent did not have access to the database for the computer program developed by Mr Linkhorn which, it was accepted, was essential to the application of his methodology. Further in this regard, as the learned trial judge found, information critical to any application of the methodology used by Mr Linkhorn was not provided to the respondent by the appellant when the respondent was briefed by the appellant and the body corporate. Thus, the appellant's criticisms of the respondent were not only unsupported by evidence, they were artificial and unfair.

[12] Finally, in this catalogue of deficiencies in the appellant's case, the learned trial judge accurately described Mr Linkhorn's approach as involving a "time and motion study applying a dollar value per hour … to duties which were said to be a necessary part of the performance of responsibilities". That was not the task contemplated by the terms of the service agreement relating to the respondent's appointment. The learned primary judge regarded the evidence of Mr Linkhorn as doing no more than demonstrating a method whereby a person who was not a valuer might have approached the problem. Mr Linkhorn's methodology was primarily concerned with computation. It was quite alien to the discipline of market valuation the application of which the service agreement required. Even if Mr Linkhorn's methodology was appropriate, the inability to discern how Mr Linkhorn ascribed particular dollar values to various activities makes it difficult to treat the result of such a process as being suitably reliable as, indeed, the learned trial judge observed. Further in this regard, the appellant's criticisms of the respondent's approach are not able to accommodate the express requirements of the service agreement that what is to be determined is a valuation put on the appellant's rights by the "market" and the deployment of "experience in the valuation of management agreements in South-East Queensland".

[13] In the upshot, and in my respectful opinion inevitably, the learned primary judge rejected the allegation of negligence on the part of the respondent.

[14] As the respondent contends, the appellant's attempt now to rely upon the evidence of Mr Wright is misconceived. Mr Wright's report was admitted without his being called to give evidence. He was not required for cross-examination by the appellant. At trial, the appellant's counsel submitted that Mr Wright's evidence ought to be discounted because he had not examined the building or given a report about the building. The appellant now submits that the learned trial judge erred in failing to give sufficient weight to the evidence of Mr Wright. That submission is hardly open to the appellant given its conduct of the trial but, in any event, the significance of Mr Wright's evidence was that it contradicted the appellant's contention that Mr Linkhorn's approach was the only appropriate method to determine fair market remuneration.

[15] Further, Mr Wright's report supported the respondent's position that the mere fact that a certain number of hours are spent on particular tasks by a manager in the context of his operating a letting and managing business does not mean that the time costing of these hours should be automatically reflected in a manager's remuneration. This is because it was part of the management agreement that the appellant acquired rights under a letting agreement with the body corporate and lot holders in the building and, accordingly, obtained the opportunity to derive

significant amounts of income from operating the letting business and providing other services to owners, tenants and their guests. Both the respondent and Mr Wright gave evidence that, as part of the exercise of assessing the fair market remuneration to be paid to a manager, the market recognizes the importance of maintaining a high standard of presentation and service which adds to the attractiveness of the property to prospective tenants and usually results in higher occupancy rates. This, in turn, leads to higher commission and service fees being payable to the manager. It follows, so it was said, that when the fair market remuneration is struck for a manager, the parties should take into account the opportunity of the manager to generate additional income from effort expended as manager. Mr Wright's evidence, therefore, demonstrates why a time and motion study of the manager's activities was not an appropriate basis on which to calculate his level of remuneration. The appellant is unable to point to any evidence that a person with the qualifications required by the service agreement would not have approached the valuation of the manager's remuneration in the same way as the respondent. It was the appellant who bore the onus of adducing such evidence.

[16] The appellant's challenge to the valuation methodology used by the respondent must fail.

Application of the methodology

[17] The appellant now seeks to criticize the choice made by the respondent of certain other buildings for the purpose of comparison and the adjustments made by the respondent to reflect points of difference between those other buildings and the Royal Albert Hotel.

[18] It appears that at trial the appellant did not invite the learned trial judge to make any findings of negligence in relation to the respondent's choice of comparable buildings for the purpose of the exercise which he carried out or in relation to his evaluative judgments, as an expert valuer, about points of difference between those buildings and the subject. Certainly no such case was pleaded.

[19] The learned trial judge found that the respondent "was an experienced, extremely professional valuer who undertook this task assigned to him … with appropriate professionalism … I can find nothing in the approach which Mr Cameron adopted nor in the matters which he took into account which can be said to disclose negligence as particularised in this case". The appellant is unable to point to evidence from an appropriately qualified person which would justify this Court coming to a view different from that of the respondent on matters which involve the exercise of a valuer's expertise in making evaluative judgments, or in setting aside the findings of the learned primary judge.

[20] In any event, the respondent submits, rightly in my view, that the appellant's case was always doomed to fail because the appellant failed to adduce any evidence that a registered valuer eligible to carry out the task of determining fair market remuneration would have reached a conclusion different from that reached by the respondent in terms of these evaluative judgments and the respondent's ultimate conclusion as to fair market remuneration.

[21] For these reasons, in my respectful opinion, this aspect of the appellant's argument should also be rejected.

Conclusion and orders

[22] In my opinion, the appeal should be dismissed and the appellant should be ordered to pay the respondent's costs of, and incidental to, the appeal to be assessed on the standard basis.