

# SUPREME COURT OF QUEENSLAND

CITATION: *MGM Containers P/L v Wockner* [2006] QCA 502

PARTIES: **MGM CONTAINERS PTY LIMITED** ACN 002 776 294  
(plaintiff/respondent)  
v  
**GEOFFREY ANTHONY WOCKNER TRADING AS  
WOCKNER PARTNERS**  
(defendant/appellant)

FILE NO/S: Appeal No 9554 of 2006  
SC No 4649 of 2004

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 December 2006

DELIVERED AT: Brisbane

HEARING DATE: 20 November 2006

JUDGES: Williams and Keane JJA and Chesterman J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE –  
QUEENSLAND – PROCEDURE UNDER RULES OF  
COURT – PARTIES – THIRD PARTY AND SIMILAR  
PROCEEDINGS – respondent issued proceedings against  
appellant, its former solicitor, for damages for breach of  
contract and negligence arising out of respondent’s purchase  
of shopping centre – appellant sought leave to file and serve  
third party proceedings against additional advisors retained  
by respondent to advise it in the transaction – discretion –  
whether primary judge’s discretion miscarried in refusing  
leave to issue third party proceedings

*Just GI Pty Ltd v Pig Improvement Company Australia Pty  
Ltd* [2001] QCA 48; Appeal No 5723 of 2000, 27 February  
2001, followed  
*Phonesivorabouth v Tops Services Pty Ltd* (1992) 106 FLR  
471, cited

COUNSEL: M M Stewart SC for the appellant  
C Heyworth-Smith for the respondent

SOLICITORS: Sparke Helmore for the appellant  
TressCox for the respondent

- [1] **WILLIAMS JA:** I agree with the reasons for judgment of Chesterman J and with the order proposed by him.
- [2] **KEANE JA:** I agree with the reasons of Chesterman J and with the order proposed by his Honour.
- [3] **CHESTERMAN J:** On 17 May 1998 Mr Lim and Ms Thong retained Short Punch & Greatorix, solicitors ('SPG'), to act for them in the preparation of contracts to purchase the Bridge Point East shopping centre at Woody Point. A contract was duly executed by the purchasers on 9 June 1998. The purchase price was \$4,180,000. The contract was conditional upon the purchasers, on or before 16 July 1998, obtaining satisfactory finance to enable them to complete the purchase. They were unable to obtain such finance and the vendor refused to extend the date for obtaining it, but offered instead to execute another, unconditional contract of purchase, for the same price.
- [4] On 15 July 1998, the appellant, who practices as a solicitor, was orally retained by Mr Lim and Ms Thong to act in connection with the purchase of the shopping centre in place of SPG whose retainer was terminated.
- [5] On 22 July 1998 Mr Lim and Ms Thong executed a second contract which committed them unconditionally to complete the purchase. On or about 30 July 1998 the purchasers agreed with the vendor that the respondent company should be substituted as the purchaser, all other terms remaining unchanged. Mr Lim has at all relevant times been a director of the respondent. Ms Thong has been a director since 11 January 1999.
- [6] The substitution duly occurred and a third contract was executed on 11 August 1998 by which the respondent became the purchaser of the shopping centre. The purchase was completed on 21 August 1998.
- [7] Almost immediately the respondent experienced difficulties in recovering rent from a number of the tenants of the shopping centre and the income received from the property was below the level the vendor had indicated would be produced by the leases. On or about 15 August 2002 the respondent sold the shopping centre for a price of \$2,400,000 which it claims was its market value at the date of purchase, August 1998.
- [8] In May 2001 the respondent commenced an action against the vendors of the shopping centre but did not prosecute that action. Instead on 28 May 2004 it commenced this action against the appellant alleging negligence in the discharge of its retainer. In particular the statement of claim alleged:

'It was a term of the said retainer contract between the Plaintiff and the Defendant, that the Defendant would:

  - (a) exercise all due care, skill, diligence and competence whilst acting for the Plaintiff;

- (b) advise the Plaintiff on all matters relevant to the retainer contract ...
  - (c) protect those interests of the Plaintiff related to the terms of the retainer;
  - (d) carry out all relevant searches in relation to the purchase of the shopping centre.’
- [9] By para 5 it was further alleged that the same duties arose in tort. Para 8 pleaded:  
‘In breach of the retainer contract and/or negligently, the Defendant:
- (a) failed to exercise due care, skill, diligence and competence ...;
  - (b) failed to advise the Plaintiff that it should make enquiries as to the solvency or financial position of each of the tenants prior to completion of the contract;
  - (c) failed to advise the Plaintiff that it should make enquiries of the status of rental payments ...
  - (d) failed to ensure that the contract contained a provision which gave the Plaintiff the right to rescind or claim a reduced price if the tenants or the terms of the ... tenancies fell short of the standard required by the Plaintiff;
  - (e) failed to conduct searches and/or enquiries and/or perform due diligence in respect of the solvency or financial position of each of the tenants;
  - (f) failed to conduct searches ... in respect of the status of rental payments ...’.
- [10] A defence was delivered on 9 August 2004 and a reply on 8 September 2004. On 13 September 2005, some 16 months after the delivery of the statement of claim, the appellant sought particulars of it. In the meantime on 4 October 2004, 25 October 2004 and 1 July 2005 the respondent delivered lists of documents. The appellant made disclosure by a list of documents on 25 October 2004 and on 1 July 2005.
- [11] On 29 November 2005 the respondent delivered an amended statement of claim. This is a much more substantial document than the original statement of claim but the changes were designed to meet the point that the appellant had been retained by Mr Lim and Ms Thong, while the shopping centre was purchased by the respondent which suffered loss by reason of the purchase. The amendment alleged facts which allow the respondent to plead that the appellant came under a duty, contractual and tortious, to the respondent. It is not necessary to notice how that case is pleaded.
- [12] The appellant did not deliver an amended defence until 6 July 2006. A reply was delivered on 9 August 2006.
- [13] In the meantime between about 16 March 2006 and 31 May 2006, the solicitors for respondent and appellant corresponded about the need to add SPG as a second

defendant to the action, or as a third party should the respondent choose not to join that firm as defendant. On 31 May 2006 the respondent's solicitors informed the appellant's solicitors that SPG would not be joined as a defendant.

- [14] The basis on which it was said that they should be made a party was that they had been retained on similar, if not identical, terms as the appellant, to act for Mr Lim and Ms Thong with respect to the purchase of the shopping centre and they, too, had not advised their clients to investigate the sustainability of the rent payable under the shop leases.
- [15] On 7 September 2006 the respondent's solicitors sent to the appellant's solicitors a signed request for trial date. Those solicitors declined to sign the request and on 5 October 2006, the respondent filed an application for an order that the signature of the appellant on the request for trial date be dispensed with. On 10 October 2006 the appellant filed an application seeking the leave of the court to file and serve third party claims against SPG and Edmund So.
- [16] It is necessary to digress briefly to describe the intended claims against the third parties. Mr So is Mr Lim's son-in-law and has qualifications as an accountant. The proposed statement of claim by the appellant against SPG alleges that in May 1998 Mr Lim and Ms Thong retained those solicitors to act in respect of the purchase of the shopping centre and that:
- 'The contract of retainer ... had the following terms:
- (a) that [SPG] would exercise all due care, skill, diligence and competence whilst acting for [the purchasers];
  - (b) that [SPG] would advise [the purchasers] of all matters relevant to the retainer contract whilst acting for them;
  - (c) that [SPG] would protect those interests of [the purchasers] related to the terms of the retainer.'

It is then alleged that SPG owed the respondent a duty to take reasonable care in the discharge of the retainer to protect the purchaser's interests 'in respect of the purchase of the shopping centre.' Then it is alleged that in breach of that duty SPG failed to give adequate advice and failed to recommend that they investigate the capacity of the tenants to pay rent. The pleading follows closely the allegations made in the amended statement of claim by the respondent against the appellant.

- [17] The appellant claims contribution from SPG 'to the extent found by the court to be just and equitable because any loss or damage suffered by the plaintiff was caused or contributed to by the negligence of SPG.'
- [18] The pleading also alleges that in June or July 1998 Mr Lim and Ms Thong engaged Mr So 'to advise them regarding the financial aspects of the purchase ... including advising them regarding the soundness of any commercial decision to purchase the shopping centre and advising them regarding the sustainability of rental returns for the shopping centre.'
- [19] There follow allegations similar to those made against SPG that Mr So owed the purchasers a duty to act with 'all due care, skill, diligence and competence' and a

breach of duty in failing to recommend an investigation of the financial standing of the tenants and the sustainability of the rents. Again, a claim for contribution is made against Mr So.

- [20] The applications came before Philippides J sitting in applications on 20 October 2006. Her Honour dismissed the defendant's applications to join third parties and ordered that the defendant's signature on the request for trial date be dispensed with and that the action be placed on the call-over list. Her Honour said, having set out a description of the proceedings and the proposed claims against SPG and Mr So:

'There is, of course, a balancing exercise ... to be taken into account in that regard. There is considerable delay by the defendant in bringing the application to join the third parties. That delay has not been, in my view, satisfactorily explained. The defendant points to delay by the plaintiff, but while there has been some delay, the proceedings nevertheless have been on foot for some considerable time.

In addition, regard must be had to whether the issuing of the third party proceedings would unduly complicate the hearing of this action. There is, it can be said, likely, given the matters raised in the defence, to be some evidence as to Mr So's involvement, but it will of course not be of the extent and nature that will arise if third party proceedings are permitted. The same applies in relation to the issue of the joinder of the proposed first third party.

In my view, the joinder of those parties is likely to add considerably to the complexity of the issues to be determined at trial, and the length and cost of proceedings.

It is open to the defendant to bring separate proceedings against the proposed third parties. It is always a factor to be taken into account that duplication of proceedings is to be avoided, but in my view, the issues that arise in the proposed third party proceedings are of a distinct nature from those raised in the defence, and not likely to be central in the current proceedings.

The proceedings are presently ready for hearing save for this application, and it is not in the interests of justice that there be yet further delay until the present action can be finalised.

Accordingly, I do not consider that it is appropriate to grant the application, and I refuse to do so in the exercise of my discretion.'

- [21] The appellant has appealed against the orders and seeks instead an order from this Court that those orders be set aside and that it be given leave to file and serve a third party notice against SPG and Mr So. The appellant's case, which was argued most persuasively by Mr Stewart SC, was that the applications judge had based her judgment on three grounds, and was mistaken about each. The grounds were:
- (a) That there had been considerable delay by the appellant in applying for leave to join the third party.

- (b) That the joinder would add considerably to the complexity of the issues to be determined at trial and therefore to its length and cost.
  - (c) That the issues to be raised in the third party proceedings were distinct from those adumbrated in the proceedings between plaintiff and defendant so that the desirability of having all issues between all interested parties determined in the one proceeding was diminished.
- [22] It was said that the applications judge was mistaken about the appellant's delay in applying to join the third parties because the relevant period with respect to which delay was to be judged commenced on 29 November 2005 when the amended statement of claim was filed. Within about three months of that date the parties were corresponding about the joinder of SPG and Mr So, and the application for leave to join them was made in October 2006, less than 12 months after the delivery of the amended pleading. The unspoken premise for this submission is that the amended statement of claim substantially recast the respondent's case against the appellant and that it was therefore reasonable not to consider the question of joinder earlier.
- [23] The submission cannot be accepted. The respondent's claim against the appellant has not essentially changed. What was added by the amendments were the circumstances necessary for the argument that the appellant owed a duty to the respondent though it had been retained by Mr Lim and Ms Thong. The terms in which the retainer and the content of the tortious duty were pleaded have not changed. The allegations of breach of duty have been elaborated on in order to allege a case by which the breach of the duty owed to Mr Lim and Ms Thong became one owed to the respondent.
- [24] Importantly the basis on which the third parties might be made liable to contribute to any damages the appellant is found liable to pay the respondent has not changed. There is nothing in the amended statement of claim which did not appear in the original pleading which would raise, for the first time, the prospect of claiming contribution from the third parties, or one of them. The prospect that the appellant might be entitled to claim contribution arose when the statement of claim was delivered in May 2004. The appellant waited almost two and a half years before making the application and only then in response to the respondent's application to have the action set down for trial. To join the proposed third parties now will delay the trial of the respondent's action by many months, and perhaps a year.
- [25] Grounds (b) and (c) can be dealt with together. The appellant's point is that the allegations to be pleaded against the third party mirror those made by the respondent against it. Mr Stewart took the Court carefully through the pleadings to show that the issues he wishes to adumbrate against the third parties are the very issues which are to be litigated between respondent and appellant, and that very little would be added by way of complication, cost or length of trial. It is not necessary to rehearse the submissions in detail. The point is that the allegations between respondent and appellant as to the terms of the retainer and the manner in which the breach gave rise to the plaintiff's loss are replicated in the proposed pleadings against the third parties. Therefore, it is submitted, little will be added that will complicate or delay the trial, or that is distinct.

- [26] There is force in the appellant's submission but the point remains that if the third parties are joined the factual issues to be investigated at the trial will expand. In addition there is likely to be a real debate about whether Mr So owed any duty of care to the respondent, or Mr Lim for that matter. Their relationship may well have been familial rather than commercial and a duty of care may be difficult to make out. This aspect of the proposed proceeding is, I think, 'distinct' from the other aspects of the action. Even with the similarities between the respondent's complaints against the appellant, and its complaints against SPG, there is bound to be an expansion of the issues in dispute at the trial and the evidence relevant to them if the third parties are joined. There will be an increase in complexity, length of trial and, consequently, cost. I do not know that one can be too critical of the qualification that those increases will be 'considerable'. The adverb is more pejorative than descriptive.
- [27] The applications called into question two conflicting principles. The first is that there are good reasons why a third party should be joined in an action where a defendant has an arguable case for contribution or indemnity from the third party against a plaintiff's claim. Such a joinder ensures finality in litigation, avoids multiple proceedings with associated extra cost, and obviates the possibility that there might be different decisions given on the same issues if tried by different courts. The second principle is that a plaintiff should be allowed to prosecute its action and obtain judgment without being delayed or inconvenienced by the defendant's endeavours to offset its liability. See *Phonesivorabouth v Tops Services Pty Ltd* (1992) 106 FLR 471.
- [28] The applications judge was obliged to choose which of these competing principles to apply. Both are important but they pull in different directions. There was, I think, no 'right' answer to the applications which Philippides J had to decide. A decision in the circumstances of this case could have gone either way and each would have been justified by one of the principles I have mentioned. Her Honour was right to consider that the delay by the appellant in applying for leave to join the third parties was relevant, as was the added inconvenience and expense to which the respondent would be exposed should the joinder be allowed. Also relevant was the further delay to the trial of the respondent's action, should the joinder have been permitted. These factors tended to attract the operation of the second principle and had to be balanced against the factors which were relevant to attract the operation of the first principle. Neither set of factors can be said to have been predominant.
- [29] In the circumstances it is impossible to conclude that her Honour's discretion miscarried. It must be remembered:
- 'This is an appeal from the exercise of discretion on a matter of practice and procedure. It has been recognised at the highest level (*Adam P. Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177) that appellate courts exercise particular caution in reviewing such decisions. Generally, in addition to error of principle, the order appealed from must work a substantial injustice to one of the parties before an appellate court would interfere. (See also the remarks of Jordan CJ in *In the Will of F B Gilbert* (1946) 46 SR (NSW) 318 at 323). Notwithstanding such observations, as the High Court itself recognised, there is no absolute rule and each case must be considered in the light of its own particular circumstances.'

Per Williams JA (Davies JA and Mullins J agreeing) in *Just GI Pty Ltd v Pig Improvement Company Australia Pty Ltd* [2001] QCA 48 para 14.

- [30] The refusal of the appellant's application for joinder will not work injustice to it. Should it be found liable to the respondent it can prosecute its claims for contribution against SPG and Mr So. The issues relevant to those claims are likely to be clarified by the evidence given at the trial of the respondent's action. If Mr Lim should prove a reluctant witness in the appellant's claim for contribution his testimony at the respondent's trial can be tendered pursuant to s 92 of the *Evidence Act 1977* (Qld).
- [31] In my opinion the appeal should be dismissed with costs.