

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MCMURDO J

No 11698 of 2007

BAKER DEVELOPMENTS PTY LTD

Applicant

and

BAKER & STAFF PTY LTD & ANOR

Respondent

BRISBANE

..DATE 06/05/2008

ORDER

HIS HONOUR: These proceedings were commenced last year. The named plaintiff on the commencement of the proceeding was Mr Andrew Fielding as liquidator of Baker Developments Pty Ltd in liquidation. It is now recognised that that was a mistake and that they should have been commenced by the company itself. That mistake seems to have been remedied by the filing of an amended claim on 16 January 2008 in which Mr Fielding's name has been ruled out and the company's name appears as the plaintiff. The first of the applications brought today was by the defendant for the substitution of the company for Mr Fielding as plaintiff, but that has already occurred.

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The next application by the defendant is for security for costs. The plaintiff company is in liquidation and is insolvent. There is a judgment creditor of the plaintiff which is owed just over \$24,000. It is a company called Senero Buildings Pty Ltd. It seems that it also is in liquidation but ultimately there are others interested in its winding up who are distinct from the defendant and those interested in the defendant. The plaintiff company appears to have no cash and the proceedings, if they are to continue, would be conducted on a speculative basis.

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The claim made here is for a total of about \$444,000 as moneys owing by the defendant to the plaintiff. The pleaded case is that there were a large number of loans pursuant to which moneys were paid to or for the benefit of the defendant. The instances of such payments are effectively particularised. In

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other words, there would seem to be no mystery as to the transactions which are the subject of this case.

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The defendant complains that nothing is pleaded as to the agreement or agreements by which these loans were made. It seems to me to be likely that if the plaintiff is entitled to any of these sums it would not be so much through a loan agreement but rather on a restitutionary basis. That was acknowledged by counsel for the plaintiff who had not settled the present pleading. Were these proceedings to continue it would be appropriate for the plaintiff to amend, or further amend, its statement of claim. But I will not make an order in that respect or as to particulars because of what is likely to come from the order for security for costs which I am persuaded to make.

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The defendant seeks security in the sum of about \$64,000 on the straightforward basis that the plaintiff, if unsuccessful, will be unable to pay the defendant's costs. The plaintiff resists that application with a number of arguments. It argues that its impecuniosity is attributable to the defendant's conduct, that its claim has apparently good prospects and that an order for security would be oppressive because it would stifle the meritorious proceeding. It is said that the proceeding involves a matter of public importance by reference to that matter in Rule 671 of the Uniform Civil Procedure Rules.

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There are other circumstances of the case, however, that make it somewhat unusual. I mentioned the fact that the company has a creditor in the sum of about \$24,000. I have not yet mentioned the membership of the plaintiff company. In effect, it is the same as those who control the defendant. There are, undoubtedly, some differences on a more precise assessment but in effect, the members of the plaintiff who will, on the face of it, would stand to gain most from success in the present proceedings, control the defendant and they have made it clear that they do not wish these proceedings to continue.

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So in reality the present proceedings are brought to benefit that creditor with its claim for about \$24,000. It is a judgment creditor and I do not mean to suggest that its interest is trivial. It is a substantial debt which it is owed. Against that, however, it is a small amount which is its debt in comparison with the costs likely to be spent by each side if this litigation continues and is tried.

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It was suggested by counsel for the plaintiff that this is a simple case; that may or may not be so. The factual enquiry involved in a trial of this litigation could be relatively extensive and the defence of the case through to the completion of the trial would certainly involve expense of much more than \$50,000. The competing interests, as I see them, are therefore the interests of that creditor with its claim for \$24,000 and the defendant which, if successful, might be in a position where it spends well more than \$50,000

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in the defence of this case which it would be unable to
recover from this impecunious plaintiff.

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The matters raised by the plaintiff are each relevant and they
have been considered but they are discretionary questions.

Ultimately the interests of justice here favour the grant of
security for costs because if those interested in the recovery
of that \$24,000 do wish to further that recovery by the
prosecution of the present proceedings, they should provide
security as the price for that course.

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The order will be, therefore, that there will be security for
costs provided. But there is a question as to the amount.

The evidence in support of the \$64,000 is not entirely
persuasive but on the other hand that evidence is advanced in
relation to certain particular steps leading to a trial.

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Rather than quantify the security by reference to those steps
it is preferable for me to simply fix an amount which would
cover at least most of the expected costs of the defence of
these proceedings up to and including a trial. I think the
justice of the case would be served by fixing that at \$50,000.

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The likely result of such an order would be to put paid to the
prosecution of these proceedings. One can understand why the
liquidator was minded to oppose that course but on the other
hand I do not think that the liquidator in these circumstances
was bound to prosecute this action, at least without seeking
the advice of the Court, given the particular circumstances

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that it was being done to recover, in reality, only the sum of \$24,000.

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The order will be that within 14 days the plaintiff provide security for costs in a form satisfactory to the Registrar in the amount of \$50,000. The application for further particulars will be dismissed as will the defendant's application in relation to the name of the plaintiff.

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The plaintiff had filed an application returnable today which it did not argue because it was overtaken by the defendant's filing an amended defence. It is relevant now on the question of costs. The plaintiff's complaint was that the defendant had pleaded denials in a number of respects without proper explanation for those denials. It appears that the defendant had pleaded denials but, given what was said to be the basis for them, what should have been pleaded on what was then known to the defendant was a series of non-admissions. Apparently recognising that the defendant filed an amended pleading last Friday.

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The plaintiff therefore appears to have had some proper basis for a complaint about that. The plaintiff seeks its costs of that application. The defendant has resisted that application for costs. But it seems to me that the plaintiff has shown that it should have them as demonstrated by the response of the defendant in amending its pleading. It is to be hoped in the context of this unfortunate set of circumstances that valuable resources are not spent on questions of the

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assessment of costs of these applications. It seems to me that the likely costs from the plaintiff's application would be relatively small. Be that as it may, the defendant will be ordered to pay to the plaintiff its costs of the plaintiff's application filed 3 April 2008. On the application for security for costs the costs should follow the event and the plaintiff will be ordered to pay the defendant's costs of that application.

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HIS HONOUR: There was a further application made by the defendant purportedly pursuant to section 536 of the Corporations Act. It sought some order whereby the Court would conduct some enquiry into the plaintiff's conduct of this litigation. The basis for that seems to have been the circumstances mentioned already in relation to security for costs, that is to say that the present proceedings have been brought on the face of it only to recover \$24,000.

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There are suggestions of some breach of duty on the part of the liquidator in pursuing the proceedings for some improper purpose such as building up fees. Given the outcome of the application for security for costs there is no proper interest of the defendants which would be served by doing anything pursuant to section 536.

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It must be recorded, however, that on the present material it
far from appears that the liquidator has not faithfully
performed his duties in terms of that section.

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They will be the orders.

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