SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 6570 of 2007

RE: EAST COAST STEVEDORING PTY LTD

BRISBANE

..DATE 18/11/2008

ORDER

HER HONOUR: This proceeding was commenced by an originating application filed on 1 August 2007.

By that originating application, Carl James Shurte, as applicant, sought orders against East Coast Stevedoring Pty Ltd for inspection of company books and associated orders.

An amended originating application was filed on 24 September 2007. The proceedings were still between Mr Shurte and East Coast Stevedoring Pty Ltd.

In addition to the application for orders relating to access to company books, Mr Shurte sought leave pursuant to section 236 of the Corporations Act to bring proceedings on behalf of the company against Richard Glen Coles and Jon Jeffrey Overell "in respect to the allegations made in paragraphs 151, 152 and 155 to 158 (inclusive) of the affidavit of the applicant filed with the originating application."

The application went on to seek an additional order in relation to disclosure of company books, namely, an order for the filing and serving of an affidavit in relation to such books and records.

The matter came before the Court in its Applications jurisdiction today, 18 November. By that time, a second amended originating application had been prepared, which was filed by leave. The only alteration to the first amended

originating application was the deletion of an application that it be heard ex parte.

The materials were not served on Messrs Coles and Overell until last week. They were posted last Wednesday and received the following day. This was short of the five clear days required under rule 2.7 of Schedule 1A to the Uniform Civil Procedure Rules.

It became clear during submissions that the intention was to join Messrs Coles and Overell and also a company EC Stevedoring Pty Ltd as respondents to the application. That company commenced to trade shortly after East Coast Stevedoring Pty Ltd ceased to trade and, further, the directors of the new company were Messrs Coles and Overell.

Counsel acting for East Coast Stevedoring Pty Ltd and the proposed further respondents did not take any point about short service at the hearing. That is not to overlook the fact that the point had been taken in communications with the solicitors for the applicant.

Ultimately, I concluded that Messrs Coles, Overell and EC Stevedoring Pty Ltd should be joined as respondents.

Section 237 of the Corporations Act, subsection (2) provides:

> "(2) The Court must grant the application if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

(b) the applicant is acting in good faith; and

(c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied."

On the hearing before me, the contentious issues with respect to bringing proceedings against the company were clearly (b), (c) and (d).

The applicant's position was that because he had been denied access to the full records of the company and/or because they had been "drip fed", he was not then in a position to satisfy me that there is a serious question to be tried. If that is not made out, it is difficult to see how it could be in the best interests of the company that the applicant be granted leave.

What is the serious question sought to be tried? Reference was made in the amended originating application to paragraphs 151, 152 and 155 to 158 of the affidavit of Mr Shurte filed on 1 August 2007. Those paragraphs relate to an agreement between the company and another company called Summit Rural Australia Pty Ltd.

Mr Shurte deposed that he believed the terms of the written agreement were false and intended to deceive him. I cannot form any view as to the prospects of his making that out but, significantly, in an affidavit of his solicitor, Mr Kimble, filed on 29 October 2008, there is a draft claim and statement of claim which Mr Shurte would seek to prosecute if granted leave. That claim is for an inquiry as to damages for breach of confidence or, alternatively, an account of profits. It does not seem to be based on the material in the paragraphs of the affidavit to which I have referred.

Mr Shurte's counsel has complained about the way in which and the slow speed at which documents had been made available to his client. On Monday of this week (yesterday) the solicitor for the respondents sent an e-mail to the solicitors acting for Mr Shurte in these terms, "I refer to my e-mails of 14 June 2008 and 18 June 2008 in which I indicated that my client would provide its consent for your client to obtain, at his cost, copies of Westpac statements directly from the bank. My e-mails were sent to you in response to your suggestion that some Westpac statements had not been provided by my client. I advise you that my client is prepared to give your client a

general consent in writing to obtain any documents he may require from any third parties regarding East Coast Stevedoring Pty Ltd. Both directors are also prepared to provide statutory declarations confirming that they do not hold any further documentation or information on behalf of East Coast Stevedoring Pty Ltd. On this basis, I invite your client to withdraw his application in order to save the parties the cost of an attendance. My client will not consent to your client's application for leave to initiate proceedings. I look forward to hearing from you." That e-mail is the last communication in what has been an ongoing series of communications about access to documents.

The company East Coast Stevedoring Pty Ltd has explained past difficulties in providing documents, such as the inadequacies of a former bookkeeper, the ravages of a mouse infestation, and that Mr Shurte himself kept some of the documents. Despite that, it seems that a few more documents have trickled in in succeeding months.

Early on, Mr Shurte provided the documents he then had to accountants for them to undertake an investigation into whether there had been irregularities in the account keeping. The accountants reported that they had not been able to identify such irregularities on the materials then provided to them, but listed a number of further types of documents which they would require in order to undertake a further investigation.

It seems to me that the application cannot proceed today. I am loath to dismiss it, largely because I have not had the benefit of considered argument upon whether the consequence of my dismissing it today would be to preclude the applicant from making a further application of similar nature. I am going to adjourn the application to a date to be fixed.

The respondents have sought an order for the payment of their costs of and incidental to the hearing today, including all costs thrown away by the adjournment. In principle, I think they should have such an order. But, further, they ask that those costs be assessed on the indemnity basis and that is opposed by the applicant.

Indemnity costs are, of course, ordered only in exceptional cases. I think this is such an exceptional case. The applicant has had many months in which to get his house in order. I have acknowledged that there have been some difficulties in obtaining documents from the company, but it seems that the very basis of the applicant's proposed claim is different from that referred to in the originating application. I have found no reason for or excuse for the late service on the new respondents to the application.

I accept what counsel for the respondents has told the Court about the very great efforts to which he and his clients have gone in order to respond to the application today which was served on short notice. In all the circumstances, the costs should be assessed on the indemnity basis.

Therefore, the order I make are as follows:

(1) That Richard Glen Coles, Jon Jeffrey Overell and EC Stevedoring Pty Ltd be joined as respondents to the application.

(2) That the application be adjourned to a date to be fixed.

(3) That the applicant pay the respondents' costs of and incidental to the hearing today, including all costs thrown away by the adjournment on the indemnity basis.

Those are the orders.
