

# SUPREME COURT OF QUEENSLAND

CITATION: *LeMass v DeVere & Anor* [2010] QSC 2

PARTIES: **WILLIAM LeMASS as trustee of THE LeMASS LEGAL TRUST (plaintiff)**  
v  
**MICHAEL ROBERT DeVERE (first defendant)**  
and  
**DeVERE LEGAL PTY LTD trading as DeVERE LAWYERS QLD, BN20381992 (second defendant)**

FILE NO: 4005 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 12 January 2010

DELIVERED AT: Brisbane

HEARING DATE: 15 October 2009

JUDGE: Daubney J

ORDERS: **1. That by 29 January 2010, the defendants serve on the plaintiff a list of the documents in the possession or under the control of the defendants which are directly relevant to work in progress, fees billed and fees recovered and all other financial data in respect of each of the client matters current as at 2 July 2007 and referred to in exhibit WLL1 to the affidavit of the plaintiff filed on 9 October 2009;**

**2. The defendants pay the plaintiff's costs of and incidental to this application.**

CATCHWORDS: PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – GENERALLY – where plaintiff applied for further disclosure – where consequent upon the exercise of an option entered into between the plaintiff and the first defendant or nominee, the plaintiff and second defendant entered into a contract for the sale to the second defendant of the legal practice conducted

by the plaintiff – where the first and/or second defendants failed to provide accounting reconciliations as required by the terms of the contract – where the alleged breach of contract was an allegation in issue – where the plaintiff’s solicitors provided the plaintiff’s list of documents and called on the defendants to provide their list of documents – where the defendants provided a list of documents which the plaintiff contended was deficient – where the defendants sought to resist the application by arguing the application was misconceived fundamentally and the order sought in the application was too wide – whether the defendants should be required to provide a further list of documents

*Uniform Civil Procedure Rules 1999 (Qld)*

COUNSEL: A Morris QC with V G Brennan for the plaintiff/applicant  
A Lyons for the defendants/respondents

SOLICITORS: Carter Capner Lawyers for the plaintiff/applicant  
Devere Lawyers for the defendants/respondents

- [1] This is an application by the plaintiff for further disclosure.
- [2] On 2 July 2007, consequent upon the exercise of an option which had been entered into between the plaintiff and the first defendant or nominee, the plaintiff and the second defendant entered into a contract for the sale to the second defendant of the legal practice which had hitherto been conducted by the plaintiff. That contract was completed on 2 July 2007.
- [3] The parties have now fallen into dispute concerning monies which the plaintiff contends are due to be paid to the plaintiff by the second defendant (guaranteed by the first defendant) under the terms of the contract. In that regard, the amended statement of claim pleads the following:

“5. Pursuant to the contract of sale, the ~~First~~ Second Defendant did not acquire the debtors (which are an Excluded Asset under clause 1.1 of the standard conditions), but did acquire the work in progress (WIP), or and disbursements owing to LeMass Solicitors at 30 June 2007, ~~but agreed to collect those amounts on behalf of the Plaintiff and pay those monies to the Plaintiff as collected.~~

5A. The Second Defendant promised to pay monies to the Plaintiff on account of debtors, WIP and disbursement as follows:

- (a) By special condition 1.7 – disbursements on the Plaintiff’s computer system as at 30 June 2007 were to be collected by the Second Defendant and paid to the Plaintiff without deduction;
  - (b) Special condition 5 provided:
    - (i) For the determination of WIP by reference to WIP outstanding on the Plaintiff’s computer system as at 30 June 2007;
    - (ii) One third of professional fees for open Conveyancing files as at 30 June 2007 inclusive of accrued WIP together with the balance of WIP (net of employee entitlements to a share of the WIP (i.e Mark Richards) were to be paid by the Second Defendant to the Plaintiff when received by the Firm at the end of the month of receipt of the payment by the client to the Firm. The Buyer was to retain 10% of receipts as an administration fee.
    - (iii) WIP billed and received by the Firm was to be paid to the Plaintiff exclusive of GST.
  - (c) By clause 6, special provision was made for WIP on two matters with success fees.
  - (d) By clause 7, provision was made for write-on and write-off of WIP;
  - (e) By clause 8.2 – Debtors will be paid by the Second Defendant to the Plaintiff in monthly instalments being the whole of the amount of the respective Plaintiff’s Debtors which (sic) were billed and received by the Firm at the end of the month of receipt.
6. In order to account for receipts and payments as set out in paragraph 5 of this Statement of Claim the Plaintiff and the First Defendant provided in Clause 10.2 of the special conditions of the contract of sale:

*“The Seller will give to the Buyer a reconciliation at the end of each month showing updated Debtors WIP and disbursements for the old firm reconciled with payments together with all necessary accounting information to allow calculation and taxation records.”*

7. The Plaintiff says that the references in clause 10.2 to “Buyer” and “Seller” are a typographical error and have been mistakenly swapped, as to read the clause otherwise would be a nonsense.”

[4] The amended statement of claim then pleads that:

- (a) In breach of the contract of sale, the first and/or second defendants have failed to provide the requisite accounting reconciliations, that failure having rendered the plaintiff incapable of completing its end of year accounts and annual tax returns;
  - (b) The failure to comply with clause 10.2 of the special conditions amounts to a breach of an obligation to account, and the plaintiff is entitled to payment of such amounts as are found payable on an account being taken.
- [5] By its prayer for relief in the amended statement of claim, the plaintiff therefore seeks, inter alia, specific performance of the contract of sale made on 2 July 2007 and, furthermore in the alternative, an order for an account.
- [6] The defendants have not filed a defence to the amended statement of claim. By reference to the defence which was originally filed, however, it is appropriate to proceed on the basis that the allegations made in the amended statement of claim are in issue. The question whether the second defendant has or has not breached special condition 10.2 of the contract is, therefore, an allegation which is in issue, and the defendants are under an obligation to disclose each document in its possession or under its control which is directly relevant to that issue.<sup>1</sup>
- [7] Under cover of a letter dated 18 August 2009, the plaintiff's solicitors provided the plaintiff's list of documents, and called on the defendants to provide their list of documents, including documents relevant to damages (being a request for the purposes of r 221).
- [8] On 1 September 2009, the defendants requested an extension of time within which to provide their list of documents, saying that they would provide same within 14 days.

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<sup>1</sup> *UCPR* r 211.

[9] That list of documents was not provided, and on 5 October 2009, the plaintiff's solicitors wrote a letter pursuant to r 444, making complaint about the defendants' failure to provide the list of documents.

[10] On 6 October 2009, the defendants provided a list of documents. The plaintiff contends, however, that the list of documents is deficient. In affidavits filed before the Court, the plaintiff has described the accounting records kept in respect of the files in the legal practice he sold to the second defendant. He says that each matter had, and continued to have, a separating accounting record which could be viewed in a "matter transaction report", which shows, among other things, particulars of work in progress ("WIP") and fees billed and/or recovered. Having reviewed the list of documents provided by the defendants, the plaintiff deposes:

“6. The list of documents filed herein by the respondent does not refer to any such matter transaction report or any other document referring to WIP or fees billed and/or recovered or any other client financial data.

7. Further, such list of documents makes no reference to any accounting records of the type that one would expect to exist in respect of the operation of a law firm namely profit and loss statements, balance sheets, bank statements etc.”

[11] Against that background, the plaintiff filed the present application, seeking the following relief:

“That the defendants provide to the plaintiff a list of documents in their possession, power or control relating to work in progress, fees billed and fees recovered and all other financial data in respect of each of the client matters current as at the date of sale of the applicant's business to the respondents on 2 July 2007 and referred to in exhibit WLL1 to the affidavit of William Leonard LeMass ...”

[12] The defendants firstly contended that this application was “misconceived fundamentally” because the documents sought in the application are not relevant to the claims of specific performance and account but only “may become relevant to

the taking of an account, if one is ordered, but they are not directly relevant prior to such an order being made”.

- [13] It is the defendants who are fundamentally misconceived in advancing this proposition. It is quite clear, as I have noted above, that the defendants are under an obligation to disclose documents relevant to the issue which exists between the parties concerning the alleged breach of special condition 10.2.
- [14] The defendants’ next submission was that the order sought in the application was too wide.
- [15] Its first submission in that regard was that the application for documents in the defendants’ “possession, power or control” ventured beyond the ambit of r 211(1)(a). This was, in the circumstances, not a particularly attractive argument. At highest, it demonstrates nothing more than that the drafter of the application remains mistakenly wedded to antediluvian terminology relevant to discovery under the Rules of the Supreme Court, rather than the modern test provided for under the Uniform Civil Procedure Rules. The defendants can rest assured that, if an order is made, it will reflect the contemporaneous approach.
- [16] The next objection was that the application, by seeking documents “relating to work in progress, fees billed and fees recovered and all other financial data in respect of each of the client matters” is too far reaching, and assumes that “each and every document in the relevant classes contains information that is directly relevant to a matter in issue”. This concern was, however, addressed in argument by the plaintiff’s counsel properly conceding that the form of order should make it clear that the only documents to be disclosed are those which are “directly relevant to”

the subject matter of clause 10.2. That is necessary because, in point of unarguable fact, the reconciliations required to be provided at the end of each month pursuant to clause 10.2 have not been provided – so much was conceded in the course of argument by counsel for the defendants.

[17] The defendants next contended that any order for disclosure should permit the defendants “to seal from view any part of a document that may be the subject of legal professional privilege in favour of any other party other than the plaintiff and the second defendant”. It was argued that the risk of breaching legal professional privilege is highest in relation to the WIP component of the matter transaction reports because of the narration of what has been done for the client. That submission, however, has scant regard to the actual contents of the matter transaction reports. There are numerous examples of those reports in the material before me. By and large they do not record any details of advice which might form the subject of legal professional privilege. True it is that the reports record details of, for example, payments made to counsel, doctors and other consultants, but the mere fact that counsel has been retained or has given advice is not privileged, nor is the fact that a particular client has seen a particular doctor. That is not to say that there may not be privileged material within particular matter transaction reports, in which case it will be for the defendants to identify and claim privilege in respect thereof.

[18] Finally, it was submitted that any order should be made against the second defendant only, because it was the second defendant, not the first defendant, which was the purchaser under the contract of sale. That argument, however, blithely ignores the guarantee case made against the first defendant. The first defendant as

noted above, together with the second defendant, is taken as being a party who has taken issue with the allegations in the pleadings which give rise to the duty of disclosure which is the subject of this application.

[19] It follows that the defendants' resistance to this application was virtually devoid of any merit whatsoever. Some might regard that, and indeed the nature of the objections raised in the course of argument, as disappointing, given the professional status of the defendants. That however is not a matter on which I will make further comment at this point. It is sufficient to say, however, that there is no reason why the costs of the application should not follow the event.

[20] Accordingly, there will be the following orders:

1. That by 29 January 2010, the defendants serve on the plaintiff a list of the documents in the possession or under the control of the defendants which are directly relevant to work in progress, fees billed and fees recovered and all other financial data in respect of each of the client matters current as at 2 July 2007 and referred to in exhibit WLL1 for the affidavit of the plaintiff filed on 9 October 2009;
2. The defendants pay the plaintiff's costs of and incidental to this application.