SUPREME COURT OF QUEENSLAND

CITATION:	*Phillips v MacDonnells Solicitor* [2010] QSC 62
PARTIES:	**MARK GERARD PHILLIPS** (Plaintiff) v **MacDONNELLS SOLICITORS (a firm)** (Defendant)
FILE NO/S:	353 of 2009
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	9 March 2010
DELIVERED AT:	Cairns
HEARING DATE:	16 October 2009
JUDGE:JUDGE:	Jones J
ORDER:	**1. That judgment be entered for the defendant against the plaintiff.** **2. That the plaintiff pay the defendant's costs of and incidental to the claim (including the defendant's costs of and incidental to this application) to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – PARTNERSHIP LAW – application of r 292 and r 293 Uniform Civil Procedure Rules 1999 (Qld) in granting summary judgment – whether the plaintiff has no real prospect of succeeding in his claim – claim of damages against a law firm for breach of retainer and breach of duty of care – was there notice of a dissolution of partnership pursuant to s 35 of the *Partnership Act* 1891 – was there a loss attributable to the conduct of the defendant
COUNSEL:	J Jacobs for the plaintiff M Jonsson for the defendant
SOLICITORS:	O'Reilly Stevens Bovey, Lawyers for the plaintiff Miller Bou-Samra Lawyers for the defendant

[1] The plaintiff was the unsuccessful party in litigation which he commenced against a former business partner. He now claims damages for breach of retainer and breach of duty of care against the defendant, the firm of solicitors who advised him in the course he took in terminating the partnership. The damages are within the jurisdictional range of the District Court and he now makes application for leave to remove the proceedings to that Court.

[2] The defendant's firm makes application for judgment pursuant to R 293 of the *Uniform Civil Procedure Rules* (UCPR) contending that the plaintiff has no prospects of succeeding in the action because, amongst other things, he cannot show any loss.

[3] Should the proceeding remain on foot, the defendant does not oppose the plaintiff's application. I have determined to hear the defendant's application for judgment.

[4] The plaintiff and his former partner formed a partnership for the purpose of using assets which comprised a pontoon and moorings on the Great Barrier Reef and various Marine Park permits which allowed the use of those items. The partners were also directors and shareholders of a corporate tourist business to which the partners gave a right of use of the pontoon.

[5] The plaintiff's central allegation against the defendants relates to advice they gave as to the effect of two documents – the partnership deed and shareholder agreements. The effect of the alleged advice was that if the plaintiff gave notice of his retirement from the partnership with an offer to sell his partnership interest and the sale offer was not accepted, then an open sale of the business would follow. The defendants deny that that was the substance of the advice.

[6] The plaintiff in fact made an offer to sell his interest and the offer was not accepted by his former partner. The partner then elected to purchase the plaintiff's interest in accordance with the terms of the partnership agreement.

[7] The litigation which followed between the former partners was to determine whether the plaintiff's partner was entitled to so elect. The outcome of the litigation included the making of a declaration that upon the true construction of the deed of partnership the former partner was entitled to purchase the plaintiff's interest upon the terms of the deed. Those terms were expressed as follows:-

> "13.1 **Subject only to this Deed**, the Partnership will not be dissolved upon the happening of any event unless the Partners by a Majority/Special Majority) resolve to do so.
>
> 13.2 Without limiting the generality of cl. 13.1 the death, bankruptcy or **retirement (whether pursuant to cl. 12 or cl. 14) of a Partner will** not effect an automatic determination of the Partnership **but will entitle the other Partners** ('continuing Partners') at their option either to determine the Partnership and have it wound up in accordance with cl. 16 or to purchase the Share of the deceased, bankrupt or retired Partner (the 'outgoing Partner') upon the following terms:
> …"

[8] By the present proceeding, the plaintiff contends that had he given notice of dissolution of the partnership pursuant to s 35 of the *Partnership Act* 1891 rather

than the notice of retiring from the partnership this would have led to the appointment of a receiver followed by an open sale. In such circumstances the plaintiff contends he would have received a higher amount for his share.

[9] The defendant in its defence denies that it gave advice in the terms alleged or that it breached its duty to the plaintiff as alleged or at all. The determination of this application does not depend on those contested issues of fact. The issue here is whether the plaintiff would have been placed in any different position had the notice of dissolution been given pursuant to s 35 of the *Partnership Act* which relevantly provides:-

> "35. (1) Subject to any agreement between the partners, a partnership is dissolved –
>
> (a) if entered into for a fixed term – by the expiration of that term;
>
> (b) if entered into for a single adventure or undertaking – by the termination of that adventure or undertaking;
>
> (c) if entered into for an undefined time – by any partner giving notice to the other or others of the partner's intention to dissolve the partnership."

[10] The effect of the opening words of this section would make notice of the kind contemplated by the plaintiff subject to the deed of partnership with the result identified in my reasons in the earlier litigation. It is sufficient to repeat the following passage from those reasons:-

> [10] Any change in the membership of a partnership has the effect of dissolving that partnership: *S J Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87. The next usual step after dissolution is to wind up the partnership by realizing the assets and paying the debts and liabilities of the firm before distributing the surplus, if any, among the partners according to their rights and interests.[1] This process is subject to agreement between the parties. In *Rushton (Qld) P/L & Anor v. Rushton (NSW) P/L & Anor*, McPherson JA goes on to explain:
>
> > "Winding up in that way may be avoided if the parties agree on a sale to one or more of the remaining partners of the shares of the outgoing partner, or if there is a provision in the partnership agreement to that effect. This is sometimes described as a technical or notional dissolution, which is something of a misnomer because it is not the dissolution but, at most, the winding up that is notional. The partnership or firm itself is dissolved as soon as there is a change in membership, but the assets and, as between the partners, responsibility for the liabilities of the partnership are taken over by the remaining partners."

---

[1] *Partnership Act 1891* (Qld), s 42; *Rushton (Qld) P/L & Anor v. Rushton (NSW) P/L & Anor* [2002] QCA 210 at [9]

[11] This statement is reflective of an earlier decision of the Court of Appeal, *McGowan & Anor v. Commissioner of Stamp Duties.*[2] That case concerned the retirement of a partner of a law firm. On retirement, he purported to transfer his share of the partnership to the other two partners. At [15], McPherson JA states:

> "On dissolution, s 42 of the *Partnership Act 1891* requires the property of a partnership to be applied in payment of the debts and liabilities of the firm, with any surplus of realizable assets being distributed in accordance with the rights of the partners. But, subject always to paying or providing for the creditors, it is open to the partners to arrive at some other arrangement for disposing of partnership assets, and, in this instance as in many others, that was what was done on dissolution."

[12] The applicant gave notice pursuant to Cl 12 with the consequence that the dissolution of the partnership took effect on the date provided. To the extent that Cl 13.2 uses the expression "option either to determine the partnership and have it wound up" there is an obvious confusion between the concepts of the legal effect of dissolution and the rights of the partners with respect to the assets of the partnership. Similar confusion is found in the terms of the relevant deeds in *Rushton* and *Mackie* referred to above. The fact that the expression contains terms that are contrary to the basic principle of partnership law does not invalidate the agreed processes for the winding up or devolution of the partnership assets. As was noted in a passage in *McGowan v Commissioner for Stamp Duties* in para [11] above it is open to the parties to arrive at some different arrangement for the disposition of partnership assets other than what is provided for in s 42 of the *Partnership Act.* In that case His Honour went on to say:-

> "Although a partner has no title to a specific property owned by the partnership, "he has a beneficial interest in the partnership assets, indeed in each and every asset of the partnership,": see *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, 446. On dissolution each partner retains that interest: *Hendry v Perpetual Executors & Trustees Association* (1961) 106 CLR 256, 266; which has been authoritatively described as "a right to a proportion of the surplus after realisation of the assets and payment of the debts and liabilities of the partnership": *FCT V Everett*."

[11] As appears from these passages the method by which the partnership was terminated leads inevitably to the application of the terms which the partners agreed would control the winding up of the partnership. That means in this instance that even if the plaintiff gave a different form of notice to terminate the partnership the

---

2 [2001] QCA 236

winding up process would have followed the same course and with the same outcome.

[12] As a consequence the plaintiff does not show any loss attributable to any conduct of the defendant and therefore his cause of action is not complete.

[13] The test for determining an application pursuant to R 293 of the UCPR has been variously stated in decisions of the Court of Appeal which might be distilled in the following remarks of Williams JA in *Deputy Commissioner of Taxation v Salcedo*[3]:-

> "[17] …Summary judgment will not be obtained as a matter of course and the Judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial; if that is established then the matter must go to trial. In my view, the observations on summary judgment made by the Judges of the High Court in *Fancourt v Mercantile Credits Ltd* [1983] 154 CLR 87 at 99 are not incompatible with that application of r 292 and r 293; what is important is that in following the broad principle laid down by their Honours the test as defined by the rules is applied."

[14] Rule 293 requires that the Court be satisfied that the plaintiff "has no real prospect of succeeding" on his claim. In circumstances where the plaintiff cannot demonstrate any loss which is attributable to whatever advice may have been given by the defendants then I am satisfied that he cannot succeed in this claim. I am further satisfied that there is no need for a trial to determine the issue of whether the plaintiff has suffered any loss, that point having been determined in the earlier proceedings wherein the plaintiff's entitlement under the Deed of Partnership was identified. It follows that the defendant is entitled to summary judgment.

Orders

[15] I make the following orders:-

1. That judgment be entered for the defendant against the plaintiff.
2. The plaintiff pay the defendant's costs of and incidental to the claim (including the defendant's costs of and incidental to this application) to be assessed on the standard basis.

---

[3] [2005] QCA 227; see also *Bolton Properties Pty Ltd v J K Investments (Aust) Pty Ltd* [2009] QCA 135