SUPREME COURT OF QUEENSLAND

CITATION:	*Mango Boulevard P/L v Spencer & Ors* [2010] QCA 106
PARTIES:	**MANGO BOULEVARD PTY LTD** ACN 101 544 601 (plaintiff/appellant) **v** **RICHARD WILLIAM SPENCER** (defendant/first respondent) **SILVANA PEROVICH** (defendant/second respondent) **MIO ART PTY LTD** ACN 121 010 875 (defendant/third respondent) **KINSELLA HEIGHTS DEVELOPMENTS PTY LTD** ACN 100 373 368 (defendant/not a party to the appeal) **PAUL DESMOND SWEENEY** (defendant/not a party to the appeal) **TERRY GRANT VAN DER VELDE** (defendant/not a party to the appeal)
FILE NO/S:	Appeal No 14571 of 2009 SC No 1999 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	12 May 2010
JUDGE:	Muir JA
ORDERS:	**1. The application by the first, second and third respondents be dismissed;** **2. The respondents pay the appellant's costs of their application and of the appellant's application;** **3. The appellant's application be otherwise dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – STAYING PROCEEDINGS – where the respondents applied for a stay of the appellant's appeal against the order of the primary judge pending trial of the proceeding – where the order of the primary judge varied an

earlier order of the Court – where the respondents argued the appeal would involve the parties in unnecessary costs – where the respondents argued that there was no guarantee that a successful appeal would resolve all of the issues between the parties – where the respondents argued that the outcome of the trial may render the appeal unnecessary

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – OTHER MATTERS – where the respondents alternatively applied for an order that the appeal be adjourned pending trial of the proceeding – whether the appeal should be adjourned

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – OTHER MATTERS – where the appellant applied for an order that the hearing of appeal be expedited – where the appellant argued that it would not be protected by *res judicata* and issue estoppel if the trial took place before the resolution of the appeal – whether the appeal should be expedited

Uniform Civil Procedure Rules 1999 (Qld), r 292, r 293

AMACSU v Ergon Energy Corporation Ltd & Ors (2005) 149 IR 35; [2005] QCA 351, cited
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Re Will of Gilbert (1946) 46 SR (NSW) 318, cited
Spalla v St George Motor Finance Ltd (No 6) [2004] FCA 1699, cited

COUNSEL: J K Bond SC, with T J Bradley, for the appellant
F M Douglas QC, with D Keane, for the respondents

SOLICITORS: Minter Ellison for the appellant
Delta Law for the respondents

[1] **MUIR JA: The applications under consideration**
The first, second and third respondents to the appeal, Richard Spencer, Silvana Perovich and Mio Art Pty Ltd apply for a stay of the appellant plaintiff's (Mango Boulevard Pty Ltd) appeal against the order of a judge of the Trial Division of this Court made on 3 December 2009. In the alternative, the respondents seek an order that the appeal be adjourned pending the trial of the proceeding. The appellant applies for an order that the hearing of the appeal be expedited and for other related orders and directions.

The history of the proceeding

[2] Some of the background to this troubled proceeding may be gleaned from the reasons of Chesterman J, as he then was, in *Mango Boulevard Pty Ltd v Spencer &*

Ors[1] and from the reasons of the Court of Appeal on appeal from Chesterman J's decision,[2] Chesterman J ordered[3] that:

(a) the defence and counter-claim of the respondents filed by leave on 3 March 2008 (save for paragraph 1) be struck out with no leave to re-plead; and

(b) there be judgment for the appellant on the counter-claim.

[3] The appeal from that decision was dismissed with costs.

[4] In order to understand the issues raised in the present applications, it is necessary to know something of the history of the proceeding and of the pleaded issues.

[5] The appellant owns half of the issued shares in the third defendant in the proceeding, Kinsella Heights Developments Pty Ltd (Kinsella). The first and second respondents held the balance of the shares. Kinsella was formed or acquired by the appellant and the first and second respondents to act as the vehicle for a real estate joint venture between them. The appellant, the first and second respondents and Kinsella entered into a Shareholders Deed on 4 July 2003 under which they agreed on the ownership of the shares in Kinsella, their relationship *inter se*, and the way in which Kinsella should carry out the proposed real estate development.

[6] Clause 10 of the Deed provided to the effect that where a party defaulted in its obligations under the Deed, another party could give notice of default whereupon "the Non-Defaulting Party [would have] … an option … to acquire the Defaulting Party's Shares" in Kinsella at a price to be determined pursuant to the Clause. In February 2006, the appellant gave notices of default to each of the first and second respondents. In March 2006, the first and second respondents gave notices of default to the appellant, alleging that it had changed its directors on 11 August 2003 and again on 30 June 2004. The second change involved the appointment as a director of a Mr Thomson.

[7] The proceeding was commenced on 9 March 2006 by the appellant who sought a declaration of its entitlement to an option to acquire the shares of each of the first and second respondents.

[8] In their defence and counter-claim filed on 1 June 2006, the first and second respondents denied being in default under the Deed. They did not allege in the defence that the appellant was disentitled to act under cl 10 because it was in itself in default of its obligations under the Deed and was therefore not a "Non-Defaulting Party" but they did so allege in their counter-claim. The counter-claim alleged that the first and second respondents were entitled as a result of the appellant's default to elect to acquire its shares.

[9] In a reply and answer filed on 4 July 2006, the appellant: admitted the alleged changes in its directors; denied that the first and second respondents were entitled to issue notices under cl 7 or that the notices had effect; alleged that the first and second respondents were in breach of an obligation of good faith (as it was in the interests of the joint venture that the changes to the appellant's directors occur and that there had been unreasonable delay between those changes and the first and second respondents' reliance on them) and that the first and second respondents had

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1 [2008] QSC 117.

2 *Mango Boulevard P/L v Spencer & Ors* [2008] QCA 274.

3 On 27 March 2008.

impliedly consented to the changes. The reply and answer also alleged that Mr Thomson's appointment was not in breach of the Deed as, had he not been appointed, the appellant would have been in breach of its obligations to act in the interests of the joint venture.

[10] The first and second respondents failed to make disclosure as required by the *Uniform Civil Procedure Rules* 1999 (Qld) and on 3 April 2007, the Chief Justice made the orders including:

> "7. Unless by 4:00pm on 27 April 2007:
>
> (a) The first defendant has complied with the orders in paragraphs 1 and 2 above; and
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> (b) The second defendant has complied with the orders in paragraphs 4 and 5 above;
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> Then upon the solicitors for the plaintiff filing an affidavit deposing to the failure of the first and/or second defendants to do so:
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> (c) Paragraphs 8, 10 and 22 to 285 of the amended defence and counterclaim filed on 29 March 2007 shall be struck out; and
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> (d) There shall be judgment for the plaintiff against the first and second defendants on the counterclaim and an order that the first and second defendants pay the plaintiff's costs of and incidental to the counterclaim of the first and second defendants to be assessed on the standard basis."

[11] There was non-compliance with the order and an affidavit deposing to the default was filed on 30 April 2007. However, no judgment was entered or filed.

[12] On 8 May 2007, the first and second respondents filed an application to vary the 3 April 2007 order. That application was dismissed by Margaret Wilson J on 28 June 2007 and there was no appeal against her order.

[13] By this time, the first and second respondents had been made bankrupt. The first respondent was succeeded as trustee of the Spencer Family Trust by the third respondent. The appellant applied for and obtained leave to proceed against the first and second respondents and for the joinder of their trustees in bankruptcy as fifth and sixth defendants. The third respondent applied to be substituted for the first respondent as a defendant. Chesterman J declined to make the substitution order but ordered that it be joined as the third defendant.

[14] The third respondent filed a defence and counter-claim. The appellant applied to strike out much of its content and for judgment on the third respondent's counter-claim pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld). The third respondent's pleading largely corresponded with the first respondent's pleading which, for the most part, had been struck out by the 3 April 2007 order. The third respondent also pleaded in its defence that the appointment of Mr Thomson resulted in a breach of cl 10 of the Deed in consequence of which the appellant was disentitled from delivering notices of default to the first and second respondents

("the Thomson point"). Those allegations were relied on in the third respondent's counter-claim. On the hearing of the appellant's application, Chesterman J made the orders referred to in paragraph 2 hereof.

[15] On appeal, the third respondent, which was the only appellant, contended that Chesterman J erred in finding that the third respondent's amended defence and counter-claim constituted an abuse of process and argued that any past abuse of process had no bearing on the right of the third respondent to litigate the Thomson point. Chesterman J's finding that the Thomson point was *res judicata* was also challenged. The Court of Appeal found it unnecessary to decide that issue, but expressed the view that the finding was correct.

The applications before the primary judge

[16] After the determination of the appeal, the respondents made an application for summary judgment in the proceeding seeking:

(a) judgment against the appellant in respect of declarations sought by the appellant as to the existence of the options which it claimed to have;
(b) dismissal of the appellant's claim for declaratory relief;
(c) the striking-out of part of the appellant's statement of claim;
(d) an order that orders previously made in the proceeding be set aside; and
(e) leave to file amended defences relying on the Thomson point.

[17] The appellant also applied for summary judgment against the respondents and sought declaratory relief.

The primary judge's determination

[18] The applications were heard by the primary judge who, on 3 December 2009, made a declaration that as at 22 February 2006 each of the first and second respondents was, in terms of cl 10.1(d) of the Shareholders Deed dated 4 July 2003, unable to pay his or her debts and orders that:

(a) the appellant's application for summary judgment be otherwise dismissed;

(b) the respondents' summary judgment application be dismissed;

(c) the order of de Jersey CJ made on 3 April 2007 be varied by deleting:
    (a) sub-paragraph (d); and
    (b) the word "and" at the end of sub-paragraph (c):
    from paragraph 7 of that order.

[19] The primary judge found that it was inappropriate to accede to the first, second and third respondents' application for summary judgment because there were factual issues requiring determination after a trial. He held that the fact that the Thomson point was not presently pleaded did not prevent him from considering it on the summary judgment application and concluded that the Thomson point could not be said to have no real prospects of success.

Counsel for the respondents' submissions

[20] The first, second and third respondents referred to the present directions in the proceeding which contemplate that any further interlocutory applications be filed

and served by 4 pm on 7 June so as to be heard in the week commencing 15 June 2010. Counsel for the respondents submitted that if the appeal were to proceed, it would involve the parties in unnecessary costs; that there was no guarantee that a successful appeal would resolve all the issues between the parties; that there is nothing to prevent the appellant agitating the issues raised in this appeal in any appeal following a trial of the proceeding and that the outcome of the trial may render this appeal unnecessary.

[21] It was submitted that the decision appealed against was interlocutory and that in order to succeed the appellant must show an error of principle and that an injustice has flowed from it.[4] Reference was made to Sir Frederick Jordan's frequently cited observations in *Re Will of Gilbert*[5] concerning the reasons for appellate court's reluctance to interfere with decisions on practice and procedure.

[22] Counsel for the appellant emphasised that: the appeal was against the refusal of a summary judgment application, the principles in *General Steel Industries Inc v Commissioner for Railways (NSW)*[6] were applicable and that, in order to succeed, the appellant was required to show that the exercise of the primary judge's discretion had miscarried.

[23] Another submission was to the effect that there was a lack of utility in the appeal. In that regard it was submitted that even if the appellant succeeded in preventing the Thomson point from being dealt with on the merits, a court would not declare that the appellant which was not a "Non-Defaulting Party" was entitled to have a defaulting party's shares transferred to it.

Counsel for the appellant's submissions

[24] I accepted counsel for the appellant's submission that if there is no issue in the proceeding as to any relevant default by the appellant, there should be no obstacle to the granting of declaratory relief. Counsel for the appellant accepted that even if the appellant succeeded in showing that the primary judge's decision refusing summary judgment was affected by error of the nature described in *House v The King*,[7] it would need to persuade the Court that the respondents have "no real prospect of successfully defending the [appellant's] claim"[8] before summary judgment would be ordered. Counsel for the appellant relied on their outline of submissions on appeal in this regard.

[25] As for the setting aside of the variation of the 3 April 2007 order, I doubt that it should be regarded as merely "a decision pertaining to practice and procedure", having regard to its potential impact on the substantive rights of the parties.

[26] On the hearing of the appeal, the appellant will contend that it is an abuse of process for the appellant to be forced to meet the Thomson point in the trial of the proceeding. In its pleadings it no longer relies on the proposition that the 3 April order gave rise to a *res judicata* or issue estoppel but instead relies on *res judicata* and issue estoppel flowing from the judgment of Chesterman J and the unsuccessful

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4 *AMASCU v Ergon Energy Corporation Ltd & Ors* [2005] QCA 351 per Jerrard JA at para [19] citing *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177.

5 (1946) 46 SR (NSW) 318 at 323.

6 (1964) 112 CLR 125.

7 (1936) 55 CLR 499 at 505.

8 *Uniform Civil Procedure Rules* 1999 (Qld), r 292(1).

appeal. It is submitted that if the trial were to proceed, the appellant would be exposed to the abuse of process about which it complains in the appeal.

[27] That argument was developed as follows. The doctrines of *res judicata* and issue estoppel serve a public policy which protects against abuse of process by supporting the finality of judicial disposition of a particular controversy.[9] In the appeal the appellant seeks to litigate its claim for the protection afforded by the doctrines. If the trial takes place before the resolution of the appeal, the protection will not be fully availed of even if the appellant is successful on the appeal.

[28] The remaining argument advanced by counsel for the appellant was that the primary judge's order varying the 3 April 2007 order deleted the parts of the order which the appellant would have pleaded as giving rise to *res judicata* and issue estoppel. While the variation of the 3 April 2007 order remains, it is contended, the appellant cannot rely on the order and it would not be open for the appellant to rely on the matter after a trial.

[29] In my view there is substance in the argument that unless the appeal is determined before the trial of the proceeding, there is an appreciable risk that the appellant may be denied, in a real practical way, the full benefit of the doctrines of *res judicata* and issue estoppel. It may have to proceed with a trial which success on the appeal might show to be wholly or partly unnecessary to vindicate its claims.

[30] There is also substance in the point that the variation of the 3 April 2007 order, while it stands, deprives the appellant of another argument based on *res judicata* and issue estoppel. In that regard though, I am inclined to accept the submission advanced on behalf of the respondents that an Appellate Court would be able to make orders giving the appellant the benefit of such doctrines. It may be that in order to protect its position the appellant would need to apply, unsuccessfully, to amend its pleadings so as to make apparent the precise contentions it would have advanced at first instance if permitted. However, to my mind, it is rather unsatisfactory that the proceeding go to trial with a substantive point such as this outstanding if it is practicable for it to be determined prior to the trial.

[31] It is submitted on behalf of the respondents that ultimately the decision should be based on the balance of convenience. To the extent that this is so, the balance of convenience favours the appellant. It is the party which may be exposed to an unnecessary trial.

[32] There are other considerations which are relevant. The proceeding, although on the Commercial List, has taken much longer than it should to be concluded. In my view, allowing the appeal to go ahead will assist the prompt determination of the matter. The appellant has been prevented from bringing the proceeding to a much earlier conclusion by delays and defaults on the respondent's part. In those circumstances, the respondents cannot expect particularly sympathetic consideration of an application that a course be taken which may lead to the deferment of the final resolution of the proceeding. It is, after all, a Commercial List matter and the principal reason for the existence of the list is to achieve the speedy and expert resolution of commercial matters. The containment of expense is a relevant consideration but I am not convinced that the hearing of the appeal before the trial will result in additional costs.

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9 *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699 at [59]-[69] per French J.

[33] Counsel for the respondents submitted that the hearing of the appeal before the trial would increase delay and costs. That was, in part, because of the prospect of an appeal to the High Court. It was intimated that a special leave application was a likelihood because of the amount at stake in the proceeding. A special leave application was made in respect of the Court of Appeal's decision, but it was abandoned. Whether one is made in respect of the Court of Appeal's decision on the present appeal remains to be seen. It does seem to me to be likely however that if special leave is granted in respect of that decision on appeal, the matters left to be decided on the trial will be unlikely to be of a nature which would justify special leave.

[34] For these reasons it is ordered that:

(a) the application by the first, second and third respondents be dismissed;
(b) the respondents pay the appellant's costs of their application and of the appellant's application; and
(c) the appellant's application be otherwise dismissed.

[35] I do not propose to order that the appeal be expedited. It is obvious that as the appeal is to go ahead, it should be expedited. The Registrar will communicate with the parties in that regard.