COURT OF APPEAL

MUIR JA

Appeal No 14571 of 2009
SC No 1999 of 2006

MANGO BOULEVARD PTY LTD **Applicant**

v

RICHARD WILLIAM SPENCER & ORS **Respondent**

BRISBANE

DATE 20/05/2010

JUDGMENT

MUIR JA: Mr Keane, thank you for coming. My associate passed on the message that if counsel and solicitors were inconvenienced there was no need to come.

When I published my reasons on 13 May, I intimated that the parties could, if they wished, make further submissions on costs. Such submissions have now been received. The respondents seek an order that the costs of the application be reserved. The appellant submits that the order proposed in the reasons should be made.

Counsel for the respondents argues that if the appeal is unsuccessful, the respondents' submissions on the application concerning additional cost to the parties and unnecessary use of curial resources resulting from the appeal will be vindicated. It was said that as the primary Judge considered that a trial was necessary, it would be appropriate for the costs to be reserved until that view was either confirmed or found to be wrong.

In the reasons for judgment, there is no finding that a trial will not be necessary. The possibility that there may not need to be a trial is adverted to. The primary considerations favouring the refusal of a stay addressed in the reasons are: whether the appellant might be deprived of the substantial benefit of the doctrines on which it relies were the appeal not to be

decided before the trial; the desirability of resolving significant questions of law which may have a material bearing on the issues can be determined on trial and the determination of those issues where possible; the need for expedition on this commercial list matter and questions of delay and costs. Whether a trial ultimately needs to take place does not bear significantly on the question now under consideration.

The respondents' submissions discuss the question of delay at some length, pointing out that since the matter has been before the primary Judge, "it cannot be said that the respondents have been productive of any delay". I do not recall that any such delay was contended for by counsel for the appellants on the hearing of the application. The reference in paragraph 32 of the reasons to delay is a reference to historical "delays and defaults" and in particular to the fact that, despite the matter being on a commercial list, it remains unresolved more than four years after the commencement of proceedings. The remaining point relates to the dispute between the parties as to the index for the appeal and record. That issue was very much of a peripheral nature.

Counsel for the appellant points out, correctly in my view, that the Court, on appeal, irrespective of the outcome, will be in no better position than me to exercise the discretion as to costs.

Having considered both sets of submissions, I have concluded that costs should follow the event. There is no good reason to depart from the conventional approach.

The orders will be as intimated in the reasons delivered on 13 May 2010.

Now, as presently advised, the composition of the Court will be Justice Fraser, Justice White and myself. Justice Chesterman is away and it hasn't been possible to contact him and that explains the departure from what was earlier intimated.

As for the Court's composition, it is necessary, having regard to the possibility of an objection, and perhaps the reality of an objection to at least my sitting on the Court, to make these directions:

1. If a party wishes to pursue an objection to any Judge sitting on the hearing of the appeal,

that party deliver to the other party and to the Court at least seven business days before 9 June 2010 the written submissions proposed to be made in that regard;

2. The other party provide its submissions in writing to the objecting party and to the Court at least three business days prior to 9 June;

3. A completed record book by 26 May 2010;

4. Amended outlines of submissions pursuant to the new practice direction be lodged and served on or before 2 June 2010.

That is simply to take into account the need to put record references in the existing submissions. It is not an encouragement to the parties to deliver yet more submissions.

And it is contemplated that any objections to the composition of the Court will be dealt with at the commencement of proceedings. It may be that we might even start early so that if there is any rearrangement of the composition of the Court, that can be done.