

SUPREME COURT OF QUEENSLAND

CITATION: *Gramotnev v Queensland University of Technology* (No 2)
[2013] QSC 177

PARTIES: **DMITRI GRAMOTNEV**

Plaintiff

And

QUEENSLAND UNIVERSITY OF TECHNOLOGY

Defendant

FILE NO/S: S6286/2010

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING
COURT: Brisbane

DELIVERED ON: 19 July 2013

DELIVERED AT: Supreme Court Rockhampton

HEARING DATE: On the Papers – last submissions received 3 July 2013

JUDGE: McMeekin J

ORDER:

1. That the proceedings be dismissed;
2. Direct that the defendant make any further submission as to the basis on which costs should be assessed on or before 4pm on 26 July 2013;
3. Direct that the plaintiff make any further submission that he might be advised in response on or before 4 pm on 2 August 2013.

CATCHWORDS: **CONTRACT – BREACH OF CONTRACT** – where defendant seeks dismissal of proceedings

CONTRACT – BREACH OF CONTRACT – where plaintiff seeks a stay on judgment

Supreme Court of Queensland Act 1991

Uniform Civil Procedure Rules 1999.

Asia Pacific International P/L v Peel Valley Mushrooms & Anor [2000] QSC 168

Cook's Construction Pty Ltd v Stork Food Systems

Australasia Pty Ltd [2008] QCA 322

Elphick v MMI General Insurance Ltd & Anor [2002] QCA

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Gramotnev v Queensland University of Technology [2013] QSC 158*Raschilla & Anor v Westpac Banking Corporation* [2010] QCA 255*South Brisbane Regional Health Authority v Taylor* (1996) 186 CLR 541

COUNSEL: The plaintiff is self-represented
D Kelly SC and D de Jersey for the Defendant

SOLICITORS: Minter Ellison Lawyers for the Defendant

- [1] **McMeekin J:** These proceedings involve the determination of separate questions concerning the terms of an employment contract between the plaintiff and the defendant. On 19 June 2013 I delivered my reasons, following a two day hearing in March, in which I answered the two questions asked. The defendant was successful in its arguments. I directed that the parties make any such submission as they might be advised as to any further order that ought to be made.
- [2] The parties have since made submissions. The successful defendant seeks that the proceedings be dismissed and costs orders made in its favour with a request that it be heard further on the basis of any assessment.
- [3] I have power to dismiss the proceedings under r 485 *Uniform Civil Procedure Rules* 1999. As the defendant submits, the answers to the questions have the result that the plaintiff is not entitled to any relief sought and the proceedings should be dismissed. Costs would normally follow the event.
- [4] The plaintiff opposes the orders sought by the defendant. He argues that it would be inappropriate to dismiss his proceedings “on the basis of a separate trial whose decision is subject to appeal”. He argues that such an order “jumps ahead of the due process”. I cannot agree with that analysis. The orders that the defendant seeks naturally follow on from my determination. In the normal course I should make all necessary orders to finalise the litigation between the parties.
- [5] Alternatively the plaintiff seeks a stay of any orders pursuant to r761(2) UCPR on the ground that my decision is in error and he intends to appeal.
- [6] The factors that I am to take into consideration when determining whether to grant a stay of the enforcement of a decision which is pending appeal are:
- (a) Whether there is a good arguable case;
 - (b) Whether the plaintiff will be disadvantaged if a stay is not ordered; and
 - (c) Whether there is some competing disadvantage to the defendant should the stay be granted which outweighs the disadvantage suffered by the plaintiff if the stay is not granted.¹

¹ *Asia Pacific International P/L v Peel Valley Mushrooms & Anor* [2000] QSC 168; *Elphick v MMI General Insurance Ltd & Anor* [2002] QCA 347

- [7] In circumstances where it can be demonstrated that there are no or very poor prospects of success on appeal, that can weigh heavily against the granting of the application for a stay.²
- [8] The plaintiff does not usefully address any relevant issue. That is not intended as a criticism. The plaintiff is a self represented litigant.
- [9] Given that after some months of deliberation I have reached the view that the plaintiff's arguments are misconceived and wrong it is difficult for me to come to the view that he has a good arguable case on appeal. Nonetheless I consider that his arguments are not hopeless.
- [10] There were effectively eleven separate breaches of contract alleged involving separate arguments and different considerations. In some instances I found the decision to be a close one. As I remarked at one point the plaintiff's arguments "have considerable force"³ and I commented in respect of one significant decision that I reached it "not with overwhelming confidence".⁴
- [11] This, then, is not a case where the prospects are so poor as to weigh heavily against the grant of the stay.
- [12] The defendant will not be significantly disadvantaged in any obvious way that I can see by any further delay. The matter has dragged on now for years. Presumably steps have long since been taken to preserve evidence as best as can be done. Any delay is counter productive of course as memories fade and evidence can be lost⁵ but there is no evidence here that there is any particular problem.
- [13] Thus these two factors are either neutral or in favour of a stay. However I cannot see how the plaintiff will be disadvantaged if I order that his proceedings be dismissed – any appeal can challenge the propriety of that order and the Court of Appeal obviously has jurisdiction to set the order aside if so minded.
- [14] Further the question of costs is a matter that I must decide and it is appropriate that I exercise my discretion now. I am armed with all relevant information. Again if the appeal is successful the Court of Appeal will make such order as might be apposite in the light of its reasons. If the plaintiff wishes to appeal any order as to costs irrespective of his success on the substantive appeal then he will need to seek leave to do so⁶ and I can consider that application if and when it is made.
- [15] The plaintiff argues, but without any evidence, that the making of a costs order would "significantly impede the Plaintiff's capabilities to properly conduct the appeal process and seek justice...". I am not sure why. No evidence is proffered to justify that claim. The plaintiff refers to his losing his employment with a consequent effect on his income and his means to support himself but that occurred many years ago. It is not clear why the making of an order would make his position any worse than it is now or impact on his capacity to prepare and argue his appeal.

² *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] QCA 322 per Keane J; *Raschilla & Anor v Westpac Banking Corporation* [2010] QCA 255 per Fraser JA

³ *Gramotnev v Queensland University of Technology* [2013] QSC 158 at [25]

⁴ *Ibid* at [26]

⁵ Cf. *South Brisbane Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J at 551

⁶ Section 64 of the *Supreme Court of Queensland Act* 1991 (reprint current as at 17 May 2013)

- [16] The plaintiff submits that the making of such an order will prevent him obtaining legal representation and qualified legal advice. The plaintiff has been self represented from the outset. The findings and determination that I have made already will presumably impact considerably on the prospects of retaining competent legal practitioners, assuming that the plaintiff's point is that he is not presently able to pay the appropriate professional fees. Those prospects will not be diminished greatly by making the orders that consequently flow from the prior determination. The most that can be said is that it is probably true that the prospects of retaining a solicitor to act at this stage are not enhanced by the making of the orders now in contemplation.
- [17] In my view the plaintiff has not shown why the orders sought by the defendant ought not to be made, nor has he demonstrated why there should be any stay of their effect. The making of orders at the trial level is not intended to be merely provisional in their effect until the views of the Court of Appeal are known. In the absence of any demonstrated prejudice I cannot see that it is just to stay any order that I see fit to make.
- [18] I order that the proceedings be dismissed.
- [19] I propose to make an order that the plaintiff pay the defendant's costs of the proceedings other than its costs of and incidental to the separate trial heard on 26 and 27 March 2013 and other than its costs of the application heard on 26 October 2012.
- [20] The costs order reflects the effect of the Order of Ann Lyons J made on 7 December 2012 restricting the defendant's right to claim costs for the determination of the separate questions.
- [21] I will delay making that order until I have heard the parties further on the proper basis of assessment. I direct that the defendant make any further submission as to the basis on which the costs should be assessed on or before 4pm on 26 July 2013. I direct that the plaintiff make any further submission that he might be advised in response on or before 4 pm on 2 August 2013.