SUPREME COURT OF QUEENSLAND

CITATION:	*MJ Arthurs Pty Ltd & Anor v Portfolio Housing Pty Ltd & Anor* [2014] QSC 151
PARTIES:	**MJ ARTHURS PTY LTD** **ACN 145 344 056** (first plaintiff) and **MICHAEL JAMES ARTHURS** (second plaintiff) **v** **PORTFOLIO HOUSING PTY LTD** **ACN 155 425 826** (first defendant) and **SHAUN MICHAEL DAVISON** (second defendant)
FILE NO:	1897 of 2013
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	15 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2, 3, 4, 5, 6 June 2014
JUDGE:	Daubney J
ORDERS:	**1. Declare for the purposes of determining the question posed in Order 1 made on 5 June 2014, that the defendants' entitlement to profit share calculated according to Exhibit 29 flowing from the plaintiffs' termination of the relationship between the plaintiffs and the defendants, is to be calculated upon the construction contracts listed in Exhibit 20 but excluding the construction contracts for the following properties (as described in Exhibit 20):** - **680 Warilla** - **694 Trinity** - **723 Trinity** - **724 Trinity** - **729 Trinity** - **744 Burleigh** - **Lot 1 Tindaridge** - **48 Morris**

- **Lot 47 Rasmussen**

2. Direct the parties to bring in draft orders to give effect to Order 2 made on 5 June 2014.

CATCHWORDS: CONTRACTS– GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the plaintiff and defendant entered into a joint venture – where the defendant identified building project opportunities – where the plaintiff performed the building work – where the profits were to be split equally – where the joint venture failed – whether the defendant is only entitled to profits in respect of the building contracts completed on or before the date the joint venture failed

Queensland Building Services Authority Act 1991 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 501

Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (In Liq) (1936) 54 CLR 361, cited

COUNSEL: D Cooper QC, with him L Bowden, for the plaintiffs
P W Hackett for the defendants

SOLICITORS: Quinn & Scattini Lawyers for the plaintiffs
Cronin Litigation for the defendants

[1] The real protagonists in this matter are the second plaintiff, Mr Arthurs, and the second defendant, Mr Davison. It is convenient for me simply to refer to the plaintiffs and the defendants, respectively, by reference to each of those men. For reasons which will become apparent, the issue I am now required to determine is of narrow compass.

[2] Mr Arthurs, who is a builder, and Mr Davison, a cabinet maker, have known one another since about 2000. In about 2005, they decided to start doing business together. Originally, the essential nature of that business was that Mr Davison would identify building project opportunities and Mr Arthurs would do the building. In essence, Mr Arthurs would be paid his actual building costs, and after construction was completed they would share the net profits equally. Initially, any profits they made were "rolled over" to assist in funding the next project. After a time, however, they were able to make payments to themselves (or entities with which they were associated) by way of an effective distribution of profits in roughly equal shares. Over the five or six years following the commencement of their joint venture, they engaged in a number of projects. Each project was completed under a different company and trust structure, but there was no question that each of Mr Arthurs and Mr Davison (or their respective corporate alter egos) ultimately had a 50 per cent beneficial interest in any profits derived from each project. Whatever might have been the formal legal framework through which the projects were undertaken, there is no issue that Mr Arthurs and Mr Davison were, at all times, the relevant guiding minds and decision-makers. In short, agreements and decisions

they made between themselves ought be regarded as the operative agreements and decisions binding the entities through which the various projects were undertaken.

[3] The final project in which they were engaged involved the building of houses in Mackay. By that time, Mr Davison had become a "permanently excluded individual" under the relevant provisions of the then *Queensland Building Services Authority Act* 1991. That legislation also limited the engagement which Mr Arthurs, a licensed builder, could have with Mr Davison with respect to building projects. Mr Arthurs and Mr Davison were concerned to ensure that their business dealings did not fall foul of the legislation. They took legal and accounting advice. The upshot was that the Mackay projects were conducted through the first defendant, Portfolio Housing Pty Ltd ("Portfolio").

[4] The Mackay project also involved an external marketer, Optima Homes Pty Ltd ("Optima"). Optima sold "house and land" packages to members of the public. Typically, Optima would require that the purchaser sign both a contract to acquire a particular block of land and a building contract with Mr Arthurs (or his company). The involvement of Optima required some modification to the way in which money was received and disbursed from the third parties for whom houses were being built. Whereas in previous projects, those third parties had paid their progress payments under their respective building contracts to Mr Arthurs (or his company, which also held a building licence), Optima required "control" of the funds generated under the building contracts.

[5] Under the particular arrangement with Optima, progress payments under a building contract were not paid to Mr Arthurs, but to a specific account which was jointly controlled by Optima and Portfolio. Optima would be paid its marketing commission from that account, and the balance would be transferred into another account controlled by Portfolio. Mr Arthurs would then be paid his construction costs from that account.

[6] Construction of houses on the Mackay project commenced from the middle of 2012. Mr Arthurs and Mr Davison then had a falling out. On 19 November 2012, Mr Arthurs sent an email to Mrs Davison which, it is agreed by the parties, had the effect of terminating whatever contractual arrangements were in place between the parties (and their respective entities) as at that date.

[7] As I have mentioned, there were, as at 19 November 2012, a number of houses in the Mackay project on which construction had been completed. There was also, at that date, a number of lots in respect of which construction contracts had been signed, but work had either not commenced or had not been completed.

[8] There is no issue between the parties that, in general terms, the agreement between them was to the effect that any net profits derived from the construction of houses in the Mackay project was to be shared equally between them. Indeed, in the course of the hearing before me, the parties settled an "agreed profit share formula" (Exhibit 29), from which one can calculate the amount of profit to be split between them. It was also agreed that the contractual arrangements between them terminated on 19 November 2012.

[9] The only question which the parties now require me to determine is, in essence, "whether the profit share formula is to be applied to those houses in the Mackay project in respect of which, as at 19 November 2012, construction contracts had

been signed but construction work had not been completed?" Once the contracts to which the profit share formula is to be applied are identified, the matter is then to be referred to a special referee, appointed under rule 501 of the *UCPR*. The special referee will then take an account of the monies due by one party to another after an application of the agreed profit share formula.

[10] For that purpose the parties consented to the following orders being made:

> "1. The trial judge determine, irrespective of the true nature of the legal relationship between the plaintiffs and the defendants whether the defendant's entitlement to profit share calculated according to Exhibit 29 flowing from the plaintiffs' termination of that relationship on 19 November 2012 is to be calculated:
>
> (a) only in respect of construction contracts completed as at 19 November 2012 as alleged by the plaintiffs; or
>
> (b) upon the 65 construction contracts in Exhibit 20 (excluding the Rasmussen contract) as alleged by the defendants or such other number of construction contracts the Court finds as having been entered into or procured on or before 19 November 2012.
>
> 2. Following the determination in paragraph 1, the trial judge appoint a Special Referee to make an enquiry to enable the Special Referee to decide what amounts if any are due to be paid by one party to the other upon the application the agreed profits share formula (Exhibit 29) with respect to the construction contracts and the following properties:
>
> (a) 41 Peverell Street, Hillcrest;
>
> (b) 17 Parklane Crescent, Beaconsfield; and
>
> (c) 23 Parklane Crescent, Beaconsfield."

[11] I note for completeness that the Hillcrest property and the two Beaconsfield properties were projects completed prior to the Mackay project but which are, by agreement of the parties, to be included in the accounting by the special referee.

[12] Accepting, as the parties do, that the "arrangement" between them was terminated on 19 November 2012, the question which has been posed calls for, as was submitted by counsel for Mr Arthurs, identification of the rights (if any) which had accrued to Mr Davison's side of the record as at the date of termination. There is abundant authority for the proposition that, whilst termination discharges obligations of further performance under a contract, rights which have accrued as at termination are not lost unless the contract provides for that consequence. It is sufficient to refer in that regard to the joint judgment of Dixon and Evatt JJ in *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (In Liq)*.[1] Counsel for Mr Arthurs relied heavily on that case as supportive of the position advanced by Mr Arthurs, but it must be noted that the *Westralian* case was expressly concerned only with a liability to pay a liquidated demand in the future.

[13] In the present case, the opposing positions can be stated as follows:

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1 (1936) 54 CLR 361.

(a) Mr Arthurs says that the only right which had accrued to Mr Davison at the date of termination was the right to receive an account of the profits which had been earned before termination. These profits were earned when construction of a house had been completed, because it was only at that point that it was possible to determine whether a profit had actually been made.[2]

(b) Mr Davison says that the right which had accrued as at the date of termination extended to an entitlement to share in the profits derived from building contracts which were entered into before termination, or in relation to which all administration work to be performed by Mr Davison for the purposes of procuring a building contract had been done, even though the building contracts were signed shortly after termination.[3]

[14] In respect of the Mackay project, Mr Arthurs gave the following evidence:

> "Tell me this: did you have a discussion against the background that you believed you make a profit on this venture?--- Yes.
>
> Now, did you believe, if you made a profit, it would be dealt with somehow?--- Yes.
>
> Did you discuss how it might be dealt with?--- It would be dealt with equally.
>
> And what did you say to him and what did he say to you about how it might be dealt with equally?--- It would be dealt with equally at the end – at the end of the project.
>
> What do you mean at the end of the project?--- At the end of the house builds. We had –we had approximately – there were 60 to 70 contracts in Mackay.
>
> I see?--- And that was going to be at the end of the project. If there was any profits, that would be dealt with then.
>
> So I understand you to be saying that you discussed with him that the profit would be paid only at the end of the whole development. Is that correct?--- Yes. Yes.
>
> And did you discuss how this project – sorry – how this profit would be calculated?--- Yes. It would become my construction costs, administration costs, any other incidentals; that would come off whatever – whatever was there. And whatever was left after that was – that was the profit and that was to be provided equally."

[15] Under cross-examination, Mr Davison's evidence concerning profits on the Mackay project was as follows:

> "MR COOPER: Anyway, and so when – when you and Mr Arthurs got together over a beer, and we're talking about how this would go forward, about what you would do and what he would do, it was against the background that you both understood that notwithstanding what you agree, either of you at any time can leave?--- Correct.

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2 Plaintiffs' submissions at [34] – [37].

3 Defendants' submissions at [6].

> Thank you. Now, I suggest to you that the two of you agreed that the profits that would be made on any house constructed in Mackay would be divided 50/50?--- Correct.
>
> And you agreed that the profit would be calculated by taking from what you actually received for the contract price by taking from that the marketer's fees, administration costs, professional fees and the things referred to in the formula?--- Correct.
>
> But the administration fees did not include personal fees, did they, fees of you?--- No."

[16] Central to the position advanced by Mr Arthurs is the contention that the parties' respective rights to receive a share in the profits only arose when the profits crystallised and were capable of calculation upon the completion of construction of a house. There was, however, no express agreement to that effect. At its highest, Mr Arthurs' evidence was that any profits on the Mackay project would be "dealt with equally at the end of the project". If that means, as I understand it to mean, that a distribution of any profits would occur when they were able to be calculated at the end of the project, then that makes perfect practical sense. But that does not necessarily mean that a party's right to share in those profits only arises when those profits crystallise. It is clear enough on the evidence, and there is no real dispute about this, that Mr Davison's obligations, which were associated with the pre-building contract dealings with third parties, were fulfilled upon the presentation of a building contract for execution between the third party and Mr Arthurs. Mr Arthurs' obligations were then to complete construction under the building contract. On that basis, it seems to me that the proper construction of the relationship between Mr Arthurs and Mr Davison was that, upon Mr Davison fulfilling his obligations and, in effect, procuring the presentation of a building contract for execution by Mr Arthurs, there arose for the benefit of Mr Davison a right to share equally in any net profits derived from the ultimate construction of the building by Mr Arthurs. Any such rights which had accrued prior to the act of termination on 19 November 2012 were not then vitiated.

[17] It follows, therefore, that I do not accept, for the purposes of the question posed, that the defendants' entitlement to profit share is to be calculated "only in respect of construction contracts completed as at 19 November 2012".

[18] Counsel for Mr Arthurs also relied on paragraph 8(f) of the second amended statement of claim which, it was submitted, was the subject of a deemed admission on the pleadings. Even if that be correct (and it is unnecessary for me to decide that pleading point), all that was averred in paragraph 8(f) was that under the relevant agreement between the parties "the completion fee for each house was payable to the first defendant at the completion of construction of that house". In fact, there was no real issue before on the question as to when profits became payable. It was, essentially, common ground that profits became "payable" only after construction of a house had been completed. But that is not the point for determination under the present question. Rather, the question directs itself to whether, as at termination on 19 December 2012, there had accrued to Mr Davison a right to share equally in any net profits derived from the ultimate construction of a building by Mr Arthurs. It did not matter that the timing of the profits being ascertained and paid was postponed until after completion of the construction of the house. Accordingly, this

pleading point does not assist the plaintiffs in respect of the question that the parties have put for resolution.

[19] It remains, then, for me to consider the issues raised in paragraph 1(b) of the agreed question, as posed in the Orders of 5 June 2014.

[20] Counsel for Mr Davison tendered a schedule (Exhibit 20) which reproduced the particulars to paragraph 9 of the counterclaim, identifying the construction contracts in respect of which Mr Davison claims an entitlement to one half of the profits. The schedule refers to 66 building contracts. Most of those specify contract dates prior to the termination date of 19 November 2012.

[21] In evidence, Mr Arthurs initially accepted that all of the 66 contracts related to the time when the arrangement between him and Mr Davison was on foot.[4] Mr Arthurs also initially accepted that,[5] in respect of the contracts on the schedule which bear dates after that of termination, all the work that Portfolio (i.e. Davison) had to do in respect of those contracts, namely the submission of plans and costings to Optima, had been completed prior to termination.

[22] Mr Arthurs was then given the opportunity to undertake a closer analysis of the details of the contracts listed in Exhibit 20, and ultimately took issue with the inclusion of a number of those contracts for the purposes of undertaking the exercise of calculation of profits to be shared between the parties.

[23] I will deal briefly with each of the building contracts challenged by Mr Arthurs:

(a) Contract for "Lot 47 Rasmussen" – this was not, in fact, a contract with Mr Arthurs. Mr Davison subsequently accepted this in evidence. The parties have, by the terms of the question referred to me, agreed that this contract is to be excluded from consideration.

(b) Building contract for "677 Holloways" – Exhibit 20 does not contain a date for this contract. Mr Arthurs accepted in evidence, however, that this building contract was signed on 10 September 2012.[6] Accordingly this contract is not excluded.

(c) Building contract for "680 Warilla" – this contract was dated 8 January 2013, after the termination date of 19 November 2012. Mr Davison led no evidence to prove, or from which it can properly be inferred, that all of the work required to be performed by Mr Davison to procure this contract had been completed prior to the termination on 19 November 2012. Accordingly, this contract should be excluded from consideration.

(d) Building contract for "694 Trinity" – this contract was dated 5 March 2013. Mr Davison led no evidence to prove, or from which it can properly be inferred, that all of the work required to be performed by Mr Davison to procure this contact had been completed prior to the termination on 19 November 2012. Accordingly, this contract should be excluded from consideration.

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4 T 1-60.48; 1-71.45; 1-72.10.
5 T 2-41.19-30.
6 T 2-45.2.

(e) Building contract for "723 Trinity" – this building contract was dated 11 January 2013. Not only did Mr Davison not lead evidence to prove, or from which it could be inferred, that all of the Davison work was completed prior to termination on 19 November 2012, the contract specified a design plan known as "Ryan". Mr Arthurs' evidence was that this design in fact would not fit on the relevant block of land, and the design had to be subsequently changed. In other words, the contract as performed was not the contract allegedly procured by Mr Davison. Given that, in those circumstances, Mr Davison had not completed all work required of him prior to the termination date of 19 November 2012, this building contract should be excluded from consideration.

(f) Building contract for "724 Trinity" – this building contract was dated 10 January 2013. Mr Davison led no evidence to prove, or from which it can properly be inferred, that all of the work required to be performed by Mr Davison to procure this contact had been completed prior to the termination on 19 November 2012. Accordingly, this contract should be excluded from consideration.

(g) Building contract for "725 Trinity" – Mr Arthurs' objection was that his copy of this building contract appeared to be undated. In fact, the evidence disclosed that a marketing contract with Optima had been signed on 28 October 2010. Mr Arthurs' evidence was that there were two relevant contracts for each house package in this project – an "Optima contract" and the Housing Industry Association ("HIA") building contract. Mr Arthurs said that, whilst these documents were separate, they were ordinarily presented to him to sign together. Moreover, contracts were presented to him in bundles, in the sense that there were contracts for more than one lot for him to sign on any one day. For each lot, there would be two contracts to sign, namely the Optima contract and the HIA building contract.[7] The Optima contract for Lot 725 Trinity was signed on 28 October 2012. It is, in my view, proper to infer that the building contract for that lot was also signed on that date. Accordingly, this building contract should not be excluded from consideration.

(h) Building contract for "728 Trinity" – this building contract was dated 7 December 2012. However, by reference to an email dated 16 July 2012, which submitted builder's costs and what Mr Arthurs accepted was a "generic plan to Optima", I am prepared to infer that all of the work required to be performed by Mr Davison to procure this contract had been completed prior to 19 November 2012. Accordingly, this contract should not be excluded from consideration.

(i) Building contract for "729 Trinity" – whilst this building contract was dated 18 July 2012, Mr Arthurs' objection was that the contract provided for the building design known as "Albert", but this design would not fit on the particular block of land. The design subsequently had to be changed from that set out in the contract which had been submitted by Mr Davison.

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7 T 2-37.

Accordingly, I do not think it can be said that Mr Davison had completed all work required of it in respect of this building contract. It should be excluded from consideration.

(j) Building contract for "744 Burleigh" – this contract was dated 28 January 2013. Mr Davison led no evidence to prove, or from which it can properly be inferred, that all of the work required to be performed by Mr Davison to procure this contact had been completed prior to the termination on 19 November 2012. Accordingly, this contract should be excluded from consideration.

(k) Building contract for "5 Manon" – Mr Arthurs' initial objection was that this contract was undated, but when shown a copy of the contract,[8] he conceded that this contract had in fact been signed, by the purchasers at least, on 9 August 2012. In the absence of any contradictory evidence from Mr Arthurs, I am prepared to infer that this contract was signed by the builder shortly after that date, and prior to the date of termination on 19 November 2012. It should not be excluded from consideration.

(l) Building contract for "Lot 1 Tindaridge" – Mr Arthurs was shown this building contract[9]. He confirmed that it is undated. He had no recollection of when he agreed that contract with the homeowner. He said that he commenced construction on that site in February 2013. No evidence was led from which the signing date of this contract can be inferred. In the circumstances, I would exclude it from consideration.

(m) Building contract for "48 Morris" –Mr Arthurs was shown this contract.[10] Whilst accepting that he built this house, he could not say when the contract was entered into. The contract in evidence is not only undated, but it does not have any particulars of the client. No further evidence was led to support Mr Davison's reliance on this contract. Accordingly, I would exclude consideration of it.

[24] Having determined the building contracts which should not be taken into account for the purposes of the accounting exercise to be undertaken by the special referee, I think the appropriate resolution is for me to make a declaration in answer to the question posed.

[25] There will be the following orders:

1. Declare for the purposes of determining the question posed in Order 1 made on 5 June 2014, that the defendants' entitlement to profit share calculated according to Exhibit 29 flowing from the plaintiffs' termination of the relationship between the plaintiffs and the defendants, is to be calculated upon the construction contracts listed in Exhibit 20 but excluding the construction contracts for the following properties (as described in Exhibit 20):

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8 Exhibit 15.
9 Exhibit 16.
10 Exhibit 17.

- 680 Warilla
- 694 Trinity
- 723 Trinity
- 724 Trinity
- 729 Trinity
- 744 Burleigh
- Lot 1 Tindaridge
- 48 Morris
- Lot 47 Rasmussen

2. Direct the parties to bring in draft orders to give effect to Order 2 made on 5 June 2014.