SUPREME COURT OF QUEENSLAND

CITATION: ***Fletcher and Anor v Fortress Credit Corporation (Australia) Pty Ltd and Ors*** **(No 2) [2015] QSC 47**

CIVIL JURISDICTION

McMURDO J

No. 3135 of 2012

WILLIAM JOHN FLETCHER and ANOTHER — **Plaintiffs**

and

FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LTD and OTHERS — **Defendants**

BRISBANE

3.20 PM, THURSDAY, 26 FEBRUARY 2015

JUDGMENT

HIS HONOUR: Of the application filed 22 January 2014, the remaining question is one of costs. The application has involved many days of hearing most of which preceded my judgment given on 12 December last. Prior to that date, there were very extensive written submissions presented by the parties after the hearing because – as it happened – time did not allow for oral submissions during the hearing. Since my judgment of 12 December, substantial costs have undoubtedly been incurred in the disposition of the remainder of the application.

The Fortress parties were asked to reconsider their claims for privilege in the light of my reasons for judgment. That was done, as detailed in an affidavit sworn by Mr Walter on 19 February, just prior to the case coming before the court on 20 February. At that time, the plaintiffs had not had an opportunity to study Mr Walter's affidavit and consider their response and consequently I granted the adjournment which they sought and the matter has come back on today.

There was further argument today as to the claims for privilege which was an argument focused upon a sample of documents selected by the plaintiffs upon the basis that those documents in particular by their description or – it might be said – lack of description in the claim for privilege were not obviously documents of a kind for which a relevant privilege could exist.

The hearing today has been occupied with my consideration of some of that sample selected by the plaintiffs. From that consideration several things emerged. One was that the documents I inspected, of which there were about 15, were often poorly described or misdescribed. In particular, the description did not reveal that a party to whom the document – or a person to whom the document was sent, was a lawyer, which, once that was revealed put the document in quite a different category insofar as its apparent purpose was concerned. But the 15 or so documents which I inspected, I held, were properly claimed as privileged documents. I should note however, that in a couple of instances the ground for the privilege had been misstated because the true ground was the without prejudice ground rather than one of legal professional privilege.

The result of today's hearing was that I made a further order, not for the production of any other documents, but for the Fortress parties to provide a proper description of the documents for which privilege was still claimed. It is unnecessary here to repeat the reasons which I've given earlier for that order, except to note that it does illustrate a shortcoming in the process on the part of the Fortress parties.

In my judgment of last December, each side could fairly claim to have had some substantial success. The plaintiffs succeeded in obtaining an order for production of all of the documents relating to the so-called restructure upon the basis that privilege had been waived. They also succeeded in obtaining production of about 10 per cent of the sample of the 200 or so documents, for which privilege had been claimed on the subject of what I described as the 2008 transaction.

Against that, however, they were unsuccessful in a number of respects. It follows from what I've just said that they were unsuccessful in impugning the claims for privilege for the remainder of that sample of 200 or so documents. They were unsuccessful in their argument that privilege had been waived in relation to February 2008 documents, and they were unsuccessful in their argument that according to cases such as Cox v Railton the privilege could not be upheld for the February 2008 documents.

In a sense, they were also unsuccessful in their argument that the entirety of the Fortress claims for privilege should be rejected because the claims had not been made or supported by evidence according to rule 213 of the UCPR. As I said in my December judgment, the Fortress parties have not complied with rule 213, but that that non-compliance was not in itself a reason in the present case to deny the privilege to a party otherwise entitled to it. Although that argument based upon non-compliance with rule 213 was unsuccessful, it was a proper argument to advance and overall did not contribute significantly to the costs of the hearing or its preparation.

Looking at the costs up to and including my judgment of December and putting on one side the Cox and Railton argument which was rejected, my view would have been that the outcome on costs should be somewhat in the plaintiff's favour. They did after all succeed in having a not insignificant number of documents produced to them. They did make the application with a starting point that the party which had to establish the privilege, namely, the Fortress parties, had not done so according to the rules. And they made the application in the circumstance that as today's hearing has again demonstrated, and as I observed in the December judgment, there was a substantial incidence of misdescription of the documents for which the claim was made.

Nevertheless, allowance has to be made for the outcome on that discrete Cox and Railton argument. There have been submissions today as to the way in which some assessment might be made by the Court of the extent to which that contributed to the overall costs of the application. Much of the evidence, particularly the oral evidence, was concerned with other questions, but the Cox and Railton argument undoubtedly contributed to the length and, therefore, the expense of the hearing itself and, moreover, must have contributed substantially to the extensive written submissions to which I have referred.

I then have to consider the events since the December judgment. It is important in the overall assessment of parties' respective merits on this application to note that the reconsideration of the claims for privilege has resulted in at least 135 documents, perhaps as many as 177 documents, being produced by the Fortress parties which had previously been the subject of claims for privilege.

In litigation of this size it would be fanciful to suppose that the process of disclosure would be so precisely executed that there would be no prospect of an erroneous claim for privilege. But given the very extensive hearing that preceded my December judgment and the written submissions to which I've referred, it is notable

that there remained more than a trivial number of documents which should always have been produced. Although no further documents have been ordered to be produced as a result of today's hearing, the plaintiffs were not unreasonable in persisting with their application because of the poor description of many of the documents.

I've earlier described how the basis for the claim for privilege, as a matter of evidence, became apparent from an inspection of the document rather than from the description of the document as it was disclosed. The existence of the privilege for many of these documents had to be further explained by an affidavit of Mr Walter which was filed by leave this morning. For those reasons, the fact that no further documents have been ordered today does not tell against the plaintiffs.

Overall, the position is that after a very hard-fought and extensive interlocutory application, about 20 per cent of the documents for which privilege had been claimed are now documents which have been or will have to be produced. That outcome, in my view, could not be reconciled with the order which was sought for the Fortress parties which was that 75 per cent of their costs be paid by the plaintiffs. In my view, it is not so much a matter of apportioning the costs according to the number of documents ordered or not ordered to be produced. The starting point is that the Fortress parties wrongly claimed privilege in relation to a not insignificant part of their disclosed documents, and the application had to be made in order to secure their production.

The plaintiffs submit in all the circumstances an appropriate order would be that each party's costs of this application be its costs in the proceedings. In my conclusion that is the order which ought to be made. It does, in my view, make appropriate allowance for the respects in which the plaintiffs were unsuccessful, particularly on the Cox v Railton argument. There were costs reserved by me when adjourning the application last week. It seems to me that they should be within the order I have just described, that is, one whereby each party's costs of the application filed 22 January 2014 be that party's costs in the proceedings.

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