

SUPREME COURT OF QUEENSLAND

CITATION: *Jawhite Pty Ltd v Trabme Pty Ltd & others* [2015] QSC 341

PARTIES: **JAWHITE PTY LTD (ACN 106 661 287)**
(applicant)

v

TRABME PTY LTD (ACN 154 609 159)
(first respondent)

BOEDRY PTY LTD (ACN 154 609 882)
(second respondent)

TRENT ANDREW RYAN
(third respondent)

VESTWELL PTY LTD (ACN 106 478 808)
(fourth respondent)

FILE NO/S: SC No 2310 of 2014

DIVISION: Trial Division

PROCEEDING: Applications

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 13 November 2015

DELIVERED AT: Brisbane

HEARING DATE: 13 November 2015

JUDGE: Atkinson J

ORDER:

- 1. The first, second and fourth respondents file an affidavit setting out in detail the amount of legal costs expended by the first, second and fourth respondents between 22 May 2015 and 17 August 2015.**
- 2. Paragraph 3 of the application filed on 1 October 2015 is adjourned to the review before Justice Flanagan on 17 December 2015.**
- 3. Pursuant to section 237 of the *Corporations Act 2001* (Cth) and rules 374 and 377 of the *Uniform Civil Procedure Rules 1999* (Qld), the applicant has leave to
 - (a) commence a proceeding referred to in section 236 of the *Corporations Act 2001* (Cth); and**

(b) file a further amended originating application and a further amended statement of claim

in the form annexed to the affidavit of TA Ryan filed on 13 October 2015.

4. Costs reserved.

CATCHWORDS: *Corporations Act 2001 (Cth) s 236, s 237*
Uniform Civil Procedure Rules 1999 (Qld) r 374, r 377

PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER MATTERS – where an order for the provision of security for costs in the form of a bank guarantee had been made in earlier interlocutory proceedings – where the sum specified in that order had been premised on the first, second and fourth respondents having legal representation – where the first, second and fourth respondents had since dispensed of legal representation – whether an order for the provision of security for costs in the form of a bank guarantee should be set aside

CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS’ REMEDIES AND INTERNAL DISPUTES – PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER – STATUTORY DERIVATIVE ACTION – where the applicant company is controlled by the third respondent and the fourth respondent company is controlled by two individuals not joined as parties in the proceedings – where a merger was obtained of the applicant company and the fourth respondent company – where the applicant company and fourth respondent company jointly operated a real estate business for a period of 18 months – where the third respondent was then dismissed from the joint business – where a controversy has arisen as to whether that dismissal was with or without grounds – where the applicant claims that there has been oppressive conduct such that it relief should be granted – whether the applicant must be granted leave under s 237 of the *Corporations Act 2001 (Cth)* to commence a proceeding referred to in s 236 of the *Corporations Act 2001 (Cth)*

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the applicant company is controlled by the third respondent and the fourth respondent company is controlled by two individuals not joined as parties in the proceedings – where a merger was obtained of the applicant company and the fourth respondent company – where the applicant company and fourth respondent company jointly operated a real estate business for a period of 18 months –

where the third respondent was then dismissed from the joint business – where a controversy has arisen as to whether that dismissal was with or without grounds – where the applicant claims that there has been oppressive conduct such that relief should be granted – where the amended originating process and pleading would reflect the derivative action, to institute which leave is also sought – whether the applicant should be granted leave to file a further amended originating application and a further amended statement of claim

COUNSEL: NJ Shaw for the applicant and third respondent
A Boland (self-represented) for the first, second and fourth respondents

SOLICITORS: McMahon Clarke for the applicant

- [1] **ATKINSON J:** There is an application before me today essentially for two orders. One is in respect of an order for the provision of security for costs where an order was made by consent by Justice Boddice on 22 June 2015 for a bank guarantee to be given. The applicant seeks an order that the bank guarantee be set aside because the first, second and fourth respondents have subsequently dispensed with the services of their solicitors.
- [2] Since there was a period of time between the order made by consent and the time when the solicitors were no longer acting for the respondents, I have adjourned that application to allow Mr Boland, who is the director of those respondents, to file affidavit material referring to how much in the way of legal expenses was incurred between the date of the order made by consent on 22 June 2015 and the time when the solicitors' services were dispensed with.
- [3] The second application is an application pursuant to section 237 of the *Corporations Act* 2001 (Cth) for the applicant to be given leave to commence a proceeding referred to in section 236 of the *Corporations Act*, which is essentially a derivative action. A proposed second amended statement of claim and a second further amended originating application set out the pleading that the applicant wishes to make.
- [4] The facts are, perhaps unsurprisingly, highly contested and it should not be thought that by allowing any such amendment, I am working on any basis that the allegations made are correct or that they will be vindicated. That is not a matter for me to determine on an application like this. I say that particularly because the first, second and fourth respondents are not legally represented at the moment; any successful application to amend should not be seen as the expression of a view by the court that the matters to be litigated will meet with success. It is merely a question of whether or not those matters could and should be litigated in these proceedings.
- [5] The proceedings are complex but are essentially proceedings for a claim of oppression. The matters sought to be added in part are able to be litigated as part of that claim for oppression, but they also seek to add, as part of the facts claimed, a claim on behalf of the company Boedry Proprietary Limited that its directors have not acted in its best interests as set out, in particular, in paragraph 70 of the proposed second amended statement of

claim. The application must be determined in accordance with section 237 of the *Corporations Act*.

- [6] I am satisfied that the applicant fulfils the requirements of section 236(1)(a) and therefore may apply to the court for leave to bring the proceedings. Section 237(2) provides that the court must grant the application if it is satisfied of the five matters therein set out. The first is that it is probable that the company itself would not bring the proceedings or properly take responsibility for them and that is easily satisfied. It is clear that the company would not bring these proceedings itself since its directors are opposed to them. Indeed, the action is against its current directors.
- [7] The second is that the applicant is acting in good faith. That is itself contested by the directors of the company on whose behalf these proceedings are sought to be brought. I can only determine that on a prima facie basis and prima facie, it appears that Mr Ryan, acting on behalf of the applicant, is acting bona fide.
- [8] The third matter is whether or not it is in the best interests of the company that the applicant be granted leave. Again, this matter is not without its difficulties. Mr Ryan swears to various allegations which, if made out, would show that the company Boedry has lost moneys because of breaches of duty by its directors, but those directors vehemently contest those breaches of duty. Nonetheless, if the allegations that are made against those directors are made out, it would be in the best interests of the company to see its property returned to it. Accordingly, that provision favours allowing that matter to be determined.
- [9] The fourth matter is if there is a serious question to be tried. There is obviously a serious question to be tried. As I have said, that does not mean it would be determined in favour of the company. However, there are serious factual contests which would need to be determined, in any event, in this proceeding and are serious matters which, if made out, would lead to a payment of moneys to the company. I am satisfied there is a serious question to be tried.
- [10] The fifth matter to be determined is whether or not, at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying. Mr Shaw, on behalf of the applicant, has frankly conceded that, although notice was given, it did not comply wholly with that paragraph. Accordingly, I must consider whether or not it is appropriate to grant leave, even though subparagraph (i) is not satisfied.
- [11] I am satisfied that it is appropriate to grant leave in those circumstances because it appears to me that these allegations will have to be litigated in any event. Mr Boland has expressed his concern, which I share, that the testing of these allegations could prolong the litigation. I am, however, of the view that these allegations would, in any event, have to be tested in the litigation and so it would not prolong the litigation. It is therefore appropriate to grant leave.
- [12] In the circumstances, I grant the application that, pursuant to section 237 of the *Corporations Act 2001 (Cth)*, the applicant have leave to commence the proceeding referred to in section 236 in respect of the matters sworn to in the affidavit of Mr Ryan in support of this application and that the applicant should have leave to amend its

originating application and statement of claim in the form annexed to the affidavit of Mr Ryan to give effect to that order.