DISTRICT COURT OF QUEENSLAND

CITATION:	*Cambio Group Pty Ltd v Fanengine Pty Ltd & Ors (No 2)* [2014] QDC 116
PARTIES:	**CAMBIO GROUP PTY LIMITED** **(plaintiff)** **v** **FANENGINE PTY LTD** **(first defendant)** **and** **BRETT JOHN MCCALLUM** **(second defendant)** **and** **DESMOND GEORGE SELVEWRIGHT** **(third defendant)**
FILE NO/S:	384/2013
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court, Southport
DELIVERED ON:	27 May 2014 *Ex tempore*
DELIVERED AT:	Southport
HEARING DATE:	21 May 2014
JUDGE:	Reid DCJ
ORDER:	1. The application pursuant to rule 292 of the *Uniform Civil Procedure Rules (1999)* for summary judgment against the first and third defendants is dismissed. 2. The first and third defendants file and serve an amended Defence and Counterclaim, if any, no later than 4.00 pm on 13 June 2014. 3. The Plaintiff file and serve the Reply and any Defence to any Counterclaim no later than 4.00pm on 27 June 2014. 4. Each party give disclosure no later than 4.00pm on 11 July 2014. 5. Any party may make application to the Court for further directions upon giving the other parties two days notice in writing. 6. Costs be reserved.

COUNSEL: Mr C. Garlick for the first and third defendants

SOLICITORS: Rose Litigation for the plaintiff

Hannay Lawyers for the first and third defendants

INTRODUCTION

[1] This is an application by the plaintiff pursuant to r. 292 of the *Uniform Civil Procedure Rules (1999)* ('UCPR') for summary judgment against the first and third defendants in the amount of $187,089, together with interest pursuant to the terms of a lease and guarantee, and for costs.

[2] The matter first came before me on 12 May 2014 when the second defendant did not appear. I entered judgment against him for the sum claimed, together with interest and costs.

[3] The third defendant appeared in person, on his own behalf and on behalf of the first defendant, a company of which he is a director. The matter was adjourned to 21 May 2014 and I made consequential orders in respect of costs thrown away by the adjournment.

[4] When the matter came before me on 21 May 2014, the first and third defendants had legal representation, but it appeared that the material which had been filed on their behalf had been prepared by the third defendant himself. In particular, the third defendant had sworn an affidavit and filed what was described as a defence, but was clearly an amended defence although it did not comply with the rules in respect of amended pleadings.

BACKGROUND:

[5] The plaintiff initiated proceedings by its claim and statement of claim filed 27 November 2013. Both the second and third defendants are said to be directors of the first defendant.

[6] It is alleged that on 28 March 2013 that the plaintiff and the first defendant entered into a lease of premises at Marine Parade, Southport. The lease was for the period from 8 April 2013 to 28 February 2015. Annual base rental was $91,700 per annum plus GST, including outgoings. There was provision for variation thereof during the lease. On the same day, that is 28 March 2013, each of the second and third defendants executed guarantees with respect of the first defendant's obligations under the lease.

[7] Those allegations were all admitted in the original defence filed on behalf of all of the defendants.

[8] It is also admitted in the defence that on 28 April and 29 May 2013 the first defendant failed to pay rental instalments, each payment being for an amount of $7,641.66, and that the lease provided for interest on arrears at 15 per cent per annum.

[9] Much that is alleged in the statement of claim is admitted in the defence. It is, in my opinion, unnecessary to consider in detail the pleadings at this stage.

[10] In opposing the application the first and third defendants rely on the affidavit of the third defendant sworn on 17 May 2014. The affidavit sets out relevant matters on which the first and third defendants rely but which have not been the subject of allegations in the defence or amended defence. It is possible, in opposing an

application under rule 292 of the UCPR, to rely on matters not pleaded in a defence. It is also important to understand that the defence and affidavit were prepared and filed by the third defendant who was then acting in person and not represented by lawyers.

[11] The circumstances in which summary judgment should be ordered are well known. They were referred to in submissions of the applicant when the matter first came before me on 12 May 2014 and again at the hearing on 21 May 2013. It is unnecessary to set them out in detail. The words of the rule require that the applicant show the defendants '*...have no real possibility of defending the claim'* and that there is no need for a trial.

[12] In this case, the matter which primarily concerned me was the contents of the affidavit of the third defendant. In my view, that affidavit indicates that the third defendant alleges:

1. that the first defendant was a start-up technology company engaged in the monetisation of large databases, primarily related to sporting endeavours, and that the second and third defendants were directors of the first defendant. The second defendant was the CEO and was effectively running the company from the Gold Coast;
2. the first defendant had, at least at relevant times, no source of income or revenue but relied on start-up investment capital;
3. Mark Sessarago, a director of the plaintiff, met the second defendant and also the third defendant and became aware of the matters referred to in subparagraphs (1) and (2) above;
4. Mr Sessarago, who was an accountant by profession:

(a) told the defendants that he was connected to international sporting identities and had clients within the sporting community, including in particular a client, Nick Gates, who lived in Monaco, who could provide the opportunity to present the platform being developed by the first defendant globally;

(b) was the accountant for the second defendant and the second defendant's wife from between October and December 2012.

(c) provided advice to the first defendant in relation to business structure and strategy, and taxation and accounting advice;

(d) knew the first defendant was seeking capital investment and had no ongoing revenue stream; and

(e) often said the plaintiff's clients and contacts would be of assistance to the first defendant and discussed the possibility of the first defendant having access to the plaintiff's clients in order to assist in the development of the first defendant's business.

[13] It was in such circumstances the plaintiff, through Mr Sessarago, and the second defendant on behalf of the first defendant entered into negotiations about the first defendant leasing the premises the subject of the claim which are owned by the plaintiff. The property was to become vacant from 1 March 2013.

[14] The third defendant says that in correspondence enclosing a draft heads of agreement relating to the first defendant's lease of the premises, the plaintiff, through Mr Sessarago, referred to Nick Gates and said that a meeting had been arranged for 7 March 2013 to get him "locked away and onboard and out spreading the word".

[15] It is said that on 9 March 2013 Mr Sessarago again emailed the second defendant about the proposed lease, writing: "*We will talk about Foxtel once you are in, as already have some connections etc"*. In my view, that offers some significant support to the fact that the plaintiff was actually involved in advising the plaintiff about its business activities or at least in assisting it with those activities through the plaintiff's client base.

[16] The entering into of the lease meant the first defendant, with no revenue stream, faced a significant increase in rental payments from about $500 per week to almost $2,000 per week. The third defendant says the defendant was not in a position to meet such payments and ought not, in its interests, have entered into the lease and that this situation was known to the plaintiff.

[17] There are also other issues surrounding the execution of the lease, but in view of the attitude I have taken to these factual matters, I have not dealt with those issues which concern formalities of what is said to be a short lease.

Fiduciary Duty

[18] In *Potts & Anor v Robins & Ors* [2013] QCA 273, the Court of Appeal considered whether the appellants in that case were under a fiduciary duty to the respondents. It is not necessary to set out the facts of the case. The court quoted, at significant length, from the decision of the High Court of *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41. The existence of a relationship of confidence, which may be abused was seen as a circumstance which might indicate such a fiduciary relationship. Mason J observed in *Hospital Products Ltd v United*

States Surgical Corporation (supra) at p. 96, referred to by the Court of Appeal at paragraph 38, that the critical feature of a fiduciary relationship is that:

> *'... the fiduciary undertakes or agrees to act for on behalf of or in the interests of another person in the exercise of a power or a discretion which will affect the interests of that other person in the legal and practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.'*

[19] Other passages of the judgment in *Potts & Anor v Robins & Ors* (supra) are also of significant relevance. In particular, at paragraph 42, the court cited the following from the reasons of Gaudron and McHugh JJ in *Breen v Williams* (2001) 207 CLR 165 at 198:

> *'In this country, fiduciary obligations arise because a person has come under the obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach.'*

[20] The factual matters set out in the third defendant's affidavit raise concerns that the plaintiff was in the position of a fiduciary *vis à vis* the first defendant. It was said to be the accountant for the second defendant, who was a director of the first defendant, and to be engaged in giving the first defendant advice about its business structure and strategy together with tax and accounting advice. It was also said that it was aware the first defendant had no income stream, and in documents in which it negotiated the lease, also indicated assistance it was able to give to the first defendant in establishing its business. In my view, those matters raise for consideration the question of whether the plaintiff and the first defendant were in a fiduciary relationship and if so, whether the plaintiff breached its obligations to the

first defendant such that it must account for any profits it made or make good any losses caused by any such breach.

[21] In such circumstances, although the matter has not been the subject of an allegation in the defence, the application is dismissed.

[22] It is however important that the matter proceed to trial expeditiously. The defendants, who are now legally represented, should be given some time to file an amended defence and any counterclaim. Consequential orders should then be made for delivery of subsequent pleadings and for disclosure. Whether ADR processes should be undertaken can be considered by the parties at that time, when the strength of the parties' respective cases can be more appropriately assessed.

ORDERS:

1. The application pursuant to rule 292 of the *Uniform Civil Procedure Rules (1999)* for summary judgment against the first and third defendants is dismissed.

2. The first and third defendants file and serve an amended Defence and Counterclaim, if any, no later than 4.00 pm on 13 June 2014.

3. The Plaintiff file and serve the Reply and any Defence to any Counterclaim no later than 4.00pm on 27 June 2014.

4. Each party give disclosure no later than 4.00pm on 11 July 2014.

5. Any party may make application to the Court for further directions upon giving the other parties two days notice in writing.

6. Costs be reserved.