

SUPREME COURT OF QUEENSLAND

CITATION: *Aqwell P/L v BJC Drilling P/L* [2002] QSC 286

PARTIES: **AQWELL PTY LTD (ACN 007 726 981)**
(applicant)
and
BJC DRILLING SERVICES PTY LTD (ACN 086 032 742)
(respondent)

FILE NO: S 7523 of 2002

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 September 2002

DELIVERED AT: Brisbane

HEARING DATE: 10 September 2002

JUDGE: Mackenzie J

ORDER: **1. The parties are at liberty to make submissions as to the appropriate form of orders after considering the findings in the reasons for judgment.**
2. If the parties agree on an appropriate form of order, an order in those terms will be made upon receipt of an agreed draft

CATCHWORDS: CORPORATIONS – RECEIVERS, MANAGERS AND CONTROLLERS – APPOINTMENT - appointment of receivers and managers – where joint venture agreement – whether sufficiency of evidence

COUNSEL: D R Cooper SC for the applicant
W Allen (*sol*) for the respondent

SOLICITORS: Porter Davies Lawyers for the applicant
Whitman and Co, acting as town agents for Cornwells Solicitors, for the respondent

- [1] **MACKENZIE J:** This is an application for appointment of interim receivers and managers of a joint venture in which the applicant and respondent were involved.
- [2] By a deed dated 28 February 2001 it was provided that the respondent would purchase a drill used in connection with the mining industry from the applicant and that the respondent would grant the applicant an interest in the drill and undertake to

pay half the profits earned by the drill until an option granted to the respondent to purchase the applicant's interest was exercised (cl 3.3 and cl 7). The applicant acknowledged that the respondent had entered into the deed for the purpose of undertaking contract work for which the respondent was bidding (cl 6.1). The applicant acknowledged that the respondent held management rights to the drill (cl 6.2).

- [3] The two parties agreed to open a joint bank account to be administered by the respondent to hold revenue from contracts performed by the drill and disperse payments for costs. The respondent was obliged to maintain separate revenue and cost records and provide summary details of all transactions to the applicant every month. Subject to a provision dealing with specified circumstances any profits earned by the drill prior to the respondent exercising its option would be distributed fifty-fifty.
- [4] A document called an "option to purchase deed" was executed in about May 2001 in respect of two other drills. Subject to the respondent exercising the option to purchase the drills a similar scheme was entered into with respect to those two drills. The option to purchase was exercised on 30 June 2001.
- [5] On 30 April 2002 a joint venture agreement was executed, reciting the sale of the drills to the respondent subject to retention of certain rights by the applicant and to the option granted to the respondent to acquire the applicant's residual rights. There was a provision that the joint venture would be effective from 28 February 2001 (cl 2.1).
- [6] A deed of cross charge securing the respective obligations was executed (cl 3.2). The respondent was appointed manager of the joint venture (cl 4.1). Some of the responsibilities of the manager were to negotiate work contracts on behalf of the joint venture (cl 4.2(e)); and to provide the applicant with copies of all invoices to customers for work performed by the drills (cl 4.2(l)). Within 30 days of the end of each month the respondent was to pay 50% of invoiced income less expenses to the applicant. The documentation supporting the calculation was to be provided. A right was given to the applicant to inspect the joint venture accounts.
- [7] The relationship between the parties has clearly broken down. The applicant has terminated the agreement and the respondent has accepted the termination.
- [8] There is evidence in the material before me that the account keeping in respect of the joint venture has been very limited and that moneys which should have been paid into the joint bank account in accordance with the agreements were not. The joint account was set up but has not been used since July 2001. It does not seem to be disputed that the provisions in the two earlier agreements concerning accounting were not complied with either, but it is alleged in response that there was justification for not doing so. The allegations include misrepresentations as to the age and condition of the drills and failures by the applicant to perform various obligations.
- [9] It is also apparent that a very limited amount of financial information was given to the applicant from time to time. Later, in about May 2002, more extensive information in the form of invoices and computer generated information and, later still, in the form of general ledgers was provided. This was analysed by an accountant on behalf of the applicant who is critical of the account keeping and

expresses the opinion that moneys that should have been banked into the joint venture account were not. The respondent alleges that the accountant's opinion is based on wrong premises and is of no value.

- [10] The submission also made on behalf of the respondent that since the joint venture was only executed on 30 April 2002 it would be unreasonable or futile to expect obligations in that agreement to be retrospectively applied to the period before that date is not a compelling answer. Even before the joint venture was entered into as a formal arrangement the obligations in the earlier agreements with regard to accounting for moneys were not being carried out by the respondent.
- [11] It is alleged on behalf of the respondent that the accounting documents supplied to the applicant were always intended to be provisional with the possibility of errors being recognised. The respondent sought to cast the blame on the applicant for not having raised issues concerning errors so that they could be considered in a timely way.
- [12] It is apparent from the evidence that there is a wide range of factual and legal issues in dispute between the parties. One of some significance is the status of contracts involving use of the drills now that the joint venture has been brought to an end. There are allegations and counter-allegations regarding the financial stability of the parties and the causes thereof. The evidence suggests strongly that the obligation to keep proper records as required by the deeds of sale was not complied with. Nor were the record keeping obligations under the joint venture agreement observed. Nor were payments in accordance with the agreements made to the applicants.
- [13] If the respondent makes out its allegations, one contributory factor to the failures is the need to expend moneys to rectify the consequences of misrepresentations and non-performance by the applicant. Resolution of the disputed issues of fact is not a part of the present process. Whatever view is taken of the facts, the contractual arrangements between the applicant and the respondent were concerned with three drills when the respondent also operated other drills on contracts it negotiated on its own behalf. There are also issues concerning the right of the respondent to use the three drills for its own purposes, now that the joint venture has been terminated.
- [14] One thing that is certain is that it would be desirable to have a proper accounting analysis by someone independent of the parties of all transactions including any in which moneys were allegedly spent by the respondent in consequence of defaults on the part of the applicant, involving the three drills from the commencement of the first agreement until the termination of the joint venture agreement. In view of the issues concerning the status of contracts that were entered into prior to dissolution which involved use of the three drills and the issues relating to use of the three drills subsequently, it is also highly desirable that there should be proper records kept of all transactions involving the three drills until trial so that in the event that it is necessary to take into account such transactions in resolving the issues between the parties, there is a reliable independent analysis of them. There is no reason to assume, having regard to the history of the matter so far, that leaving the task to the parties will do any of those things effectively.
- [15] However, in view of the multiplicity of disputed issues which cannot be resolved on the present application and which would need to be resolved as and when particular problems arose during receivership, it seems impractical to appoint the receiver as

manager. However, there does seem to be justification for what is, in effect, an audit of the joint venture done by an independent person or persons. It also seems desirable for those persons to keep accounts of transactions involving the drills into the future until trial. Without being necessarily exhaustive, that would involve most if not all of the things referred to in paras 5(b) and (c) of the draft order handed to me by Mr Cooper SC.

- [16] In principle the appropriate course would be to appoint the persons nominated in the draft order, if they are prepared to act, to perform that function. Given the extensively disputed circumstances of the matter, I am not persuaded that it is appropriate to appoint receivers and managers with the full extent of the powers sought by the draft order. I will hear the parties as to the precise form of an order which will effectuate what is proposed. If the parties, after having considered these reasons, can agree on an appropriate form of order, I would be prepared to make it upon receipt of an agreed draft, so that the costs of another appearance may be avoided.