



Transcript of Proceedings

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Date: 26 August, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MACKENZIE J

Application No 343 of 2003

ABC AUSTRALIA PTY LTD

Applicant

and

SUNSTATE FINANCE CORPORATION PTY LTD

Respondent

CAIRNS

..DATE 25/08/2003

JUDGMENT

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HIS HONOUR: This is an application to set aside a statutory demand under the Corporations Act. The principles are not, I think, disputed. There must be a genuine dispute. The dispute must truly exist and the grounds must not be illusory. The applicant and another individual, Mr Voyka, wished to refinance separate existing loans. The applicant and Mr Voyka told the respondent that they would be interested in refinancing their loans if the finance could be obtained on terms suitable to both.

It seems to be common ground that the respondent was told that a warrant of execution existed over land that Voyka had and which, it appears, was to form part of the security for the loan. It is alleged by the director of the applicant that the applicant and Voyka told the respondent that they were prepared to give mortgages over their respective lands to the new lender if loans were on terms satisfactory to the applicant and Voyka.

Mr Wight, acting on behalf of both the applicant and Mr Voyka, said that warrants of execution were in place and accommodation was sought on that basis. Subsequently he instructed the respondent to do all things necessary to procure a loan in the sum of 1.45 million dollars. The letter of instruction did not refer to paying out the debt to the ATO as one of the purposes of the loan. It appears that the respondent contacted a solicitor to see if a loan could be sourced through the solicitor's sources.

The solicitor approached Zenith Finance Queensland Proprietary Limited which ultimately offered conditional finance. The first condition was that the warrant of execution be removed from the secured property. Later Mr Voyka said he wanted to proceed with the facility but the applicant does not. Presumably there would be joint and several liability under the proposed agreement and it would not be surprising if a condition that may cast a greater proportion of liability on the applicant alarmed it, but equally it would be surprising if finance were offered while the property to be secured had a warrant of execution over it.

In the end it seems to me that there is a disputed issue of what the understanding was as to the fundamental basis upon which finance was to be obtained as between the applicant and the respondent. I think that that is not necessarily inconsistent with the agreement exhibited in PD4. I do not think that Mr Voyka's subsequent wish to proceed is determinative of this issue.

The order will therefore be that the creditor's notice of statutory demand served on the plaintiff by the defendant and dated 14th of July 2003 be set aside. And with regard to costs I would reserve the question of costs of this application to the Judge or other judicial officer who may hear any proceedings relating to this particular matter. I do not think that the case is one where it is appropriate to make an order at this point that the respondent pay the applicant's costs.

The matter also seems to me to be one where, having regard to the amount of fee sought, a sensible commercial resolution of the matter on something approaching a quantum meruit basis, if there is in fact any merit in what is ultimately found on behalf of the applicants, is called for. Nothing further?

MR PHILP: I can't-----

MR ROYDS: Your Honour, just in - in the off chance the respondent doesn't commence any proceedings-----

HIS HONOUR: Mmm.

MR ROYDS: -----would your Honour be prepared to put a time limit-----

HIS HONOUR: Well I think you - no, I'm not prepared to - to make a - another order at that stage. It seems to me that what I've said is all I want to say at this point. Yes, okay.

MR ROYDS: Thank you, your Honour.

HIS HONOUR: Yes, thank you.

MR PHILP: Thanks, your Honour.
