[2003] QSC 420

State Reporting Bureau

Queensland Government
Department of Justice and Attorney-General

Transcript of Proceedings

REVISED COPIES ISSUED
State Reporting Bureau
Date: 17 November, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MCMURDO J

No S3836 of 2002

DALLAS COOPER HAWKINS	First Plaintiff
and	
LINDA ROSEMARY IZZARD	Second Plaintiff
and	
PERMAVIG PTY LTD (ACN 086 570 584	First Defendant
and	
BRISBANE CITY COUNCIL	Second Defendant
and	
END FS PTY LTD (ACN 007 015 965) (formerly known as Fisher Stewart Pty Ltd)	First Third Party
and	
FISHER STEWART QUEENSLAND PTY LTD (ACN 072 942 520)	Second Third Party

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

BRISBANE

..DATE 05/11/2003

JUDGMENT

HIS HONOUR: These proceedings arise out of the purchase by the plaintiffs of land at Rocklea upon which they intended to construct an industrial building. The land had been subdivided by the first defendant, pursuant to an approval issued by the Council, which is the second defendant in these proceedings. The plaintiffs purchased the land from the first defendant.

The approval given by the Council contained certain conditions to be complied with by the first defendant. The plaintiffs completed their purchase of the land before those conditions were fulfilled and they complain that the first defendant has then failed to perform the required acts in respect of works upon the land in breach of express terms of the contract between them and the first defendant. They claim damages for breach of contract against the first defendant in a number of components.

Their claim against the second defendant is for damages for negligence. The components of that claim are the same as those making up the contract claim against the first defendant. The largest of those components is that particularised in paragraph 31(c) of the statement of claim by which it is alleged that, as a consequence of the first defendant's breach of contract, the plaintiffs have suffered loss or damage constituted by "loss of profits resulting from the delays in the development of the land."

By reference to correspondence between the respective solicitors, it becomes apparent that the particulars of that loss of profits claim are to be found within a report prepared by accountants as expert witnesses for the purpose of these proceedings. In fact, there are two reports, the second having the effect of reducing the relevant component to an amount slightly in excess of $300,000, but for present purposes, not affecting the nature of the damages claimed.

The "loss of profits" as appears from those reports, are not profits of the plaintiffs, but profits lost by their company which is called Sprygrove Proprietary Limited. The effect of the case with the benefit of a reading of those reports is that the delay in the construction of buildings upon this land, has resulted in an impact upon the business of that company causing it loss of profits. In turn, the plaintiffs, as the shareholders of the company, are alleged to have thereby suffered loss. The case is further clarified by paragraph 7 of the reply which pleads that the company, Sprygrove Proprietary Limited, is obliged to make distributions from profits "exclusively to them (the plaintiffs) by virtue of their being its sole shareholders."

The claim against the second defendant pleads, as I have mentioned, the same components of loss and damage and does so by specific reference to the particulars of paragraph 31, including of course, those within paragraph 31(c).

Each of the defendants makes an application for summary judgment as to that part of the plaintiff's claim which claims the damages particularised in paragraph 31(c). In the alternative, each defendant applies to strike-out paragraph 31(c).

I have concluded that the summary judgment applications should be dismissed, but that the strike-out applications should succeed. The basis for the summary judgment application is that the claim is bound to fail against each defendant for the same reason which, in essence, is that the loss which is claimed, is not a loss recoverable by the plaintiffs, but at its highest is a loss recoverable by Sprygrove, which is not a party and makes no claim.

The defendants rely heavily upon what was said in Gould v. Vaggelas (1985) 157 CLR 215, especially in the judgment of Gibbs CJ at 219 to 220. The response by the plaintiffs is that their case does not offend any principle there stated for the reason that there is no risk of some aspect of double recovery here by which I mean there is no prospect of a claim both by the plaintiffs as shareholders and by their company.

Instead it is said that it is a case where the company, Sprygrove, has no cause of action for the losses from this impact upon its business, and that being so there is no reason according to principle or to authority by which their loss through a diminution in their dividends from Sprygrove ought not to be recoverable.

In addition, it is submitted that their claim is supported by authority and in particular by Johnson v. Gore Wood and Co. [2002] 2 A.C.1 and especially in the speeches of Lord Bingham at page 35 and of Lord Millett at page 62 and following. Lord Bingham there set out three types of claims or potential claims by shareholders for losses apparently suffered by a company.

The second of his three categories involves a case, "where a company suffers loss but has no cause of action to sue to recover that loss", in which, "the shareholder of the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding."

It was conceded by each of the defendants that this proposition is not inconsistent with any authority which binds me and in particular, with anything which was said in Gould v. Vaggelas. The concession seems to be rightly made. The particular passage from the speech of Lord Bingham was cited with approval by Beazley JA with whom Heydon JA agreed in Chen v. Karandonis (2002) NSW CA 12 at [39].

It is sufficient to say that according to Australian law it is at least arguable that in a case within the second of Lord Bingham's three categories losses thereby suffered by shareholders are recoverable. The question then is whether this case is arguably within that principle. It may be correct to say as was submitted for the defendants that it is

not plain that Sprygrove has no cause of action, but nor is it plain that it does have a cause of action.

The position then is that it appears that there is a real prospect that ultimately the plaintiffs could establish that their claim is within a category of case for which shareholders can recover for what appear at first sight to be the company's loss.

A further submission on behalf of the defendants was that the shareholders' rights went only so far as to be able to claim the capital loss represented by diminished value of their shareholding from the events which have affected the company's profits, whereas in the present case the claim is in the nature of lost revenue rather than being translated to a diminished capital value of their shareholding. In my view, however, the authorities are not so clearly against a claim for lost profits as distinct from a diminution in the value of the shareholding as the defendants would suggest.

In particular, the English Court of Appeal in Gerber Garment Technology v. Electra systems [1997] RPC 443, seems to have provided some particular support for a loss of profits claim of this kind.

I am conscious of the recent authorities to the effect that upon applications for summary judgment the Court must adopt a somewhat more robust attitude than that which was appropriate under previous rules of Court.

It seems to me, however, that the plaintiffs pleaded case, taken together with the accountant's report, demonstrate enough to show some real prospect of success, albeit in a case which requires some repleading.

Accordingly the application for summary judgment, as I have indicated earlier, will be dismissed in each case. There are, however, problems with paragraph 31(c) which warrants an order that it be struck out.

The first is that the paragraph, in the context of the pleading, is a reference to the plaintiffs' profits, which as I have said, these lost profits are not: they were the profits lost by the company. Paragraph 31(c) thereby misstates the position, not deliberately of course, but it does require amendment. It also seems to me to be necessary for the plaintiffs to plead within the statement of claim, the facts by which the lost profits of the company have resulted in losses to the plaintiffs. As I see it, they are essential elements of the plaintiffs' cases and they must be pleaded within the statement of claim.

The third difficulty, in any event with paragraph 31(c) is one of form. Taken by itself, it would not warrant the striking out of paragraph 31(c), but as that paragraph will have to repleaded, I should mention it. In my view it is inappropriate for losses of this kind to be particularised by

reference to an expert's report. The material facts and particulars should be pleaded.

In consequence, the orders will be upon each application that paragraph 31(c) of the statement of claim is struck out and the application is otherwise dismissed and I will hear the parties as to costs.

...