

SUPREME COURT OF QUEENSLAND

CITATION: *Mid Australia Pty Ltd v Around Australia Pty Ltd & Ors*
[2004] QSC 374

PARTIES: **MID AUSTRALIA PTY LTD**
ACN 010 670 925
(plaintiff)
v
AROUND AUSTRALIA PTY LTD
ACN 071 096 734 (formerly The Harvard Shoppe Pty Ltd)
(first defendant)
PURELY AUSTRALIAN CLOTHING CO. PTY LTD
ACN 072 516 164
(second defendant)
ALAN MICHAEL PITT BOYD
(third defendant)
JOHN IVAN HANRAHAN
(fourth defendant)

FILE NO/S: SC No 10828 of 2003

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 29 October 2004

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: White J

ORDER:

- 1. The defendants serve any expert reports upon which they wish to rely in respect of the damages claimed in para 7 of their counter-claim filed 22 December 2003, 28 days from the receipt of this order.**
- 2. The defendants pay one half of the plaintiff's costs of and incidental to this application to be assessed on the standard basis.**
- 3. The defendants sign and return the Request for Trial Date within 7 days of serving the expert report on the plaintiff.**
- 4. If there is no expert report the defendants to sign and return the Request for Trial Date 28 days from the receipt of this order.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – OTHER MATTERS – where plaintiff filed an application that the defendant’s signature on the Request for Trial Date be dispensed with –where respondents submit they are not ready for trial – where outstanding report concerning quantum of loss – whether premature request for trial date

Uniform Civil Procedure Rules 1999 (Qld), r 469(4)

SOLICITORS: Minter Ellison (Gold Coast) for the applicant/plaintiff
Hickey Lawyers for the respondents/defendants

- [1] The applicant who is the plaintiff filed an application for a hearing on the papers on 1 October 2004 that the defendants’ signature on the Request for Trial Date be dispensed with pursuant to r 469(4) of the *Uniform Civil Procedure Rules 1999* (“UCPR”). That relief is opposed by the respondents who are the four defendants who submit that they are not ready for trial because they need to obtain an accountant’s report concerning the quantum of the loss of the second to fourth defendants.
- [2] The claim and statement of claim was filed on 27 November 2003. The notice of intention to defend, defence and counterclaim was filed on 22 December 2003. The plaintiff’s reply and answer was not filed until 4 June 2004.
- [3] The Deputy Registrar had written to the parties in accordance with Practice Direction 4/02 noting the failure to file a Request for Trial Date within 180 days of the filing of the defence and extending time for doing so to 5 November 2004.
- [4] The plaintiff served a signed Request for Trial Date on the defendants by letter dated 30 August 2004. Having heard nothing, the plaintiff’s solicitors wrote on 21 September 2004 noting that the 21 days allowed under the UCPR for the return of the request had elapsed and foreshadowing this application.
- [5] The defendants’ solicitors contend that they had an ongoing request for quantification of damage which had not been satisfied despite the promises by the plaintiff but that has now been provided.
- [6] In para 7 of their counter-claim the second, third and fourth defendants allege that they had suffered loss and damage as a consequence of the plaintiff’s alleged representations. The particulars read

“The Second, Third and Fourth Defendants estimate their loss to be \$75,000. Further particulars will be provided upon receipt of an expert’s report”

That pleading was filed on 22 December 2003.

- [7] When the plaintiff’s solicitors requested a copy of that report, in their letter of 21 July 2004 drawing the defendants’ solicitors attention to para 7 of the counterclaim the defendants’ solicitors responded by letter dated 2 August 2004

“We propose to disclose our client’s expert report pertaining to its loss and damages suffered as soon as same is to hand.”

That might suggest that the report had already been sought and was, at that date, being prepared. That, however, was not the case because in response to the Request for Trial Date signature the defendants’ solicitors said

“Our client is not yet ready for trial. We must obtain a report from an expert accountant. We will immediately seek instructions to obtain that report as soon as possible.

Upon receipt of that report we expect we will be in a position to certify the matter is ready for trial.

We had not previously incurred the expense of obtaining that report in the anticipation that there might be some prospect of resolving this matter by negotiation. It is now apparent that this is not the case.

Until we have obtained a report from an expert accountant this matter is not, from our client’s point of view, ready for trial and we cannot execute the Request for Trial Date.”

This was reiterated in a letter from the defendants’ solicitors of 24 September 2004.

- [8] In his affidavit filed 13 October 2004 Mr Scott Eustace, the defendants’ solicitor, deposed that after receiving the plaintiff’s solicitor’s letter of 21 September about signing the Request for Trial Date

“... it became apparent that the Plaintiff wished these proceedings to go to trial. It was at that stage that I sought instructions from my client to obtain an expert’s report. Shortly thereafter I received instructions to obtain that report.”

In the letter of 27 September 2004 the defendants’ solicitors wrote to the plaintiff’s solicitors

“As stated in our previous correspondence, we are endeavouring to obtain an expert accounts [sic] report as a matter of urgency. We will provide that report to you as soon as it is to hand.”

- [9] In the meantime the plaintiffs had provided an amended list of documents. The defendants contend that since some of those documents were in existence prior to the date of the original list of documents the plaintiff had not complied with its obligation of disclosure. As the plaintiff readily acknowledged in correspondence disclosure is a continuing obligation. There is nothing to suggest that these documents were not disclosed deliberately merely that they had come to light after the original list had been compiled. There is nothing unusual about this and the thought that some further documents relevant may emerge would not preclude signing a Request for Trial Date.

- [10] Despite the impression created both by the reference to an expert accountant's report in the counter-claim filed in December 2003 and statements made in earlier correspondence, the defendants had made no attempt to quantify their damages claim as required by the rules. It is disingenuous of the solicitors to maintain that they had not done so because they believed that matters could be settled.
- [11] Nonetheless, I accept that until a report is to hand and the plaintiffs have had an opportunity to consider it, it is premature to set the matter down for trial which may follow closely upon filing the Request for Trial Date. It is, however, appropriate that the court make directions for the delivery of an expert report.
- [12] Each party in its submissions seeks the costs of the application. There is a sense that the defendants would have gone on procrastinating about obtaining an expert report had matters not been brought to a head by the Request for Trial Date and, possibly, this application. In an attempt to reflect those matters raised in the material I would order that the respondents defendants pay one half of the applicant plaintiff's costs of this application.
- [13] The orders are:
1. The defendants serve any expert reports upon which they wish to rely in respect of the damages claimed in para 7 of their counter-claim filed 22 December 2003, 28 days from the receipt of this order.
 2. The defendants pay one half of the plaintiff's costs of and incidental to this application to be assessed on the standard basis.
 3. The defendants sign and return the Request for Trial Date within 7 days of serving the expert report on the plaintiff.
 4. If there is no expert report the defendants to sign and return the Request for Trial Date 28 days from the receipt of this order.