

# SUPREME COURT OF QUEENSLAND

CITATION: *Phillips v Spinaze* [2005] QSC 268

PARTIES: **MARK PHILLIPS**  
(Applicant)  
v  
**STEVEN EDWARD SPINAZE**  
(Respondent)

FILE NO/S: SC No 307 of 2005

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 1 September 2005

DELIVERED AT: Cairns

HEARING DATE: 2 August 2005

JUDGE: Jones J

ORDER: **(1) I declare that upon the retirement of the applicant from the partnership constituted by the Deed of Partnership dated 20 June 2002 between the applicant and the respondent, the partnership was dissolved as at 22 September 2004.**  
**(2) I declare that upon the true construction of the said Deed of Partnership the respondent is entitled to purchase the applicant's interest in the partnership upon the terms set out in Cl 13.2 of the Deed and by reference to the accounts prepared by Pacifico Chartered Accountants dated 13 December 2004 subject to any challenge the applicant wishes to make in respect of the accounts in accordance with the said Deed.**  
**(3) I give liberty to apply in respect of any dispute which might arise concerning the calculation of the amount payable by the respondent to the applicant for the applicant's interest in the partnership.**  
**(4) I reserve the question of costs to allow the parties to make written submissions on that issue within 14 days from the date hereof.**

CATCHWORDS: PARTNERSHIP – DISSOLUTION AND WINDING UP – RIGHTS AND DUTIES OF PARTNERS INTER SE – partnership deed provided a mechanism for winding up partnership – applicant seeks to avoid winding up mechanism – whether winding up mechanism conferred by partnership

deed is extinguished on dissolution of partnership

*S J Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd*

[1989] 2 Qd R 87

*Rushton (Qld) P/L & Anor v. Rushton (NSW) P/L & Anor*

[2002] QCA 210

*McGowan & Anor v. Commissioner of Stamp Duties* [2001]

QCA 236

COUNSEL: Mr J Jacobs for the applicant  
Mr M Jonsson for the respondent

SOLICITORS: O'Reilly Stevens Bovey Lawyers for the applicant  
Bakers Lawyers for the respondent

- [1] By this application, Mark Phillips (“the applicant”) seeks declarations that his partnership with Steven Spinaze (“the respondent”) was dissolved on 22 September 2004 and that the parties’ rights are governed by Cl 16 of the Deed of Partnership.<sup>1</sup> He seeks orders also that the partnership be wound up pursuant to Cl 16.

### **The Facts**

- [2] On 20 June 2002, the applicant and respondent entered into a partnership pursuant to the said Deed. The assets of the partnership comprise a pontoon and moorings and various Marine Parks permits which permits the use of those items. The partners are also directors and shareholders of the business Down Under Helicopters Pty Ltd to which the partners gave the right to use the assets of the partnership.
- [3] On 29 February 2004, the applicant wrote to the respondent to the effect that he intended to dissolve the partnership. He put forward a proposal whereby he would sell his interest in the partnership to the respondent on certain terms and concluded as follows:-

“My offer is open for 7 days from today’s date. If you advise the offer is unacceptable or I do not hear from you in that time, then unless I receive a satisfactory counter proposal I will be left with no option to proceed with dissolution of the partnership and disposal of partnership assets to enable my equity to be realised.”<sup>2</sup>

The applicant’s offer to sell was not acceptable to the respondent.

- [4] On 22 March 2004, the applicant gave notice of his retirement from the partnership in accordance with the terms of Cl 12 of the Deed of Partnership. Cl 12 provides:-

“12. **RETIREMENT**

Any Partner may retire from the Partnership on giving not less than (six (6) calendar months prior notice (“retirement notice”) in writing to the other Partners of the Partner’s intention to retire and on the expiry of the retirement notice, the Partnership will determine in accordance with the provisions of cl.13.3, but only as regards the Partner giving the notice. Service of a retirement notice under this

<sup>1</sup> Ex “MP1” to affidavit of Mark Phillips filed 29/07/05

<sup>2</sup> Ex SES2 to affidavit of Steven Edwin Spinaze filed 27/07/05

clause does not prevent the Partnership expelling the Partner in accordance with cl.14 prior to the expiry of the retirement notice.”<sup>3</sup>

That notice did not specify any particular date<sup>4</sup> for the cessation of the partnership but this simply means that this had occurred after the elapse of six calendar months on a date to be agreed or within a reasonable time of that date.

- [5] Despite extensive negotiations, the parties could not agree on an appropriate price for the applicant’s share of the business.<sup>5</sup> The parties agreed to get an independent valuation of the business as at 22 September 2004; it was performed by Pacifica Chartered Accountants.<sup>6</sup>
- [6] The applicant did not agree with Pacifica’s valuation and in mid-2005 negotiations broke down. The applicant suggested the partnership should be dissolved, and its assets sold by way of auction. In June 2005 the applicant discovered a third party who was willing to purchase the business.<sup>7</sup> The respondent does not want to follow this course of action: he wants to purchase the applicant’s interest, and continue the business himself.
- [7] The respondent contends that he is entitled to make the election to purchase the applicant’s share of the partnership, this right having been granted under the Deed of Partnership. The applicant submits that the respondent has no such right to elect. He argues that with the dissolution of the partnership, any such right contained in the Deed of Partnership has lapsed. Further Mr Jacobs of Counsel for the applicant submits that on the proper construction of the Deed, this pre-emptive right is ineffective because it can only apply where there are multiple “acquiring partners”.

### **The Deed of Partnership**

- [8] The relevant section of the Deed of Partnership agreement is as follows:

**“13. EFFECTS OF DEATH, BANKRUPTCY OR RETIREMENT**

13.1 Subject only to this Deed, the Partnership will not be dissolved upon the happening of any event unless the Partners by a Majority/Special Majority resolve to do so.

13.2 Without limiting the generality of cl 13.1, the death, bankruptcy or retirement...of a Partner will not effect an automatic determination of the Partnership but will entitle the other Partners (“continuing Partners”) at their option either to determine the Partnership and have it wound up in accordance with cl 16 or to purchase the Share of the deceased, bankrupt or retired Partner (the “outgoing partner”) upon the following terms:

(1) The continuing partners who propose to purchase the outgoing Partner’s Share (the “acquiring Partners”) must give written notice signed by each of them, of their intention to do so, to:

<sup>3</sup> Ex “MP1” to affidavit of Mark Phillips, filed 29/07/05

<sup>4</sup> Ex “MP2” to affidavit of Mark Phillips, filed 29/07/05

<sup>5</sup> Affidavit of Christopher Kendall Baker, filed 27/07/05

<sup>6</sup> Ex SES3 to Affidavit of Steven Edwin Spinaze, filed 27/07/05

<sup>7</sup> Ex CKB25 to Aff of Christopher Kendall Baker, filed 27/07/05

(a) the retiring Partner before the expiration of the retirement notice under cl 12...

(3) If the vendor and the purchaser or purchasers of the outgoing Partner's Share cannot agree on the purchase price of the Share within one (1) calendar month after the expiration of the relevant period referred to in sub paras (1)(a)... the continuing Partners must instruct the Accountants to make up the Partnership accounts as at either the date of the death, bankruptcy or retirement, whichever is appropriate.

(4) Within two (2) calendar months of the presentation of the accounts to the acquiring Partners, they must pay to the retiring Partner...all sums shown to be due to the outgoing Partner, whether in respect of capital, goodwill, advances, profits, interest or otherwise together with interest on due sums at the rate of 12% per annum calculated at daily rests from the date on which the outgoing Partner ceased to be a Partner to the date of payment."

- [9] Clause 13.2 calls for an election between a winding up in accordance with Cl 16 or a purchase of interest. Clause 16 provides for the distribution of proceeds of a winding up in conformity with s 47 of the *Partnership Act* 1891, and makes other provisions not relevant to the issues here.

### **The Law**

- [10] Any change in the membership of a partnership has the effect of dissolving that partnership: *S J Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87. The next usual step after dissolution is to wind up the partnership by realising the assets and paying the debts and liabilities of the firm before distributing the surplus, if any, among the partners according to their rights and interests.<sup>8</sup> This process is subject to agreement between the parties. In *Rushton (Qld) P/L & Anor v. Rushton (NSW) P/L & Anor*, McPherson JA goes on to explain:

"Winding up in that way may be avoided if the parties agree on a sale to one or more of the remaining partners of the shares of the outgoing partner, or if there is a provision in the partnership agreement to that effect. This is sometimes described as a technical or notional dissolution, which is something of a misnomer because it is not the dissolution but, at most, the winding up that is notional. The partnership or firm itself is dissolved as soon as there is a change in membership, but the assets and, as between the partners, responsibility for the liabilities of the partnership are taken over by the remaining partners."

- [11] This statement is reflective of an earlier decision of the Court of Appeal, *McGowan & Anor v. Commissioner of Stamp Duties*.<sup>9</sup> That case concerned the retirement of a partner of a law firm. On retirement, he purported to transfer his share of the partnership to the other two partners. At [15], McPherson JA states:

<sup>8</sup> *Partnership Act 1891* (Qld), s 42; *Rushton (Qld) P/L & Anor v. Rushton (NSW) P/L & Anor* [2002] QCA 210 at [9]

<sup>9</sup> [2001] QCA 236

“On dissolution, s 42 of the *Partnership Act 1891* requires the property of a partnership to be applied in payment of the debts and liabilities of the firm, with any surplus of realisable assets being distributed in accordance with the rights of the partners. But, subject always to paying or providing for the creditors, it is open to the partners to arrive at some other arrangement for disposing of partnership assets, and, in this instance as in many others, that was what was done on dissolution.”

- [12] The applicant gave notice pursuant to Cl 12 with the consequence that the dissolution of the partnership took effect on the date provided. To the extent that Cl 13.2 uses the expression “option either to determine the partnership and have it wound up” there is an obvious confusion between the concepts of the legal effect of dissolution and the rights of the partners with respect to the assets of the partnership. Similar confusion is found in the terms of the relevant deeds in *Rushton* and *Mackie* referred to above. The fact that the expression contains terms that are contrary to the basic principle of partnership law does not invalidate the agreed processes for the winding up or devolution of the partnership assets. As was noted in a passage in *McGowan v Commissioner for Stamp Duties* in para [11] above it is open to the parties to arrive at some different arrangement for the disposition of partnership assets other than what is provided for in s 42 of the *Partnership Act*. In that case His Honour went on to say:-

“Although a partner has no title to a specific property owned by the partnership, “he has a beneficial interest in the partnership assets, indeed in each and every asset of the partnership,”: see *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, 446. On dissolution each partner retains that interest: *Hendry v Perpetual Executors & Trustees Association* (1961) 106 CLR 256, 266; which has been authoritatively described as “a right to a proportion of the surplus after realisation of the assets and payment for the debts and liabilities of the partnership”: *FCT v Everett*.

- [13] By its terms, Cl 13.2 contemplates that the retirement of a partner will entitle the other partners at their option, or the option of any one of them, to determine the partnership and have it wound up (thereby invoking the provision s of Cl 16) **or** to purchase the share of the retiring partner in accordance with the terms of Cl 13.
- [14] The applicant argues that the respondent has no entitlement to make the election to purchase. He submits that the terms of Cl 13.2 can only have effect if there is more than one partner remaining after the retiring partner has given notice of dissolution. Such a submission does not accord with the provisions of the Deed nor, in my view, with the purpose of Cl 13.2. The Deed allows for words denoting the singular to include the plural and vice versa. See Cl 1.2. Further Cl 13.2(2) contemplates a single partner acquiring an outgoing partner’s share.
- [15] The practical reason for the presence of Cl 13.2 is to allow the business to continue in the event of death, bankruptcy or retirement of a partner. The applicant’s submission would make inevitable a winding up or of forced sale where there were only two partners conducting the business. There is no apparent reason for making any such distinction between a partnership of two persons and one having more than two partners.

- [16] Mr Jonsson of Counsel for the applicant points to the change in terminology in the use of words 'dissolved' and 'dissolution' in Clauses 13.1 and 16.1 and the words 'determine' and 'determination' in Clauses 12 and 13.2 and elsewhere and suggests that the 'determination' of the partnership comprehended by sub-clause 13.2 must be something other than the 'dissolution' of the partnership contemplated by Cl 13.1. He argues that the term 'dissolution' comprehends the full and formal cessation of the partnership, necessitating a winding up, that a 'determination' of the partnership was intended to connote the cessation of partnership in a more practical sense.
- [17] I am not convinced that the drafters of the Deed had such a distinction in mind and I incline rather to the view that the terms have been used interchangeably. Nor do I believe the construction of Cl 13.2 depends upon such refinement. Once any confusion between the cessation of a partnership in accordance with basic legal principle, and the requirement to deal with the interests of the partners is cleared away, then the intention of the parties is, in my view, clear from the words of the Deed. That intention is that a non-retiring partner or partners have the right to make the election between seeking the winding up of the partnership in accordance with Cl 16 or purchasing the retiring partner's interest in accordance with Cl 13. Such an outcome gives full effect to the whole Deed and gives the instrument sensible commercial operation.
- [18] The parties have pursued a course which is consistent with the respondent having a right to make the election to purchase by obtaining the partnership accounts and the determination of the individual partner's interest. The fact that this evaluation is disputed by the applicant is a matter which falls to be resolved in the manner agreed in the Deed i.e. by arbitration pursuant to Cl 20, or such other manner upon which they might agree.

### **Orders**

- [19] In those circumstances I would make the following declarations and orders:-
1. I declare that upon the retirement of the applicant from the partnership constituted by the Deed of Partnership dated 20 June 2002 between the applicant and the respondent, the partnership was dissolved as at 22 September 2004.
  2. I declare that upon the true construction of the said Deed of Partnership the respondent is entitled to purchase the applicant's interest in the partnership upon the terms set out in Cl 13.2 of the Deed and by reference to the accounts prepared by Pacifica Chartered Accountants dated 13 December 2004 subject to any challenge the applicant wishes to make in respect of the accounts in accordance with the said Deed.
  3. I give liberty to apply in respect of any dispute which might arise concerning the calculation of the amount payable by the respondent to the applicant for the applicant's interest in the partnership.
  4. I reserve the question of costs to allow the parties to make written submissions on that issue within 14 days from the date hereof.