



Transcript of Proceedings

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

REVISED COPIES ISSUED
State Reporting Bureau

Date: 24 August, 2006

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MACKENZIE J

No 6358 of 2006

DYNE AND ANOTHER

Applicant

and

BRAKE AND ANOTHER

Respondent

BRISBANE

..DATE 18/08/2006

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: When this matter was before me on the 10th of August 2006, it was argued without reference to the fact that one of the two offers, at first impression pre-emptive tenders, which had been accepted by the statutory trustees for sale, was by the Dynes who were entitled to one half of the net proceeds of the sale and a stranger to the order, Ms Hayes.

1
10

This raised in my mind the possibility that the acceptance of the tender was outside the terms of the orders of Judge O'Brien and Justice Fryberg. Having regard to the approach of the High Court in matters of late where matters not necessarily raised have sometimes become contentious, I invited further submissions on the point.

20

Annexed to the respondent's supplementary submissions are letters from the trustees' solicitors to the solicitors for the Dynes and the Greens dated the 13th of June 2006 and a reply date of 29th June 2006 from the Greens' solicitors which clarify what happened. I will give leave to admit them as exhibits.

30

40

It is apparent from them that the question of compliance with the orders, by including a stranger to the order as a joint tenderer, had been adverted to by the trustees who said that they were prepared to bring an application under section 96 of the Trusts Act to have the question of validity of the tender determined. However, they invited the competing tenderers to try to resolve the issue without the need for an application.

50

The letter of the 29th of June 2006 from the Greens' solicitors expressly waved any right to object to the validity of the tender by reason of Ms Hayes being a party. As a result the tender of the Dynes and Ms Hayes, being that preferred, was accepted.

10

It can therefore be seen that the trustees acted prudently in identifying the issue and trying to resolve it as expeditiously and cost effectively as possible. It is not necessary to finally decide whether the sale to the Dynes and Ms Hayes was acceptance of a pre-emptive tender or a sale by private treaty, although on first impression the former seems more likely having regard to the analysis in paragraphs (a) and (b) in the letter of the 13th of June 2006.

20

30

For pragmatic reasons, the parties to the order consented to the course followed. It is well established that, as Mr Morgan's submission elaborate, at least in the case of private trusts, departure from the strict terms of the trust may be consented to by sui juris beneficiaries. That is essentially what happened in this instance. (cf *Ross v Ross* 1999 WASC 180).

40

Undoubtedly a Court would have allowed an amendment of the previous orders if regularisation were necessary because the trust is a statutory one. Nothing in Mr English's submissions suggests that, from the point of view of the Dynes, the current contractual relationship should be invalidated.

50

Accordingly I will determine the questions raised in their application.

1

The trustees primary submission is that the words "he or she or they may set off against the purchase price, the value of the whole of his, her or their share in the land" in clause 3 of Judge O'Brien's order, must be read together with clause 2. The relevant concept in clause 2, it was submitted, was that the trustees became vested of the land subject to encumbrances to sell the same and to stand possessed of the net proceeds of the sale after the payment of various costs and expenses and outgoings.

10

20

It was submitted that costs and expenses in that collocation extended to the trustees' costs and expenses. I have no reason to doubt that. As a secondary position, Mr Morgan submitted that entering into a contract that provided for payment of a deposit, not required under the order, and made no provision for set off, was also a consensual variation of what the order required.

30

40

Mr English's case is essentially that the set off permissible under the order is half of the purchase price without allowance for the expenses and outgoings, to use a compendious term for those referred to in the order. It is true that the calculations by the trustees include estimated sums by way of expenses, and those amounts, if the trustees methodology is correct, increase the amount that the applicants will have to pay in monetary form. The higher the trustees costs and

50

expenses the less the sum of set off available on their
argument.

1

I should add that it is not suggested by the trustees that
they are ultimately entitled to retain any more than their
actual costs and expenses incurred and if the sum estimated
proves to be in excess of that sum, it would be liable to be
returned to the beneficiaries.

10

In my view, as long as the estimate for costs and expenses is
made bone fide, any calculation of the sum to be paid in
monetary form by the Dynes and Ms Hayes, may incorporate
estimates subject to what I have just said about returning any
surplus.

20

In a transaction of this kind it is impractical to be exact at
the point of time at which the settlement occurs, but by that
time a reasonably accurate estimate of what the costs and
expenses will be, should be ascertainable. Where as in this
case, there is a difference of opinion about provision for
taxation, presumably its resolution will depend on valuation
evidence and the Commissioner of Taxation's methodology.

30

40

One would have thought that such a difference might be
resolved by the parties putting their evidence on the table
and discussing the points of difference. But provided in the
end the bone fide conclusion is reached by the trustees as to
the likely quantum of any such liability, and that it was
proper for them to retain such a sum for that purpose, such

50

sum could properly be retained by them until the precise sum was ascertained, but no longer.

1

In my view the focus in the order on the net proceeds of sale, defines what the value of a party's share in the land is for the purpose of set off where such an order is operative. Equally I do not accept that the applicants' contentions contained in its primary submission can be maintained as to the quantum.

10

The secondary submission on the part of the trustees that, by entering into the form of the contract they did, the Dynes waived the right to set off the value of their interest in the land is in my view problematic. It is true that there was provision for a deposit to be paid when none was necessary under the terms of the orders.

20

30

However, a provision for payment of the balance of the purchase price on settlement, firstly, does not expressly require payment of the whole sum in a monetary form, and, secondly, it is not inconsistent with a set off being taken into account.

40

Accordingly I am in agreement with the methodology of the trustees in calculating what may be set off by the applicants. The quantum is governed by what has been said above us to the forming of a bone fide estimation of the costs and expenses which may be deducted in calculating how much may be set off.

50

The orders therefore are:

1

1. The application is dismissed.

2. The applicants pay the respondents costs of and incidental to the application to be assessed.

10

20

30

40

50