SUPREME COURT OF QUEENSLAND

CITATION:	*Re Varsity Queensland Pty Ltd* [2006] QSC 356
PARTIES:	**IN THE MATTER OF VARSITY QUEENSLAND PTY LTD (ACN 096 778 559)** **DAVID CHARLES HAWKINS** **(applicant)** **v** **MITCHELL FRANK JAKEMAN** **(first respondent)** **JOHN MARTIN SPEEDY** **(second respondent)** **BARRY LEE JAKEMAN** **(third respondent)** **VARSITY APARTMENTS PTY LTD (ACN 095 290 252)** **(fourth respondent)** **VARSITY QUEENSLAND PTY LTD (ACN 096 778 559)** **(fifth respondent)** **PINCH MY CHEEK PTY LTD (ACN 072 818 716)** **(sixth respondent)** **BRIDGEMAN PTY LTD (ACN 010 592 346)** **(seventh respondent)** **JAKEMAN CORPORATION PTY LTD (ACN 083 166 134)** **(eighth respondent)**
FILE NO/S:	BS8956 of 2006
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	1 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2006
JUDGE:	Mullins J
ORDER:	**Originating application is dismissed**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER – statutory derivative action – application by former member for leave to bring a proceeding in the name of the company under s 237(2) *Corporations Act* 2001 (Cth) – whether serious question to be tried

Corporations Act 2001 (Cth)

Fiduciary Ltd v Morningstar Research Pty Ltd (2005) 53 ACSR 732
Metyor Inc v Queensland Electronics Switching Pty Ltd [2003] 1 Qd R 186
Swansson v R A Pratt Properties Pty Ltd (2002) 42 ACSR 313
Thomas v D'Arcy [2005] 1 Qd R 666

COUNSEL: PW Hackett for the applicant
SSW Couper QC for the respondents

SOLICITORS: Tucker & Cowen for the applicant
Home Wilkinson Lowry for the respondents

[1] **MULLINS J:** Mr Hawkins who is the applicant applies under s 237 of the *Corporations Act* 2001 (Cth) ("the Act") for an order that he be granted leave to bring proceedings on behalf of Varsity Queensland Pty Ltd ("the company") which is the fifth respondent to this application against the other named respondents for damages for negligence.

[2] There is another proceeding in this court BS1527 of 2004 between the first respondent as the plaintiff and the applicant as the defendant ("the existing proceeding"). I will therefore refer to the applicant and the first respondent in this application as the defendant and the plaintiff respectively. In the existing proceeding, the plaintiff claims the sum of $199,000 (plus an additional amount of $33,000) as moneys due and owing by the defendant pursuant to an agreement in writing dated 21 July 2001 ("the original agreement") or, alternatively, the sum of $199,000 (plus the additional amount of $33,000) as damages for breach of the original agreement.

[3] In the existing proceeding the defendant sought to join Mr Speedy, Mr Barry Jakeman and Varsity Apartments Pty Ltd ("Apartments") together with the plaintiff as defendants by counterclaim. The counterclaim by the defendant arose out of a joint venture between the plaintiff, the defendant, Mr Speedy and Mr Barry Jakeman ("the joint venturers") who personally (or by companies associated with them) promoted the company (which was incorporated on 11 May 2001) to acquire and develop land described as Lots 653, 654, 655 and 656 on SP 112416 County of Canning Parish of Mooloolaba ("the land"). The company entered into a contract dated 18 May 2001 with Birchgate Pty Ltd ("Birchgate") to purchase the land for the sum of $1.5m. The company applied to the local council and received approval to construct at least 124 units. The purchase of the land was to be completed in four stages corresponding to each of the four lots. The purchase of the first lot was to be completed by 18 May 2002.

[4] Although the circumstances under which the defendant transferred his shares in the company to the plaintiff is in dispute, it is common ground that by written transfer of shares dated 22 April 2002 the defendant transferred his shares in the company to the plaintiff. He also resigned as a director of the company by letter dated 22 April 2002. The transfer of the defendant's shares stated:

> "In consideration for the sum of One Dollar ($1.00) paid to me by Mitchell Frank Jakeman (receipt whereof is hereby acknowledged) I

> hereby transfer my shares in Varsity Apartments Pty Limited ACN 096 778 559 to the said Mitchell Frank Jakeman."

The resignation and transfer were forwarded by the defendant to the plaintiff by facsimile dated 22 April 2002 which included the following:

> "I enclose my resignation as a Director of the above company.
> I enclose my transfer of shares in the above company.
> Each is issued under duress to avoid ongoing issues with you, as I would not wish our friendship to be devalued by what is happening to me in this project."

[5] The defendant alleges that, despite this transfer, he remained the beneficial owner of the shares and that the joint venture between the joint venturers continued. The plaintiff, Mr Speedy, Mr Barry Jakeman and a third party, Pongrass Investments Pty Ltd ("Pongrass"), promoted Apartments. In lieu of the company, Apartments entered into a contract with Birchgate on 17 May 2002 to purchase the land for $1.5m and completed that purchase.

[6] In that proposed counterclaim in the existing proceeding the defendant alleged that the plaintiff, Mr Speedy and Mr Barry Jakeman owed to the defendant certain fiduciary duties which the defendant alleged they breached by inviting Pongrass to become involved in the joint venture, causing the company to be released from the contract to purchase the land and promoting Apartments to purchase and develop the land. The defendant alleged that his interest in the joint venture as represented by his shares while the company had the contract to acquire the land with council approval was at least $179,306, and that his interest in the joint venture on account of the development potential of the land was at least a further $412,125.50.

[7] The application for leave to join the defendants by counterclaim to the existing proceeding was opposed by the plaintiff on the basis that the cause of action was one only available to the company as it was in substance a claim of fraud on a minority: *Thomas v D'Arcy* [2005] 1 Qd R 666. Wilson J in her reasons for judgment delivered on 25 September 2006 in the existing proceeding concluded that the facts alleged in the counterclaim fell within the concept of fraud on a minority and the proposed counterclaim could not succeed because the loss claimed was a loss of the company. The defendant was therefore refused leave to join the defendants to the counterclaim and to file and serve the proposed counterclaim. As a result of this decision, the defendant commenced this proceeding in order to pursue as a derivative action under s 236 of the Act the claim that had been the subject of the proposed counterclaim in the existing proceeding. The defendant also filed a further amended defence, set-off and counterclaim in the existing proceeding on 6 October 2006 which confined his claim for damages for breach of fiduciary duty in relation to the joint venture as one against the plaintiff. The counterclaim was otherwise identical to that of the proposed counterclaim in respect of which Wilson J had refused the defendant leave to join the additional parties as defendants by counterclaim.

Nature of application for leave under s 237 of the Act

[8] Under s 236(2) of the Act, a member or former member or an officer or former officer of a company may apply for leave to bring proceedings on behalf of that

company under s 237(2) of the Act and the court must grant the application for leave if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
(b) the applicant is acting in good faith; and
(c) it is in the best interests of the company that the applicant be granted leave; and
(d) if the applicant is applying for leave to bring proceedings – there is a serious question to be tried; and
(e) either:
    (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
    (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied."

[9] An application under s237(2) of the Act is not interlocutory, but the relief sought is final and an applicant bears the onus of establishing that each of the requirements set out in s237(2) has been fulfilled on the balance of probabilities: *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313, 318 [24] ("*Swansson*"). An application for leave under s 237 "should not be granted lightly": *Fiduciary Ltd v Morningstar Research Pty Ltd* (2005) 53 ACSR 732, 735 [15].

[10] The very nature of the application is such that it is to be expected to be determined in light of the fact that disputes exist between the members or former members of the relevant company: *Metyor Inc v Queensland Electronics Switching Pty Ltd* [2003] 1 Qd R 186, 191 [10]. Although, as was stated in *Swansson* at 318 [25], in order to ascertain whether there is a serious question to be tried for the purposes of s 237(2)(d) of the Act, the court will not normally enter into the merits of the proposed derivative action to any great degree, the application for leave must be supported by evidence or an indication of the evidence which enables the court to reach the requisite degree of satisfaction in relation to that requirement.

Whether there is a serious question to be tried

[11] Of the five conditions set out in s 237(2) of the Act, the plaintiff argued that the defendant had failed to discharge its onus in respect of showing that there was a serious question to be tried. Extensive material was relied on by both parties in connection with the application. The defendant filed a lengthy affidavit of himself on 16 November 2006 that included 476 pages of exhibits. A comparison of the evidence of the defendant, on the one hand, and the plaintiff and Mr Speedy, on the other, shows varying accounts of meetings, conversations and events. There was no cross-examination which was consistent with the usual practice on an application of this nature not to endeavour to decide disputed questions of fact.

[12] The submissions on the hearing of the application focussed on whether there was a serious question to be tried including whether the defendant could show that:

(a) the company would have been able to purchase the land, if the contract had not been rescinded;
(b) the joint venture continued in existence, despite the transfer of the defendant's shares to the plaintiff.

[13] It is an implied allegation in the defendant's proposed derivative action that the company would have obtained the funds to complete the purchase of the land, if it had not been discharged of its obligations under the contract in favour of Birchgate entering into a substitute contract with Apartments. The defendant subsequently swore an affidavit that confirmed his ability to procure the completion of the contract from his own resources had the company been unable to do so. Of more relevance is the fact that the joint venturers are property developers and, apart from the defendant, managed to procure the involvement of another party to assist Apartments to complete the purchase of the land. I am satisfied that the defendant has shown that there is a serious question to be tried on the issue of whether the company would have been able to complete the purchase of the land, if it had not been discharged from its obligations under the contract.

[14] It is critical to the derivative action, as pleaded in the proposed statement of claim, that the defendant can show that the joint venture continued, despite the transfer of his shares to the plaintiff on 22 April 2002, as the content of the fiduciary duties that are pleaded depend on the existence of the interests of the joint venture and the corresponding interests of the defendant claimed in the joint venture.

[15] It is part of this allegation that the defendant remained the beneficial owner of the shares that he transferred to the plaintiff. That allegation is very much in dispute. The defendant relies on the fact that the ASIC records of the company show that the plaintiff does not hold his shares (which were transferred to him by the defendant) beneficially. The plaintiff and Mr Speedy assert that that information was incorrect and conveyed as a result of a clerical mistake. The plaintiff relies on the terms of the transfer of the shares which do not refer to any trust and denies that there was any oral agreement to hold the shares on trust.

[16] The defendant's evidence of the circumstances of the transfer of these shares is set out in full in paragraph 86 of his affidavit filed on 16 November 2006. After the defendant deposes to his version of the meeting of directors of the company held on 4 April 2002 (of which there are different recollections as evidenced by the differing minutes of that meeting prepared by Mr Speedy and the defendant respectively), the defendant states at paragraphs 86(e) and (f):

> "(e) I called Mitchell Jakeman after the meeting during which:
>
> (i) Mitchell Jakeman said words to the effect that as a consequence of what had happened during the meeting that he wanted me out of the First Company;
>
> (ii) I said words to the effect that I would resign as a director of the First Company because of our relationship and because I believed that Barry and John were ripping the company off;
>
> (iii) I said (*sic*) would transfer my shares in the First Company to Mitchell to hold on trust provided that I got my money back and that quarter share in the company would give Mitchell control.
>
> (iv) Mitchell said that if I did resign and transfer my shares that he would deduct any money owing by me to him pursuant to the Original Agreement from the money or value that Mitchell received from holding or dealing with the shares in accordance with the Joint Venture;

(v) Mitchell also said that any surplus money or value received or held by Mitchell from holding or dealing with the shares would be paid or assigned by him to me;

(f) Mitchell Jakeman then repeated words to the effect that he would accept transfer of my shares in the First Company and would hold those on trust, and that "whatever I get from this project, if anything, you will get half"."

[17] In view of the disputed nature of this evidence of the defendant which cannot be resolved on this application, for the purpose of determining whether the defendant has shown that there is a serious question to be tried on the existence of the fiduciary duties which he pleads against the respondents, I will proceed on the basis that the defendant's evidence set out in paragraph 86(e) and (f) of his affidavit will be accepted. What is noteworthy about that evidence, however, is that it indicates an arrangement between the defendant and the plaintiff to which the other joint venturers were not privy. It is completely inconsistent with a continuation of the joint venture for which the company was promoted. Even if the plaintiff held the shares transferred to him by the defendant on the trust that the defendant alleges in paragraph 86 of his affidavit, that trust did not involve the other joint venturers. It was directed at obligations assumed by the defendant. Without the allegation of the continued existence of the joint venture, the question of the purpose of the defendant (and therefore his good faith) in proposing the derivative action then becomes an issue.

[18] A considerable part of the argument was directed at whether the plaintiff's approval of the company's discharge from the contract to purchase the land and the substitution of Apartments as the purchaser was valid and effective, if the plaintiff held the shares on trust for the defendant. On the defendant's own evidence, the terms of any such trust were not disclosed to the other joint venturers. It is not necessary to resolve these arguments, because of the conclusion that I have reached that, on the defendant's own evidence, he cannot show that there is a serious question to be tried on the critical allegation that he makes that the joint venture continued after he transferred his shares in the company to the plaintiff.

Orders

[19] It follows that the originating application must be dismissed.

[20] When I raised during the hearing of the application, that this would be an inconsistent result with the decision given by Wilson J in the existing proceeding, the submission was made on behalf of the plaintiff that the decision of Wilson J rested on the pleadings, but this application had to be resolved by reference to evidence. That is the explanation for the result in this matter.

[21] I will hear submission on costs.