[2006] QSC 363

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No 11324 of 2006

RANSARD PTY LTD (ACN 060 719 422) Plaintiff

and

MM PROPERTIES PTY LTD (formerly known as JEFFERSON PROPERTIES PTY LTD) (ACN 010 860 821) Defendant

BRISBANE

..DATE 30/10/2006

ORDER

CATCHWORDS: Security for costs - defendant's application not regarded as late where plaintiff made recent significant amendments to statement of claim- further and better particulars ordered within 7 days of security being provided - plaintiff's application under UCPR r 469 (4) held premature.

HIS HONOUR: There are cross-applications before the Court. The first in time is the defendant's, seeking security for costs under Rule 670 of the UCPR in an amount in excess of $100,000. There has been an offer by the plaintiff of $12,000. A stay is sought until the costs security is provided and, on the assumption that it will be, further and better particulars are sought of three subparagraphs of the amended statement of claim.

The plaintiff's cross-application seeks dispensing of the defendant's signature of the request for trial under Rule 469 subrule (4). The plaintiff's application is plainly premature. As will be seen, the statement of claim was significantly amended in February this year and, in the defendant's and the Court's view, hasn't been particularised as it ought to have been. There's no amended defence filed to it yet.

Mr Tucker for the defendant tells the Court that, as recently as a couple of months ago, his client was awaiting further amendment of the statement of claim which had been foreshadowed. It has not eventuated. The plaintiff's application follows.

In respect of the security for costs aspect Mr Bland has made no attempt to provide any comfort that an adverse order for costs made against the plaintiff after the trial could be satisfied. His principal argument is that the application for security has been made too late and ought to be refused as a

matter of discretion for that reason. Authorities have been cited which do support an approach that ordinarily security for costs ought to be sought before a plaintiff is allowed to expend large amounts on prosecution of its action.

I must say that in this instance the plaintiff seems to have only the vaguest idea of what it's after. It is hard to think that there has been any significant expenditure or, indeed, thought devoted to it.

The original claim and statement of claim filed on Christmas Eve 2004 were comprehensible. The statement of claim pleaded the plaintiff's ownership of some land at Coomera and an agreement in writing in or about October 1996 by which the defendant agreed to purchase a half interest. There was to be a joint venture for development of the land and it was agreed that "profit arising from the sale of the land would be distributed by (1) paying the first $2,500,000 to Ransard, (2) dividing any balance equally."

There is no more by way of agreement than a letter of Coopers & Lybrand, dated 24th September 1996, which was apparently sent by fax to both parties. That document is in evidence. It alludes to a purchase price for the one-half interest in the land of 1.25 million dollars payable as to $500,000 on the 20th of December 1996 and otherwise by "assumption of liability of $750,000" on the same date. That is explained from the Bar table to be an assumption of liability in respect of some existing indebtedness.

The fax refers to the distribution of profits in the following terms: "Ransard to receive first profit distribution of $2.5 million payable from sales at $8,500 per sale."

The statement of claim then alleged a sale of the land for $5 million in or about October 2001 and, in its original form, alleged:

> "(5) the net profit resulting from the sale of the land was $2,370,475;
>
> (6) wrongfully and in breach of the agreement the whole of that profit was divided equally between Ransard and MM Holdings.
>
> The plaintiff claims the following relief:
>
> (a) a declaration that the joint venture has been dissolved as at 13 September 2001;
>
> (b) an order that the affairs be wound up;
>
> (c) an order that receivers be appointed to conduct winding-up;
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> (d) an order that an account be taken of the dealings of the joint venture;
>
> (e) an order for the payment of any balance found to be due;
>
> (f) all necessary enquiries and directions."

That pleading could be understood as alleging a wrong distribution, correction of which to favour the plaintiff (and presumably in respect of its claim to the first two and a half million dollars by divesting the defendant of the half share of the pleaded net profit) was sought.

The amended statement of claim no longer identifies a net profit but follows the pleading of the sale for $5 million with the following new material:

> "(5) a substantial part of the proceeds of sale has been applied to the payment of loans which were made on the security of the land but which were obtained for purposes other than those of the joint venture;
>
> (6) the plaintiff and the defendant have made differing contributions to the expenses of the venture."

The relief claimed is now a declaration that the plaintiff was entitled to receive two and a half million dollars from the net proceeds of sale before any distribution was made to the defendant; otherwise the relief claimed is similar.

The plaintiff, through Mr Bland, makes the broad submission that this is a classic occasion for an account to be taken in the Court. While, if one thinks in terms of tradition, that might be the case, in my opinion in modern conditions it is incumbent on a plaintiff, if required, and the defendant requires it here, to formulate his case with much more precision and particularly in dollars and cents respects.

The plaintiff has given some particulars of the new paragraphs 5 and 6 but not to the defendant's satisfaction or to the Court's. There is no identification of the non-joint venture purposes for which a substantial part of the proceeds of sale are said to have been applied.

I might say that it is not positively contended by the plaintiff that the defendant is to blame if anything of that kind happened. Mr Tucker has asserted from the Bar table, and there may well be no evidence of it, that the running of the venture was essentially in the plaintiff's hands or at least in the plaintiff's hands rather than in the defendant's. He has talked about four inconsistent sets of accounts having been supplied.

The Court really has no information as to the formality or otherwise with which accounts or records or notes of things that happened might have been kept.

There is an outstanding issue in relation to particulars, whether they should be supplied of the non-joint venture purposes. In my opinion, prima facie, they should.

The loans have already been particularised in respect of a company, identified dates and amounts, but so far as concerns the purposes for which moneys might have been used, there is complete mystery.

Particulars have been given of the allegation in the new paragraph 6 of differing contributions but only by totals in columns, one headed "plaintiff", one headed "defendant", which show amounts by reference to whole calendar rather than financial years and divergence in favour of the plaintiff in the sense that it is said to put in more in the year 2001 when nothing is credited to the defendant and in 2002 when

something under half the plaintiff's contribution is credited to the defendant.

Mr Tucker says he wants to know more particulars of those payments and, in my opinion, he is entitled to have them. It would seem to me a simple matter for the plaintiff to indicate whether the contributions were made in cash or in kind, what they were for, dates and the like.

I would propose to deal with this aspect by ordering the plaintiff to supply particulars of each of the "contributions" referred to by date, amount, manner in which the amount was provided and the expense or purpose of the venture for which it was provided.

In respect of the allegation in the other paragraph, in paragraph 5, and sums applied to non-joint venture purposes, I will order the plaintiff to give particulars of the amounts and dates of such applications and particulars of the purpose or purposes of them.

Turning to security for costs, I am not persuaded that this is a case in which any doctrine penalising late applications is relevant. The amendment to the statement of claim made a radical change to the nature of the proceeding. It converts it into one redolent of unfortunate 19th century litigation, real or apocryphal, in which the Court is resorted to for the purpose of conducting rather unfocused enquiries.

In principle, I think it is proper to order security for costs but not in the amount suggested by the defendant, which has in mind defending a claim whose parameters are now totally uncertain but which probably cannot exceed $1.25 million in a luxurious fashion with senior counsel and the like. Regarding engagement of accounting expertise in circumstances where there is not the slightest demonstration that that is appropriate, it seems to me that notions of what are appropriate expenses and the like in land development is fairly commonsensical and would not require the expenditure of the $15,000 suggested by Mr Tucker.

This could well be a case for the appointment of a single accounting expert, if necessary, by the Court. That, it seems to me, is premature.

It is common ground between the solicitors that estimated solicitor/client costs of the kind which Mr Tucker has collated are in the event reduced to about 60 per cent of their full value.

I think, on the basis of the first day of a trial only being included, it is appropriate to order that security for costs be provided in the amount of $35,000. The proceeding ought to be stayed until that is done in a fashion satisfactory to the Registrar. The particulars, which I have described above, ought to be provided within seven days after the provision of security.

...

HIS HONOUR: Each of the parties has liberty to apply on giving three business days' notice.

...

HIS HONOUR: I will order that the security be in the form of moneys paid into Court or some other alternative approved by the Registrar.

...

HIS HONOUR: I will order that the plaintiff pay the costs of both applications.
