SUPREME COURT OF QUEENSLAND

CITATION:	*Begun Property P/L v Business in Focus (Aust) P/L & Anor* [2007] QSC 342
PARTIES:	**BEGUN PROPERTY PTY LTD** ACN 104 730 976 (plaintiff) **v** **BUSINESS IN FOCUS (AUST) PTY LTD** ACN 062 413 665 (first defendant) **WELBON BUILDING & PLUMBING PTY LTD** ACN 003 640 373 (second defendant)
FILE NO/S:	BS 3383 of 2007
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	8 & 9 November 2007
JUDGE:	Martin J
ORDER:	**Order in terms of the draft provided by the plaintiff**
CATCHWORDS:	DAMAGES – GENERAL PRINCIPLES – MEASURE OF DAMAGES FOR BREACH OF FIDUCIARY DUTY – where parties had entered a venture agreement for the running of a tourist resort – where disputes arose and Begun took steps to terminate the agreement – where defendant failed to perform obligations under venture agreement – where plaintiff's successfully applied to court for removal of consent caveat – where bank guarantee given to protect the defendants' interests – where plaintiff claims damages for loss occasioned by defendants' failure to comply with their obligations under the venture agreement and loss of opportunity arising from that failure – where plaintiff also claims damages for loss occasioned by having to secure a bank guarantee for removal of caveat – whether damages should be awarded under these heads – appropriate measure of damages for breach of fiduciary duty – whether set-off of arbitration costs and four costs orders should be allowed

Hull v Thompson [2001] NSWCA 359, cited

COUNSEL: J W Peden for the plaintiff
T A Hall *(sol)* for the defendants

SOLICITORS: Nicholsons Solicitors for the plaintiff
Hall Partners for the defendants

[1] **MARTIN J:** On 12 October this year judgment was given for the plaintiff in this matter in the following terms:

> "1. That there be judgment for the Plaintiff in terms of paragraphs 2 to 9 below;
> 2. The defence be struck out;
> 3. Damages, alternatively equitable compensation, for breaches of fiduciary duty to be assessed in accordance with paragraphs 5 to 8 below;
> 4. Damages for breach of the venture agreement to be assessed in accordance with paragraph 5 – 8 below;
> 5. A declaration that the Begun Value is $1,393,750.00 being fifty percent of the value of the developed land as determined by Mr J D Dodds;
> 6. A declaration that Begun is entitled to have the option specifically performed and carried into execution by the First and Second Defendant;
> 7. The assessment for damages at paragraph 3 and 4 be heard on 8th & 9th November 2007;
> 8. That the First and Second Defendants specifically perform and carry into execution the option with the settlement date fixed as seven days after the damages have been assessed and fixed in accordance with paragraph 7 above."

[2] This is the assessment of the damages referred to in the order above.

Background

[3] In September 2003 the plaintiff, Michael Steven Begun (MB), the defendants and Gloucester Point (Aust) Pty Ltd (GPA) entered into a venture agreement to develop and operate a tourist resort situated at Gloucester Point some 47 kilometres by road north of Proserpine. The basis of the proposal was that the defendants would build the resort and that MB would provide the necessary land. Construction started at about the time that the parties entered into the venture agreement but by August 2004 the parties were in dispute about various matters.

[4] The land upon which the resort was being built was one part of a larger parcel of land owned by MB. The larger parcel had an area of about 57 hectares (the gross land). The land upon which the tourist resort was to be constructed had an area of about 16 hectares (the development land). It was provided in the venture agreement that GPA would apply for approval to subdivide the gross land and that the relevant parties would take the necessary steps to ensure that the subdivision went ahead.

[5] Clause 12 of the venture agreement provided:

> "12.1 If the subdivision approval is not granted or granted on terms that are not acceptable to the Venturers and the business of the

resort has been operating for a period of not less than 12 months and if either of the Venturers wish to wind up the Venture then the following shall occur in the priority as set out below:

12.1.1 Begun or its nominee shall have the option to purchase the interest of BWG in the venture for the Begun Value which shall be exercised within 14 days of the Venturers being notified by GPA that the subdivision approval has not been granted or having been granted is not acceptable.

…

12.1.3 Each of the payments referred to in clauses 12.1.1 and 12.1.2 shall be made within 90 days after the exercise of the first right of refusal by either Venturer in exchange for any legal transfers for the relevant interest(s) including repayment of any loan moneys, and in respect of Begun's first right of refusal being exercised, the Loan."

[6] Clause 12.2 defined some of the terms used in the above clauses as follows:

"'Valuer' means the price determined by an independent valuer of not less than five years experience appointed by agreement between the Venturers or failing agreement the President of the Queensland Law Society Incorporated."

"'Begun value' means 50% of the Value of the Developed Land including the business and all improvements."

[7] In February 2005 the Begun interests took steps to terminate the joint venture agreement. Those steps were resisted by the respondents. That led to an arbitration in which the arbitrator (Mr Bain of Queens Counsel) found in favour of the Begun interests and directed that steps occur which would lead to the determination of the agreement and the buyout by the Begun interests of the defendants' interests.

[8] The defendants did not comply with the award and the plaintiff had the award registered as a judgment of this Court. The arbitrator had made certain orders which required that steps be taken which would result in the defendants paying the plaintiff 50 per cent of the Begun value.

[9] After some delays a valuer was engaged in May 2006. Both parties briefed the valuer and it was agreed that he should produce a valuation at the date of inspection – 12 June 2006 – and at 15 February 2005. The latter date was the date at which, on the plaintiff's case, the plaintiff could have purchased the defendants' interests in accordance with the Notice it had given at the time and which had been resisted by the defendants. The former date was the date agreed upon by the parties as the appropriate date for assessment of the Begun value following the decision of the arbitrator. The valuation was completed in November 2006 and the valuations at the particular dates were:

1. 15 February 2005 – $2,100,000;
2. 12 June 2006 – $2,787,500.

[10] In accordance with the definition in the venture agreement the Begun value at 15 February 2005 was $1,050,000 and at 12 June 2006 was $1,393,750. The latter value is the subject of the declaration in paragraph 2 of these reasons.

[11] After receiving the valuation the plaintiff, consistent with the decision of the arbitrator and the provisions of the venture agreement, gave the requisite notices to complete and sought settlement on 7 December 2006. The plaintiff's representatives attended the settlement with all necessary documents and a bank cheque payable to the defendants in the correct amount.

[12] The defendants did not attend the settlement.

[13] It is recorded in the venture agreement that the defendants and GPA were to advance to MB the sum of $500,000 (described as "the Loan") on the execution of the venture agreement and that in exchange for the Loan MB was to execute and deliver to the defendants and GPA a consent caveat over the gross land to "better secure the repayment of the Loan and the obligations of Mr Begun and [the plaintiff] in the venture agreement".

[14] That amount was advanced and a consent caveat was lodged.

[15] Following the failed settlement attempt the plaintiff and MB brought an application before this Court for the removal of the caveat. The matter came on before P D McMurdo J (in *Begun & Anor v Business in Focus (Aust) Pty Ltd & Ors* (BS 2213 of 2005, unreported)) and on 15 December 2006 his Honour ordered that the caveat be removed conditional upon the provision by the applicants in that application of a bank guarantee in the amount of $1.5 million.

[16] His Honour was satisfied that the defendants would be sufficiently protected by the provision of the bank guarantee referred to above.

[17] The defendants, notwithstanding the arbitrator's award, its registration as a judgment of this Court and the decision of P D McMurdo J still refused to settle in accordance with the requirements of the venture agreement.

[18] In May this year Begun Property Pty Ltd commenced these proceedings against the defendants seeking, among other things, specific performance of the option for purchase contained within the venture agreement. A defence to the claim was filed in July but, following a series of failures to comply with both the rules of this Court and orders made for disclosure, the defence was struck out and the order set out in paragraph 2 above was made.

[19] The plaintiff seeks damages in two parts:

- the Loss of Opportunity Claim: the difference between the Begun value at February 2005 ($1,050,000) and at June 2006 ($1,393,750), i.e, $343,750, and
- the Bank Guarantee Claim: the costs associated with procuring the bank guarantee so that the caveat might be released – $46,833.93.

Loss of Opportunity Claim

[20] The defendant has failed at every step to resist the plaintiff's claims with respect to the performance of the defendant's obligations under the venture agreement. Had the defendants complied with the conditions of the venture agreement, then the

plaintiff would have paid to them the amount of $1,050,000 (with any adjustments) in February 2005 and the defendants' interests would have been conveyed to the Begun interests. Because of the defendants' breach the plaintiff was not able to comply with various requirements in the venture agreement and so, on its own case, it has to pay the higher Begun value in accordance with the arbitrator's award – $1,393,750.

[21] MB gave evidence that the plaintiff had the capacity to raise the funds necessary to pay the Begun value at either February 2005 or June 2006. He also outlined the steps he had taken to give the appropriate notices under the venture agreement and to determine the amount for which the plaintiff would be liable. This latter point was supported by the plaintiff having obtained a separate valuation of the property prior to giving the relevant notice in January 2005. It was conceded by the defendants that the plaintiff was willing to engage in the transfer of property.

[22] There was nothing put to MB on behalf of the defendants to suggest that the plaintiff was not ready, willing and able to complete at either February 2005 or June 2006. Although MB's evidence on the plaintiff's ability to pay the appropriate amount was not detailed I regard it as credible and, in the absence of any challenge, I accept it. (*Hull v Thompson* [2001] NSWCA 359)

[23] In answer to the plaintiff's analysis of its loss the defendants put the following argument:

- any assessment of damages must take into account the benefits that have accrued to the plaintiff by virtue of the defendants' failure to complete;
- the plaintiff benefited from not paying the Begun value in 2005 by reason of not having to pay interest on money borrowed to finance the purchase;
- the plaintiff benefited by remaining in possession of the resort from the time of the defendants' initial breach in early 2005;
- it follows, say the defendants, that an amount equivalent to the interest which did not need to be paid and an amount representing the value of remaining in possession of the resort should be deducted from any damages arising out of the difference between the 2005 Begun value and the 2006 Begun value.

[24] I will deal with the latter point first. The plaintiff was not in possession of the resort after March 2005. From that month another company, Begun Resorts Pty Ltd, was in possession of the resort until another entity, not associated with any of the parties, started to conduct the resort.

[25] The argument put forward on the major point – that the defendants should benefit from the financial arrangements of the plaintiff – must be dismissed. Should it be otherwise then it would mean that, while the plaintiff's damages would be reduced by the notional interest payments, the defendants would still receive the higher of the Begun valuations. The calculations put forward in support of this argument were entirely speculative and completely lacking in any evidentiary basis.

[26] Had the venture agreement not contained the process which requires that the 2006 Begun value be the amount to be the paid by the plaintiff, then, in the ordinary way, the 2005 Begun value would have been the amount required to be paid and, thus, upon an order for specific performance, the plaintiff would have been liable only for

that amount. The defendants' breach has caused that amount to increase and the plaintiff lost the opportunity to purchase at the lower figure. The damage suffered, then, is the difference between those two amounts.

Bank Guarantee Claim

[27] The plaintiff claims it is entitled to damages equal to the costs incurred in obtaining a bank guarantee to replace the security constituted by the consent caveat. Had the defendants honoured their obligations under the venture agreement they would have attended at the settlement on 7 December 2006 and they would have received the requisite amount. The reason for the caveat would have dissolved and the caveat would have been removed.

[28] As was observed by P D McMurdo J in his reasons for ordering the removal of the caveat:

> "The applicants [the plaintiff and MB] wish to proceed with the development of the land and the existence of the caveat [i]s a substantial impediment to their obtaining finance to do so. They are also interested in the trading of the resort by Begun Resorts Pty Ltd which is trading at a loss and is likely to have to close the resort unless the Begun interests can obtain refinance, again, dependent upon the removal of the caveat. The caveat is there only to secure the payment of money."

[29] The action taken by the plaintiff in replacing the caveat with a bank guarantee was generated by the failure of the defendants to complete their bargain in the terms of the venture agreement. The costs incurred include the legal costs expended in the application to this Court and the fees charged by the bank for the guarantee. I find that the total of those costs is $46,833.93 and that they are damages recoverable by the plaintiff.

Other matters

[30] It is agreed between the parties that the costs of the arbitration ($205,000) are to be set-off against the amount otherwise owed by the plaintiff to the defendants for the 2006 Begun valuation.

[31] The plaintiff also seeks to set-off the amount of $97,829.96 which is the sum of four costs orders in favour of the plaintiff against the defendants. Three of those orders were made in this Court and one was made in the Federal Court. There is agreement as to the quantum of the costs payable under those orders but no agreement that they be set-off in the same way as the arbitration costs. In paragraph 37(a) of the Statement of Claim an amount of "Approximately $75,000" is claimed as the costs of the proceedings to remove the caveat but no claim is made to set-off that sum or any other amount. In any event an amount has already been awarded in respect of the caveat proceedings. The other costs orders are not the subject of any claim in the pleadings and no application was made to amend. I reject the claim to set-off the amount owing under the costs orders against the amount to be paid under the venture agreement.

Assessment

[32] I assess damages in the sum of $390,583.93. I direct the plaintiff to bring in minutes of order reflecting this assessment and I direct that such orders allow for execution of necessary documents by a person other than the defendants should the defendants fail to carry into effect the order for specific performance made on 12 October 2007.

Addendum

[33] When this matter came on for the delivery of these reasons, I was informed by Mr Peden of Counsel (for the plaintiff) that there was an agreement between the parties concerning the amount for costs referred to in [31] above. Mr Hall (for the defendants) concurred. That agreement is in the same terms as those set out in [30]. Therefore, the sum otherwise payable by the plaintiff to the defendants pursuant to the order for specific performance will reflect that agreement by being reduced by the amount of $97,829.96.