SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Dale and Meyers Operations Pty Ltd* [2010] QSC 361
PARTIES:	**STATE OF QUEENSLAND** (applicant/plaintiff) **v** **DALE AND MEYERS OPERATIONS PTY LTD** **ACN 110447366** (respondent/defendant)
FILE NO/S:	SC No 1066 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2010
JUDGE:	Chief Justice
ORDERS:	**1. Orders in terms of paras 1 and 2 of the application filed 31 August, 2010.** **2. Costs reserved.**
COUNSEL:	D A Kelly SC for the applicant/plaintiff B D O'Donnell QC for the respondent/defendant
SOLICITORS:	Allens Arthur Robinson for the applicant/plaintiff Hopgood Ganim Lawyers for the respondent/defendant

CHIEF JUSTICE:

Introduction

[1] The plaintiff seeks the determination of a preliminary question, under r 483(1) of the *Uniform Civil Procedure Rules*. That is whether the plaintiff and the defendant entered into a compromise agreement.

[2] The issue arises out of the sale by the plaintiff to the defendant of a timber business. The sale was completed, subject to the defendant's obligation to pay, following completion, any amount by which the value of the stock exceeded $4.5 million. Clause 8 of the agreement obliged the plaintiff to send the defendant a "statement of stock". Completion had occurred on 14 September 2007. It was not until 19 November 2008 that the plaintiff furnished that statement, valuing the stock at approximately $4.8 million. The precise balance was $374,260. Discussions ensued.

[3] The plaintiff contends that the parties resolved a dispute as to any additional amount payable at a meeting on 18 May 2009, whereby the plaintiff would accept $240,000 in satisfaction of its claim. The plaintiff alleges that the defendant repudiated the compromise.

[4] In this proceeding, the plaintiff sues on that compromise, or alternatively for damages in that amount of $374,260. Pleadings have been exchanged, including three versions of the defence. The defendant denies that there was a binding compromise agreement, and as to the alternative claim, alleges non-compliance by the plaintiff with cl 8, waiver and estoppel.

Proposed preliminary question

[5] The proposed questions are:

> "(a) Did the plaintiff and defendant enter into a settlement agreement on or about 18 May 2009 in which they compromised their dispute as to the amount to be paid by the defendant in respect of $374,260 claimed by the plaintiff pursuant to cl 8 of a sale of business agreement entered into by the plaintiff and defendant on 31 August 2007; and
>
> (b) If the answer to (a), above, is yes, what were the terms of the settlement agreement?"

[6] The scope of the question is circumscribed by the delineation of the applicable "material facts", defined in para 2 of the application filed 31 August 2010 as paras 4-12 of the amended statement of claim, paras 4I-12 of the second further amended defence and paras 7-10 of the amended reply.

The "material facts"

[7] In those paragraphs of the amended statement of claim, the plaintiff alleges the existence of a dispute in relation to the further amount owing (para 4), a meeting "in an attempt to resolve the dispute" (para 5), and agreement to resolve the dispute (para 7(a)).

[8] In the specified paragraphs of the second amended defence, the defendant alleges that there was no dispute (para 4I(b)), because of the circumstances then alleged, which include that the parties attended a meeting for other purposes, and at the meeting merely discussed the "respective contentions". Significantly, however, in paragraph 7, the defendant says that "the plaintiff indicated that it would be willing to accept a payment of $240,000 over two years in respect of the moneys allegedly owed in respect of the statement of stock" (d), which is the language of the compromising of a dispute. In para 7(i), the defendant alleges:

> "In the further alternative, if the parties reached a consensus and intended (objectively assessed) to be immediately bound, the agreement was unsupported by consideration provided by the plaintiff.

Particulars

> By the time the meeting occurred on 18 May 2009, the Plaintiff had lost any right it might have otherwise have had to recover more than $4.5m for stock upon failing to submit to the Defendant, as soon as practicable after the 14 September 2007 completion date, a Statement of Stock."

[9] In para 9(d) of the amended reply, the plaintiff denies para 7(i), asserting that the settlement was supported by consideration as alleged in para 8(a) of the amended statement of claim, that is that the "Defendant pay to the Plaintiff $240,000, in full and final satisfaction of the Balance Owing".

[10] Accordingly, the consideration alleged by the plaintiff is its settlement of its dispute with the defendant by agreeing to accept a lesser sum than that demanded. It is on that basis that the preliminary question is framed and presented. That is the consideration upon which the plaintiff relies: it must establish that to succeed in its claim on the compromise.

[11] In the most recent version of the defence, which was delivered on 21 September 2010, the defendant repeats its account of the meeting, to the effect that (para 7(c) and (d)) "the Plaintiff contended that the Defendant owed monies to the Plaintiff in respect of the Statement of Stock, [and] the Plaintiff indicated that it would be willing to accept a payment of $240,000 over two years in respect of the monies allegedly owed in respect of the Statement of Stock," which is again the language of compromise.

[12] But in that latest amended defence, the defendant alleges that the agreement was "unsupported by consideration provided by the plaintiff" because of the matters pleaded in para 16. In para 16(b) the defendant alleges that it "owed no monies to the Plaintiff in respect of the Statement of Stock", because of a host of circumstances, including non-compliance with cl 8 of the agreement, and the factual issues going to the claims of waiver and estoppel. Mr O'Donnell QC, who appeared for the defendant which opposes any separate preliminary hearing, submitted that to determine whether or not any compromise was supported by consideration, it would still be necessary to canvass all of those factual concerns, so that the claimed savings would not eventuate.

[13] But the plaintiff advances the proposed preliminary question on a confined basis, going to the compromise of an existing dispute, and by the pleadings to which I have referred, the defendant has dealt with the matter within that framework, although denying the existence of the alleged dispute.

Discussion on consideration

[14] To determine, therefore, whether any compromise agreement was supported by consideration on the basis presented by the plaintiff, and to which the plaintiff has limited itself, it would be sufficient for the Court to determine whether there was a dispute between the parties which was compromised by the plaintiff's agreement to accept a lesser sum than it had demanded. (Compare *Amos v Bauer* [2010] QCA 199, para 18.)

[15] The plaintiff must honestly have believed its claim was well-founded, and perhaps it must also be shown that that claim was not vexatious or frivolous (*General Credits Ltd v Ebsworth* [1986] 2 Qd R 162, 166-7; *Wills v Petroulias* [2003] NSWCA 286, paras 73-76).

[16] To resolve a point debated before me, it fell to the defendant, in its pleading relating to consideration for any compromise agreement, to allege that the plaintiff had no honest belief that its disputed demand was well-founded, if that is to be the defendant's contention (cf *General Credits*, p 167 lines 35-40). See also r 153 *Uniform Civil Procedure Rules*. The defendant has not done that, and has not done so notwithstanding its having been put on notice at the hearing before Phillip McMurdo J on 14 April 2010. See the transcript of that hearing at pp 1-4 to 1-8. At that hearing, the then Counsel for the defendant accepted the defendant had to allege the absence of an honest belief, if that be the defendant's case.

[17] Insofar as Mr O'Donnell submitted the defendant's case is there was no consideration because the plaintiff's claim for the $374,260 is simply unsustainable, he must, in the framework presented by the plaintiff, go to the point of contending that the claim being unsustainable, it was not genuine, and the plaintiff could not honestly advance it. Significantly, the defendant has not pleaded to that effect.

[18] Whether the compromise was supported by consideration, on the limited basis propounded by the plaintiff, could conveniently be determined as part of the determination of this question if dealt with separately and on a preliminary basis.

Convenience

[19] Prima facie it would be convenient to determine first whether the parties entered into this alleged compromise. Such a question is one "ripe" for preliminary determination (*Reading Australia Pty Ltd v AMP Society* [1999] FCA 718, para 8(e). See also the observations of Chesterman J as he was in *Mitchell v Pacific Dawn Pty Ltd* [2006] QSC 198, para 6. Indeed, the defendant indicated at an earlier time in correspondence that it was agreeable to the preliminary determination of such a question, although in different terms (see e-mail from Hopgood Ganim of 24 May 2010).

[20] If the plaintiff were to succeed at the proposed preliminary hearing, the need to consider the alternate claim would disappear, saving a lot of time and cost (and court time). I accept the forecast, for present purposes:

1. that only 10 to 20 documents would be relevant to the compromise claim, whereas up to 5,000 would have to be considered in respect of the overall proceeding;

2. that while each party would call only two witnesses at the preliminary hearing, many more would be needed for a full trial;

3. that comprehensive expert evidence would be needed at a full trial, but not at the preliminary hearing, and that would necessitate the assessment of some 52 stock valuation spreadsheets on A3 size paper; and

4. that whereas the preliminary hearing should last no more than two days, the full trial could last up to eight days.

Credibility

[21] A question which has substantially exercised my mind is whether having a preliminary hearing could create problems in relation to the assessment of credibility, should the plaintiff fail, necessitating a full trial.

[22] Each party will need to call two witnesses at the preliminary hearing, and they would remain as potential witnesses on any necessary hearing of the alternate valuation claim. It appears that the compromise question is relatively separate, however, and of quite different character from that of the question arising on the alternate claim.

[23] While the prospect of conflicting findings on the credibility of the same witness at various stages of a proceeding needs to be given serious consideration, this is a case where a witness could be considered unreliable on the compromise issue, but nevertheless accepted as reliable on the valuation point, or aspects of it, without jeopardising confidence in the system, because of the completely separate and different character of the respective issues. Also, were evidence of a witness for the plaintiff to be rejected as dishonest in relation to the separately determined compromise point, that could have serious ramifications in relation to whether the plaintiff even proceeded with the alternate claim.

[24] Another point is that as the matter was presented to me, it should not be necessary for a judge to hear all of the evidence which would be given at a full trial in order to determine the reliability and credibility of the evidence of a witness confined to the compromise issue.

Authorities

[25] I was referred to a number of authorities. I do not intend to repeat all the references here: recourse may be had as necessary to the helpful outlines provided by counsel. But I should mention *Heery v Criminal Justice Commission* (2001) 2 Qd R 610, 621 and re *Multiplex Constructions Pty Ltd* (1999) 1 Qd R 287, 288, for an affirmation of the utility of these orders in appropriate cases, and the "greater willingness" of courts to make them in contemporary times.

Conclusion

[26] I determine in the exercise of my discretion that this is an appropriate case in which to order the preliminary determination of the question advanced. There will accordingly be orders in terms of paras 1 and 2 of the application filed 31 August 2010, and that costs be reserved.