SUPREME COURT OF QUEENSLAND

CITATION:	*Harris & Anor v Australand & Anor* [2010] QSC 385
PARTIES:	**SHANE EDWARD HARRIS AND KIM MAREE HARRIS AS TRUSTEES FOR THE HARRIS FAMILY TRUST** (first plaintiffs) **v** **CARINYA (QLD) PTY LTD ACN 135 687 339 AS TRUSTEES FOR THE HARRIS FAMILY TRUST** (second plaintiff) and **AUSTRALAND APARTMENTS NO. 6 PTY LTD ACN 100 251 287** (defendant) **ALLENS ARTHUR ROBINSON (A FIRM)** (defendant added by counterclaim)
FILE NO/S:	BS13391/08
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	12 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2010
JUDGE:	Margaret Wilson J
ORDER:	**That the application be dismissed with costs.**
CATCHWORDS:	CONTRACTS – particular parties – vendor and purchaser – where first plaintiffs entered into a contract with defendant to purchase retail lot – where first plaintiffs provided a bank guarantee – where first plaintiffs purported to terminate the contract – where defendant purported to accept the first plaintiffs' conduct as repudiation and itself purported to terminate the contract – where defendant claimed damages against the first and second plaintiffs – where defendant argued its solicitors had been negligent – where the defendant brought counterclaim against solicitors that had advised it – where firm joined to proceedings as defendant by counterclaim – whether nature of the defendant's loss must be characterised – whether it was likely that the first plaintiffs would have experienced financial difficulties in completing the purchase

	PROCEDURE – Supreme Court procedure – Queensland – procedure under *Uniform Civil Procedure Rules* 1999 (Qld) and predecessors – whether court has power to order plaintiff to make disclosure to defendant by counterclaim – whether court can order such disclosure pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) r 367 or r 658, or chapter 7 part 1 – whether court can order such disclosure pursuant to *Supreme Court Act* 1995 (Qld) s 283
	Property Agents and Motor Dealers Act 2000 (Qld) s 365 *Supreme Court Act* 1995 (Qld) s 283 *Supreme Court of Queensland Act* 1991 (Qld) s 118D *Uniform Civil Procedure Rules* 1999 (Qld) r 367, r 658, chapter 7 part 1
COUNSEL:	AM Pomerenke for the applicant / defendant added by counterclaim
	MR Hodge for the respondent / plaintiffs
SOLICITORS:	Brian Bartley & Associates for the applicant /defendant by counterclaim
	Robbins Watson for the respondent/plaintiffs

[1] **MARGARET WILSON J**: This is an application by the defendant by counterclaim ("Allens") for disclosure by the plaintiffs (Shane Edward Harris and Kim Maree Harris, first plaintiffs, and Carinya (Qld) Pty Ltd as trustee of the Harris Family Trust, as second plaintiff) of all documents relevant to their capacity to complete a contract for the purchase of certain property.

Procedural question

[2] Counsel for the respondent plaintiffs accepted that the Court has power to order a plaintiff to make disclosure to a defendant by counterclaim, while noting some uncertainty about the source of that power. Possible sources of power identified in submissions are –

(i) *Uniform Civil Procedural Rules* 1999 (Qld) ("*UCPR*") r 367 or r 658;
(ii) *UCPR* chapter 7 part 1; and
(iii) *Supreme Court Act* 1995 (Qld) s 283.

[3] Under r 367, the Court has a general power to give any directions. In exercising that power, the interests of justice are paramount. The Court may give any directions it considers appropriate, even though inconsistent with another provision of the rules. Under r 658 the Court may, at any stage of a proceeding, make any order the nature of the case requires.

[4] I am satisfied that r 367 is a sufficient source of power for the Court to make an order of the type sought.

[5] Both counsel proceeded on the basis that the provisions of *UCPR* chapter 7 part 1 are not applicable. Because I am satisfied of the Court's power to make the order

sought under r 367, it is not necessary for me to consider whether chapter 7 part 1 affords another source of power.

[6] This proceeding is on the Commercial List. The provisions of the *Commercial Causes Act* 1910 (Qld) were relocated to part 18 of the *Supreme Court Act* 1995 (Qld). However, they are no longer used, and the Commercial List now maintained by the Court was created pursuant to a Practice Direction issued by the Chief Justice under s 118D of the *Supreme Court of Queensland Act* 1991 (Qld).[1] Accordingly, s 283 of the *Supreme Court Act* 1995 is not a source of power to make the order sought.

The factual background

[7] The first plaintiffs were the trustees of the Harris Family Trust until about 5 March 2009; since then the second plaintiff has been the trustee of that trust.

[8] The defendant Australand Apartments No 6 Pty Ltd ("Australand") was the developer of a residential and retail complex at Burleigh called Ambience on Burleigh.

[9] The first plaintiffs entered into a contract with Australand dated 21 December 2006 to purchase a property described as "Proposed Lot No 2 on SP 166404", which was to be a retail lot comprising seven shops in the development. The purchase price was $8,631,047 (excluding GST and subject to increase in accordance with clause 5), and the first plaintiffs provided a bank guarantee for $863,104 in satisfaction of the requirement for a deposit. The contract provided that settlement was to occur 21 days after Australand's solicitors gave the first plaintiffs (or their solicitors) notice that a subdivision plan had registered.

[10] Allens, who are solicitors, were retained by Australand to act for it in relation to the drafting of the contract and the conveyance.

[11] Settlement was due on 28 November 2008. The first plaintiffs purported to terminate on a number of grounds on 27 November 2008. Australand refused to accept that the termination was valid, asserted it was ready, willing and able to settle, and called on the first plaintiffs to settle on 28 November 2008. Settlement did not occur. On 29 December 2008 Australand purported to accept the first plaintiffs' conduct as repudiation and itself purported to terminate the contract.

This proceeding

[12] The first plaintiffs commenced this proceeding for a declaration that they validly terminated the contract, or alternatively for a declaration that pursuant to s 365 of the *Property Agents and Motor Dealers Act* 2000 (Qld) they were never bound by the contract, and for the return of the guarantee. There are various grounds on which they claim to have validly terminated the contract. They do not plead that at all material times they were ready, willing and able to complete the purchase.

[13] Australand responded to the claim and statement of claim by a defence and counterclaim against the plaintiffs and, in the alternative to the counterclaim against the plaintiffs, a counterclaim against Allens.

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[1] Supreme Court Practice Direction 3 of 2002; amended by Practice Direction 2 of 2008.

[14] Australand alleges that, had the plaintiffs performed the contract, they would have paid it approximately $9,568,971.42 at settlement on 28 November 2008. It alleges that the value of lot 2 on that date was $3.8 million plus GST. In paragraph 12 of the counterclaim, it claims damages against the plaintiffs, calculated as follows:

Purchase price	$ 9,568,971.42
plus Costs associated with the contract	$ 19,720.50
less Market value (including GST)	$ 4,180,000.00
less Bank guarantee	$ 863,104.00
Total	**$ 4,545,587.92**.

[15] Australand alleges that Allens were negligent in the drafting and preparation of the contract, and that some (not all) of the grounds relied on by the plaintiffs would not have been available to them but for Allens' negligence. After dealing with each of the matters in relation to which it alleges Allens were negligent, Australand alleges –

> "**Loss**
> 45. In the premises pleaded above in paragraph 12 of this counterclaim, the plaintiffs [sic] have suffered loss by reason of the plaintiffs' termination of the Contract."

There is no further particularisation of the loss caused by Allens' negligence. The prayer for relief simply claims damages for breach of contract; alternatively, damages for negligence.

[16] In their answer to the counterclaim against them, Allens deal with each allegation in the counterclaim *seriatim*, and then continue –

> "23. Allens denies the allegations made in paragraph 45 because of the matters pleaded above.
>
> 24. Alternatively, if the defendant has suffered loss by reason of the plaintiffs' valid termination of the Contract (which is denied), Allens:
>
> (a) does not admit that the loss was of the nature or to the extent alleged because, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the defendant's allegations in this regard;
> (b) says that any such loss was not caused by any breach of Allens' obligations in that, by reason of the matters pleaded in paragraphs 15, 16, 17, 18(c), 19(c) and 20 of the Amended Statement of Claim (being matters for which the defendant was solely responsible), or by reason of the inherent likelihood that the plaintiffs would have been unable to complete the contract, the loss would have been suffered irrespective of any breach on the part of Allens."

[17] On 30 June 2010 Allens' solicitors told the plaintiffs' solicitors –

> "The intention of subparagraph 24(b) of the Answer was to contend that the first plaintiff would have been unable to complete the purchase in circumstances in which:

(a) They had contracted to pay $8.6 million (approximately) for the purchase of property which, on the basis of the valuation evidence which has now been obtained, was worth something of the order of $2.9 million - $3.2 million;

(b) No prudent lender would have advanced more than a proportion of the market value of the property, assuming that the lender was prepared to lend at all in circumstances in which the first plaintiffs' entering into the contract had resulted in substantial loss by reason of the discrepancy between the contract price and market value;

(c) Completion was due on 28 November 2008, by which time it is notorious that the global financial crisis had severely impacted upon the availability of credit generally, let alone for imprudent transactions.

We are not in a position to know whether, nevertheless, your clients may have been in a position to settle because they had access to funds of their own which would have been sufficient for the purpose. For that reason, subparagraph 24(b) is pleaded in terms of 'inherent likelihood' rather than an allegation of actual incapacity for which no sufficient factual basis was available to our client. We therefore trust that this explains the intention of the pleading."

Submissions of counsel

[18] The submissions of counsel for Allens were premised on the damages Australand seeks against Allens being the same as those it seeks against the plaintiffs. He submitted –

"14. Thus Australand's claim for damages against AAR depends expressly upon the contention that, if AAR had performed its obligations:
(a) the First Plaintiffs would have been bound to complete the contract on 28 November 2008;
(b) on that date, the First Plaintiffs would have paid over approximately $9.5 million at settlement – for a property only worth $4,180,000.

15. AAR takes issue with this causation hypothesis in paragraph 24 of its Answer by alleging that:
(a) the claimed loss was not caused by any breach of AAR's obligations;
(b) the loss would have been suffered irrespective of any breach on the part of AAR;
(c) this was because:
(i) the First Plaintiffs had other valid grounds of termination arising from matters for which Australand was solely responsible;
(ii) of the inherent likelihood that the First Plaintiffs would have been unable to complete the contract.

16. The legal principles engaged by those contentions were described in Seddon & Ellinghaus, *Cheshire & Fifoot's Law of Contract* (9th ed, 2008) at pages 1112-1113 as follows:

> 'It is implicit in the 'but for' test that if the loss in question would have occurred even if there had been no breach of contract, that breach cannot be regarded as its cause. So a solicitor's breach of retainer in failing to advise a lender of the unenforceability of a guarantee is not the cause of the lender's loss if the guarantee would in any event have been financially worthless. Similarly, negligent failure to advise is not the cause of loss if the advice would not have been followed. '"

[19] Counsel for the plaintiffs took issue with this formulation of Australand's loss. He submitted that whether the plaintiffs would have been in a position to settle is a red herring, and that what Australand lost by reason of Allens' negligence was the right to recover damages from the plaintiffs.

Discussion

[20] It is not necessary to determine on this application the true nature of Australand's loss if the plaintiffs' rescission was valid on grounds that would not have been available to them but for Allens' negligence.

[21] The allegation in the pleading to which the disclosure is said to relate is that there was an "inherent likelihood" that the plaintiffs would not have been able to complete. The expression "inherent likelihood" is too imprecise to raise an issue in relation to which disclosure should be ordered.

[22] Allens have not pleaded facts from which an inference of inability to complete is to be drawn. On the most generous interpretation of their pleading, they have done no more than point to the disparity between what was payable at settlement and the value of the property at settlement.

[23] There is no evidence to support counsel for Allens' submission that there is an objective likelihood that the first plaintiffs would have required finance to complete the purchase. The amount required to complete the purchase was large, but it would be speculative to assume that any purchaser would have had to borrow money in order to complete. He asserted that the first plaintiffs are the owners of numerous other properties, each of which is subject to a registered mortgage; in support of that assertion, he referred to the affidavit of Brinton Keath filed 26 May 2010. Mr Keath is a licensed valuer and a licensed real estate agent. He has expressed opinions as to the current value of numerous properties referred to in his affidavit. Title searches and other documents relating to those properties are exhibited to his affidavit. According to the title searches, most of those properties are owned by entities other than the plaintiffs. There is simply no evidence before the Court to support counsel's assertion.

[24] There is no evidence to support counsel's submission that there is an objective likelihood that the first plaintiffs had in fact made attempts to obtain finance and knew whether they were in a position to complete.

[25] He submitted that there is an objective likelihood that any finance application actually made by the first plaintiffs, or any hypothetical application they might have made, would have failed. He argued –

"As to this:

(i) There is the common sense proposition that a financier would be unlikely to lend $9.5 million on the security of property worth less than half that amount.

(ii) That common sense proposition is reinforced by the evidence of Mr Bartley, who has deposed to his experience and observations of banking practices over the course of his 33 years as a solicitor specialising in commercial litigation.

(iii) To these difficulties may be added the notorious difficulties associated with the onset of the global financial crisis, a matter also addressed in Mr Bartley's affidavit.

(iv) There is nothing to suggest that there would have been sufficient equity in any of the First Plaintiffs' other properties to support the shortfall that would likely be suffered on the financing of completion of this particular property – as has already been observed, each of those other properties was subject to is own registered mortgage."

[26] In support of those submissions, he relied on an affidavit of Brian David Bartley, Allens' solicitor, filed 2 July 2010.

[27] Mr Bartley referred to valuations of lot 2 of $2.9 million and $3.2 million (excluding GST), as at February and April 2010 respectively. They do not assist the submission, given that the completion was due in November 2008. He referred also to a valuation of $3.8 million as at February 2009; I note that is closer in time to the settlement date, and happens to accord with the value as at the settlement date alleged by Australand.

[28] Mr Bartley swore to the practices of lending institutions in setting loan to value ratios. Counsel for the plaintiffs objected to this evidence as inadmissible opinion evidence. I do not think it rises any higher than a statement of Mr Bartley's observations over many years' practice as a commercial litigation solicitor. What Mr Bartley has observed does not necessarily reflect usual practice in the industry, and in my view that part of his affidavit lacks the relevance needed for it to be admissible.

[29] Mr Bartley referred to the global financial crisis in 2008. That there was such a crisis is something of which the Court can take judicial notice, but its potential impact on the first plaintiffs' ability to complete the contract is speculative.

[30] There is no evidence to support the assertion of a likely shortfall on the financing needed to complete the sale of this property, and no evidence to support an assertion that the first plaintiffs would not have been able to meet such a shortfall.

[31] Counsel for Allens submitted –

"(d) In light of the foregoing, there is an objective likelihood that the First Plaintiffs have at least the following documents in their possession or control which will tend to prove or disprove that they were able to complete the contract: documents relating to an application for finance; documents evidencing their ownership of other real properties; documents evidencing the value of those other real properties; and documents evidencing the amount owing to the registered mortgages of those other real properties."

[32] In my view this is a fishing expedition, and it would be oppressive to order the disclosure sought.

Disposition

[33] The application should be dismissed with costs.