United Super Pty Ltd v Randazzo Investments Pty Ltd [2009] NTSC 50

PARTIES:	UNITED SUPER PTY LTD and UNITED SUPER INVESTMENTS (MITCHELL PLAZA) PTY LTD v RANDAZZO INVESTMENTS PTY LTD and RANDAZZO INVESTMENT (MITCHELL CENTRE) PTY LTD and MITCHELL CENTRE NOMINEES PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 66 of 2009 (20915435)
DELIVERED:	22 September 2009
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JUDGMENT OF:	MILDREN J

CATCHWORDS:

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MacDonnell Shire Council v Miller & Ors [2009] NTSC 46; applied

Jeco Welding Pty Ltd (in Liq) & Peter Robert Vince (Liquidator) v Gabriel Van Orschoit & Ors (Unreported, Supreme Court of Victoria, 14 April 1992); distinguished

Aon Risk Services Australia Ltd v Australian National University (2009) 83 ALJR 951; followed

Agar v Hyde (2001) 201 CLR 552; *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438; *Howard v Australian Jet Charter Pty Ltd* (1991) 6 ANZ Ins Cas 77,104; *Lawfund Australia Pty Ltd v Lawfund Leasing Pty Ltd & Ors* (2008) 66 ACSR 1; referred to

REPRESENTATION:

Counsel:

Plaintiffs:	P Riordan SC with K Naish
First & Second Defendants:	M Maurice QC with N Christrup

Solicitors:

Plaintiffs:	Ward Keller (as agents for Holding Redlich)
Defendants:	Cridlands MB Lawyers

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

United Super Pty Ltd v Randazzo Investments Pty Ltd [2009] NTSC 50
No 66 of 2009 (20915435)

BETWEEN:

UNITED SUPER PTY LTD
First Plaintiff

and

UNITED SUPER INVESTMENTS (MITCHELL PLAZA) PTY LTD
Second Plaintiff

AND:

RANDAZZO INVESTMENTS PTY LTD
First Defendant

and

RANDAZZO INVESTMENTS (MITCHELL CENTRE) PTY LTD
Second Defendant

and

MITCHELL CENTRE NOMINEES PTY LTD
Third Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 22 September 2009)

[1] On 15 September 2009 I heard the following interlocutory applications:

(1) An application by the plaintiffs to amend the Statement of Claim.

(2) An application by the first and second defendants to file and serve an Amended Defence and Counterclaim.

(3) An application by the first defendant for summary judgment.

[2] The dispute between the plaintiffs and the defendants as appears from the Statement of Claim concerns an alleged agreement to develop and operate a retail, office, entertainment and car parking complex on two contiguous blocks of land, one of which is held by the first plaintiff, as assignee of a lease granted by the Uniting Church of Australia Property Trust and the other of which is owned by the first defendant, both of these interests having been subleased to the second plaintiff and the second defendant as contemplated by the terms of a Joint Venture Agreement between the second plaintiff and the second and third defendants dated 24 October 2001 (the JVA) and as subsequently provided for by a Development Deed dated 22 November 2002 (the Development Deed) entered into between the plaintiffs and the first and second defendants. It is also common ground that the complex has been constructed over the two blocks of land.

[3] It is alleged that the third defendant (which is owned in equal shares by the second plaintiff and the second defendant) was incorporated pursuant to the

terms of the JVA and appointed by the second plaintiff and the second defendant as their nominee and custodian to hold their respective interests in the joint venture property including their respective interests in the land. Further, under the JVA, it is alleged that the third defendant would (and did) establish a Management Committee to control and manage the joint venture.

[4] Further, it is alleged that the first defendant was appointed to act as centre manager, subject inter alia to policy decisions made by the third defendant.

[5] In essence, the plaintiffs claim that there was an over-arching "joint venture" constituted by the JVA and the Development Deed, that by reason of certain differences between the parties which arose in 2007 and 2008 there was a dispute as to whether or not the leasehold interest of the first plaintiff and the fee simple interest of the first defendant are assets of the Joint Venture and that it is just and equitable to dissolve the Joint Venture, sell the property and distribute the proceeds to the parties, for declaratory relief as to (essentially) what property is joint venture property and for incidental orders to facilitate the winding up of the alleged joint venture.

[6] The Draft Amended Statement of Claim is annexed to the affidavit of Benjamin David John Patrick of 14 September 2009, curiously, as Ext BDJP-9 (although there are no exhibits BDJP 1 to 8 to that affidavit). During the hearing, counsel for the plaintiff, Mr Riordan SC, handed up a new page 22 of the proposed draft.

[7] The proposed amendments are opposed by counsel for the first and second defendants. The nature of the objections raised fall into two broad categories. First, it was submitted that as a matter of pleading the proposed amendments were bad for various reasons; secondly, the amendments should be refused on discretionary grounds relating to the conduct of the trial.

Should the Amendments be Allowed?

1. The first group of proposed amendments

[8] These relate to paragraphs 6 and 7A of the Draft Amended Statement of Claim. The effect of the amendment to paragraph 6 is to plead a joint venture partly constituted by the written JVA, the Development Deed, a transfer of the lease between National Mutual Life Association of Australasia Limited, two deeds of guarantee entered into on 18 June 2002 and a deed of consent between the first plaintiff and Uniting Church in Australia Property Trust (NT) and by implied terms said to arise by law to give effect to the commercial intentions of the parties.

[9] The implied terms are pleaded in proposed paragraph 7A as follows:

> "(a) United Super would procure the Cbus land;[1]
>
> (b) United Super and RI would each contribute its Land to the Joint Venture for the purposes of the Joint Venture;
>
> (c) The Joint Venture and/or Joint Venture Agreement was terminable on reasonable notice, alternatively at will."

[1] i.e. the first plaintiff's leasehold interest from the Uniting Church of Australia Property Trust (NT).

[10] In *MacDonnell Shire Council v Miller & Ors*,[2] I set out the test usually applied when considering whether or not to grant leave to amend:

> One test to be applied is whether or not the amendments are so obviously bad in law that it would be futile to allow the amendment. But in granting leave to amend, the Court is concerned with the raising of issues and not with their merits. Raising a claim which may appear not to have much chance of success is not a sufficient reason to refuse leave to amend. Provided the case is arguable, whether it ought to succeed or not is a question for the Judge at trial.

[11] The first and second defendants have raised very formidable objections to the amendments. The alleged "over-arching" Joint Venture asserted by Mr Riordan SC, seems to have only one purpose – to enable the plaintiffs to assert that there was a joint venture agreement involving all of the plaintiffs and the defendants notwithstanding that the actual JVA is between only the second plaintiff and the second and third defendants. However, there are no terms of this over-arching agreement pleaded, other than the terms of the JVA and there are no terms in the other documents particularised which contain any of the terms pleaded in paragraph 7 of the Statement of Claim all of which come from the JVA to which neither the first plaintiff nor the first defendant is a party. Nor does the pleading reveal how it is that the documents referred to constitute this over-arching joint venture. No conduct on the part of the parties, oral agreement or written agreement which supersedes the JVA so as to alter the parties to that agreement, is pleaded.

[2] [2009] NTSC 46 at par [9].

[12] There is also a difficulty with the particulars insofar as they allege that documents entered into 2002 evidence a joint venture which arose in 2001. As counsel for the first and second defendants correctly pointed out, these documents could not possibly be particulars of an agreement made on or about 24 October 2001. At best, they might have amounted to variations of the JVA, but even a cursory examination of those documents reveals that this not so, but are either documents contemplated by the terms of the JVA as conditions precedent to its coming into effect (the guarantees of 18 June 2002 – see Clause 2 (f) of the JVA); or have nothing to say about amending the terms of the JVA; or expressly confirm the terms of the JVA. In any event, no variation of the JVA is pleaded. It is difficult to see how the undated Deed of Consent, which is only between the first plaintiff and the Uniting Church in Australia Property Trust (NT) could possibly constitute a document involving contractual terms between the parties to the action when only one of the parties is a party to that document and no other facts are pleaded.

[13] The last of the documents pleaded, the Development Deed dated 22 November 2002, is between the first and second plaintiffs and first and second defendants. The third defendant is not a party to it, although it is a party to the JVA. No facts are pleaded as to how the Development Deed effected in some way an over-arching joint venture agreement and, in any event, that document expressly provides by clause 4 that neither the deed nor the leases granted under it are intended to supersede or affect the second

plaintiff's and second defendant's rights or obligations under the JVA and to the extent of any inconsistency between the deed or the JVA, the provisions of the JVA prevail. No facts are pleaded which would provide a basis for asserting that, notwithstanding the express provisions of clause 4 of the deed, there was an over-arching agreement between the first and second plaintiffs and the first and second defendants which operates independently of the JVA and bound those parties to the terms of the JVA.

[14] In my opinion, the proposed amendments to paragraph 6 of the Statement of Claim do not plead an arguable case and must be refused.

[15] As to the terms said to be implied by proposed paragraph 7A, there are no facts alleged which form a proper basis for the existence of any of the terms alleged. So far as paragraph 7A(a) is concerned, the allegation is that the first plaintiff would procure the "Cbus land", i.e. its leasehold interest in the lease granted by the Uniting Church of Australia Property Trust (NT) and para 7A(b) pleads that the first plaintiff and the first defendant would each contribute its "land" to the Joint Venture for the purposes of the Joint Venture. It is difficult to see why this would need to be implied to give business efficacy to the contract when the JVA specifically provides for a sublease of the various interests in land held by the first plaintiff and the first defendant (see clause 3.3) and such subleases have in fact been granted. No facts or other circumstances are alleged to give colour to this assertion.

[16] So far as para 7A(c) is concerned, counsel for the plaintiffs referred me to the decision of Brereton J in *Lawfund Australia Pty Ltd v Lawfund Leasing Pty Ltd & Ors*[3] where His Honour, applying the reasoning of McHugh JA in *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd*[4] implied a term in a joint venture of indefinite duration that the arrangement was terminable on reasonable notice.

[17] Mr Maurice QC asserts that the proposed implied term is inconsistent with clauses 4 and 5 of the JVA. Mr Maurice QC also referred to what he called the "Russian roulette clause" (clause 14.3) of the JVA which provides a mechanism for a party to sell its interest in the JVA. However, I think it is arguable that the Joint Venture is subject to the proposed implied term. I will allow the plaintiffs to amend the Statement of Claim to plead paragraph 7A(c).

Proposed Amendments to the Statement of Claim – Paragraphs 17A to 17P

[18] Paragraphs 17A to 17D of the proposed Amended Statement of Claim raises a dispute which has arisen between the first defendant, the third defendant and the "Joint Venture" over the method of calculating the first defendant's management fees. Paragraphs 17E to 17G plead that because Messrs Paulo and Giuseppe Randazzo (the Randazzo brothers) were members of the Management Committee of the Joint Venture and directors of the first and

[3] (2008) 66 ACSR 1 at [31]-[32].

[4] (1988) 14 NSWLR 438 at 443-444.

third defendants, a conflict of interest arose between them in their capacity as directors of the first and second defendants and in their capacity as directors of the third defendant and as members of the management committee. Paragraphs 17H to 17I plead that, in breach of clause 22.4 of the JVA, the Randazzo brothers failed to declare their conflict and failed to disqualify themselves from relevant meetings called to deal with any proposal in respect of the management fee dispute.

[19] Paragraphs 17J to 17P deal with another dispute concerning the form in which the first defendant should provide certain reports to the management committee. Similar allegations of conflict of interest and failure to disqualify are alleged.

[20] Paragraphs 17A to 17P are pleaded in aid of a prayer in paragraph 18 for the Joint Venture to be dissolved (with consequential relief) on the just and equitable ground.

[21] These amendments are opposed on a number of grounds, but none of them relate to the form of the pleading. It cannot be said that the amendments raise matters which are unarguable. Mr Maurice QC sought to show that, as a matter of fact, the plaintiffs at all times knew all of the facts relied upon to establish the alleged breaches of clause 22.4, were complicit in them and would be defeated by waiver, estoppel and laches. However that may be, those are questions to be decided at trial.

[22] Similarly, it was urged upon me that at no time was there a meeting to deal with any proposal where there was a conflict of interest. As I understand this submission, Mr Maurice QC contended that, although there were discussions at various management committee meetings covering those issues, at no time was a formal resolution put to the meeting to be voted upon. Whether this is so or not is a question of fact to be decided at trial. Even if Mr Maurice QC is correct, I do not consider that it is unarguable that there was not a breach or breaches of clause 22.4.

[23] As to the submissions based on the observations of the High Court in *Aon Risk Services Australia Ltd v Australian National University*,[5] I accept that this Court is required to take into account or give appropriate weight to case management principles and to give weight to the principles which underline them. However, this action was only commenced on 6 May 2009 and it was set down in my list at a time when I was absent on sick leave by the Chief Justice. However, the Chief Justice's order was subject to confirmation by me as to the listing and I have not confirmed the hearing date.

[24] There is evidence before me that, if these amendments are allowed, it will not be practical for this matter to proceed to trial on 8 October 2009. I accept that that will be so and that this will mean that the tentative trial dates will not be confirmed and that there will be some delay before the matter can be relisted. However, this case has not reached a point where the effects of a delay, likely in any event to be relatively short, will outweigh

[5] (2009) 83 ALJR 951.

the interests of the parties in having all issues determined so far as is reasonably possible. It is to be noted that in this jurisdiction, there is not a backlog of civil cases awaiting trial, so that a delay will have no significant repercussions on other litigants. Further, according to Mr Maurice QC the centre is well managed and able to function properly. The defendants, in any event, oppose the winding up order. A reasonably short delay will not affect the proper running of the Joint Venture or the creditors of the Joint Venture.

[25] I have taken into account that the only explanation for the timing of the application to amend was because of a change of counsel and Mr Maurice QC's submission that the purpose of the amendments sought is strategic rather than to serve a proper purpose. The Court has ample power to prevent a party from using its procedures to pursue an improper purpose, to prevent oppression and to prevent abuse of the Court's processes. I am not satisfied that the purpose of the amendments is strategic rather than to raise matters relevant to the Court's consideration.

[26] The proposed amendments to insert paragraphs 17A to 17P will be allowed.

Application by First Defendant for Summary Judgment

[27] Essentially, the first defendant's application is based upon the consideration that it is not a party to the JVA and that a reading of the documents relied upon by the plaintiffs' shows that their case, insofar as it seeks relief against the first defendant, is untenable.

[28] The submission of the plaintiffs is that on a consideration of the obligations of all the parties, including the Development Deed and the Management Agreement, each of which the first defendant is a party to, an "over-arching" joint venture was created which was different from the joint venture created by the JVA.

[29] Further, the plaintiffs submit:

(a) That the application is in effect a preliminary point which will fragment the resolution of the issues, or possibly lead to duplication of proceedings if there is an appeal; and

(b) The procedure of summary judgment is inappropriate where it is in effect the trial of the proceeding on a preliminary question of law, citing *Howard v Australian Jet Charter Pty Ltd*.[6]

[30] I do not think that the observations of Hill J in *Howard v Australian Jet Charter Pty Ltd* would prevent the Court from granting summary judgment if, as a matter of law, the case was, for instance, so clearly untenable that it cannot possibly succeed. On the other hand, the Court should not deny a party the opportunity to place its case before the Court in the ordinary way, unless there is a high degree of certainty that the plaintiffs case must fail.[7] In the present case, it may be that the plaintiff, by amending its pleading, is able to sustain its case that the over-arching joint venture exists. In any

[6] (1991) 6 ANZ Ins Cas 77,104 at 77,110.
[7] *Agar v Hyde* (2001) 201 CLR 552 at 575-6 [57].

event, the existing paragraph 6 to the Statement of Claim, which also alleges the over-arching joint venture, has not been struck out; nor is there an application before me to take that course.

[31] There is also the consideration that determining the application at this stage is likely to fragment the resolution of the issues. I was referred by Mr Riordan SC to an unreported judgment of Nathan J in *Jeco Welding Pty Ltd (in Liq) & Peter Robert Vince (Liquidator) v Gabriel Van Orschoit & Ors,*[8] but that decision deals with an application for summary judgment by the plaintiff under O 22, rather than an application by the defendant under O 23 and I found it unhelpful. Nevertheless, I consider that no good purpose will be served by delving into the contentious areas of fact and law which would be necessary at this stage, particularly when the whole action can be soon brought to trial in the regular way, the application if successful, would not dispose of the suit and could give rise to appeals which would delay the action even further.

[32] In all the circumstances, I consider that the application for summary judgment must be dismissed.

Application by the Defendant to Amend its Defence and Plead a Counterclaim (Summons 25 August 2009)

[33] At the hearing, Mr Riordan SC raised no objection to this application. There will be an order accordingly.

[8] Unreported, Supreme Court of Victoria, 14 April 1992.

Formal Orders

[34] For the reasons given above, I make the following formal orders:

(1) Order that within 7 days the Plaintiffs have leave to file and serve an Amended Statement of Claim in the form annexed to the affidavit of Benjamin David John Patrick affirmed 14 September 2009, except for:

(a) the proposed amendments to paragraphs 6 and 7A(a) and (b);

(b) the proposed paragraph 19; and

(c) as to the prayer for relief in Paragraph A, except for the words "is terminated or".

(2) The first defendant's application for summary judgment is dismissed.

(3) That the first and second defendants have leave to file and serve the Amended Defence and Counterclaim in the form annexed to the affidavit of Josine Marie Wynberg sworn 25 August 2009, within 14 days.

(4) That the proposed hearing dates are not confirmed and are hereby vacated.

(5) That in the event that the action is not resolved by the mediation ordered on 15 September 2009, liberty to the parties to apply for a new hearing date.
