

34/00; [2000] VSC 468

SUPREME COURT OF VICTORIA

***EQUUSCORP PTY LTD v FRASER & Anor***

Beach J

27 October 2000

**CIVIL PROCEEDINGS – APPLICATION TO FILE AND SERVE COUNTERCLAIM ONE WEEK BEFORE ALLOCATED HEARING DATE – NUMEROUS INTERLOCUTORY STEPS TAKEN IN 18-MONTH PERIOD – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR.**

On 24 April 1999, F. filed a claim in the Magistrates' Court seeking from E P/L the return of moneys paid by F. in relation to a pine plantation scheme. Since the date of issue of the claim, numerous interlocutory steps were taken. On 19 July 2000, the proceeding was fixed for hearing on 30 October 2000. A week before the return date, E P/L applied to a magistrate for leave to file and serve a counterclaim on F. seeking to recover damages in respect of alleged breaches of certain leases. The magistrate refused the application on the grounds of its "timing, its prospects of success and the lack of explanation". Upon an originating motion seeking prohibition to prevent the hearing proceeding on 30 October—

**HELD: Originating motion dismissed.**

**In considering the application the magistrate was bound to consider whether there was any merit in the counterclaim. In that regard, it was an important factor to take into account that the counterclaim was filed at a late stage of the proceeding. Further, having regard to the late filing of the counterclaim, it was open to the magistrate to refuse the application.**

**BEACH J:**

1. This is the return of an originating motion whereby the plaintiff Equuscorp Pty Ltd seeks an order in the nature of prohibition to prevent the Magistrates' Court at Melbourne proceeding with the hearing of a complaint and summons brought by Gregory Donald Fraser and Marilyn Anne Fraser against Equus and two other corporations named Berrema Finance Pty Ltd and Sintoff Pty Ltd relating to loans said to have been made by Berrema to the Frasers in 1992 to enable them to participate in a pine plantation scheme conducted on land owned by Sintoff. The hearing of the proceeding has been fixed for 30 October 2000.

2. As part of the pine plantation scheme Sintoff granted three leases to the Frasers over three separate parcels of land on which part of the pine plantation was being grown or was to be grown.

3. Moneys lent to the Frasers were not to be actually paid to them but were to be paid to National Mutual Trustees Limited, which in turn would disburse them to Sintoff.

4. The Frasers contend that the moneys were never in fact paid over by Berrema to National Mutual and now seek to recover from Equus, Berrema and Sintoff other moneys which they did pay under the loan agreement in respect of the scheme. Both Berrema and Sintoff have been placed in receivership.

5. The Frasers' proceeding was filed in the Magistrates' Court on 24 April 1999. Since that time there have been numerous interlocutory steps taken in the proceeding.

6. I should say that there are six related proceedings brought by other investors which have proceeded through the Magistrates' Court in tandem with the Frasers' proceeding. On 19 July 2000 those six proceedings and the proceeding brought by the Frasers were fixed for hearing on 30 October. Because the claims of the seven complainants total \$108,108.30, on 25 September 2000 Equus made application to the Magistrates' Court to transfer the seven proceedings to the County Court.

7. On 12 October 2000 Equus took an assignment of the leases between Sintoff and the Frasers from the receiver of Sintoff. I shall return to that aspect in a moment.

8. On 23 October 2000 the designated judicial officers of the County Court and the Magistrates' Court refused Equus' application to transfer the seven proceedings to the County Court.

9. On 23 October Equus filed an application in the Magistrates' Court whereby it sought, *inter alia*, leave to file and serve a counterclaim on the Frasers. By its proposed counterclaim Equus seeks to recover damages from the Frasers for what it alleges were breaches of the three leases in question. The application came before the magistrate on 24 October and was refused. Equus' solicitor's notes of the magistrate's reasons for refusing the application are Exhibit PK8 to the affidavit of Phillip Kotsanis, the relevant paragraphs of which read:

"I have a number of concerns about the application. The first is the timing. It comes at a time when Equus applied for the vacation of the hearing date. I am concerned whether there is merit in the counterclaim given that matters raised in the counterclaim have been previously litigated between Dr Anne Hopkins, Seymour Softwoods, Sintoff, Berrema and Equus and another Equus entity and found in the Federal Court to be without merit. Mr Holzer says his instructions were that Equus did not argue the matter before the Federal Court. The only passage I have read of the judgment says, 'so far as the leases are concerned I am satisfied by the submissions of counsel for the applicant ...' If Equus chose not to argue the enforceability of the leases, it did so advisedly. There is no material before me regarding why Equus elected to take an assignment from Sintoff. Mr Holzer argues that the matters are bound by the decision in *Anshun* and that there is a prejudice to his client if I do not allow it to file and serve a counterclaim. The prejudice being that if Equus commences separate proceedings later they may be barred because it might have included the matter in this proceeding. Weighing all these matters, I think an inference might be drawn that the application to file and serve a counterclaim is brought for reasons other than the expressed reasons. I have concerns about the timing of the application, its prospects of success and the lack of explanation. I refuse the application."

10. Insofar as the magistrate's observation that "There is no material before me regarding why Equus elected to take an assignment from Sintoff" is concerned, it is to be noted that the Deed of Assignment dated 12 October 2000 demonstrates that this was not the first occasion on which Equus had taken assignments of the leases. The recitals to that deed reveal that on 17 January 1992 Sintoff assigned the lease agreements to RMBL Investments Pty Ltd. On 18 December 1996 RMBL assigned the leases to Equus. On 26 June 1995 Equus appointed Geoffrey Kelly as the receiver over all the assets and undertaking of Sintoff. On 10 July 1997 Equus assigned the leases to Kelly in his own right and as the receiver of Sintoff and, according to the recitals, it did so for no consideration.

11. Recital H to the agreement then reads:

"H. There is no longer any utility in the Receiver retaining those choses in action and rights of action acquired by him pursuant to the third Deed of Assignment or otherwise. On 25 September 2000 Equus therefore instructed the Receiver to assign or reassign to Equus those choses in action and rights of action obtained pursuant to the third Deed of Assignment or otherwise."

The third Deed of Assignment, of course, being the deed of 10 July 1997.

12. It was then on 12 October last that Kelly assigned the leases back to Equus.

13. The matter relied upon by counsel for Equus in support of its present application is the statements made by the magistrate: "I am concerned whether there is merit in the counterclaim given that matters raised in the counterclaim have been previously litigated between Dr Anne Hopkins, Seymour Softwoods, Sintoff, Berrema and Equus and another Equus entity and found in the Federal Court to be without merit." It is said that in making that statement the magistrate in effect prejudged the counterclaim of Equus and in so doing made an error of law.

14. I am unable to agree with that contention. In considering whether to grant Equus' application the magistrate was bound to consider whether there was any merit in the counterclaim. Coming at such a late stage of the proceeding, that would be an important factor for him to take into account. In my opinion, in considering that aspect of the matter, the magistrate cannot be held to have prejudged the matter.

15. As to *Anshun*, I simply say that having regard to the Frasers' opposition to Equus' application, they may well find it very difficult to successfully run an *Anshun* defence in a separate

proceeding brought against them by Equus in respect of the three leases.

16. As to whether or not a magistrate should give leave to file and serve a counterclaim at such a very late stage of the proceeding, is in my opinion a matter entirely within the discretion of the magistrate. Having considered the circumstances in this matter, I simply say that I am not persuaded that the magistrate did make any error in the exercise of that discretion.

17. In that situation the originating motion will be dismissed with costs to be taxed and paid by the plaintiff.

**APPEARANCES:** For the plaintiff Equuscorp Pty Ltd: Mr A Herskope, counsel. Davies & Molony, solicitors. For the defendants: G A'Hearne, counsel. Collins & Stephens, solicitors.

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