HIGH COURT OF AUSTRALIA

McHUGH AND GUMMOW JJ

Matter No P9/2000

THE HANCOCK FAMILY MEMORIAL FOUNDATION LIMITED & ANOR	APPLICANTS
AND	
ROSEMARIE PORTEOUS & ANOR	RESPONDENTS

Matter No P10/2000

HANCOCK PROSPECTING PTY LTD	APPLICANT
AND	
ROSEMARIE PORTEOUS	RESPONDENT

Matter No P11/2000

HANCOCK PROSPECTING PTY LTD	APPLICANT
AND	
ROSEMARIE PORTEOUS	RESPONDENT

Matter No P12/2000

THE HANCOCK FAMILY MEMORIAL FOUNDATION LIMITED — APPLICANT

AND

BELLE ROSA HOLDINGS PTY LTD & ANOR — RESPONDENTS

Matter No P13/2000

HANCOCK PROSPECTING PTY LTD — APPLICANT

AND

BELLE ROSA HOLDINGS PTY LTD & ANOR — RESPONDENTS

Matter No P14/2000

HANCOCK FAMILY MEMORIAL FOUNDATION LTD — APPLICANT

AND

JOHANNA LACSON NOMINEES PTY LTD & ANOR — RESPONDENTS

Hancock Family Memorial Foundation Limited v Porteous [2000] HCA 51
8 September 2000
P9/2000, P10/2000, P11/2000, P12/2000, P13/2000, P14/2000

ORDER

In each matter the application is dismissed with costs.

Representation:

P R Hayes QC with M J Collins for the applicants (instructed by Mallesons Stephen Jaques)

D G Collins for the respondents (instructed by Slater & Gordon)

1 McHUGH AND GUMMOW JJ. By reason of the evidence of Mrs Porteous, the entries in the accounts of the applicants, the concurrent findings of fact by the trial judge and the Full Court and the conduct of the case by the applicants at the trial, there is no reason to doubt the correctness of the judgment of the Full Court that no breach of fiduciary duty occurred in this case.

2 It would only be if the applicants had established that there had been a breach of fiduciary duty that a question would arise whether the Full Court was right in concluding that the applicants could not obtain equitable relief unless the relevant transactions were set aside – which the applicants did not seek to do at the trial.

3 Given the conduct of the case by the applicants at the trial and the different case they sought to make on appeal, the detailed analysis of the case by the Full Court shows that it did not fail to perform its appellate function.

4 We also reject the claim that the trial judge should not have allowed the respondents to amend their defence or, alternatively, should have allowed the applicants to amend their reply. Counsel for the applicants consented to the amendment of the defence, and there was no error in the trial judge's exercise of discretion in refusing the totality of the amendment of the reply, which the applicants sought.

5 It will be necessary to dismiss these applications, but before we do so it is necessary to repeat what we said at the outset of this hearing – that we have been concerned at the terms of the summary of argument filed by the applicants. It follows a pattern that is not uncommon. The statement of the factual background does not state all the facts found by the trial judge and the Full Court and which they considered to be relevant to the issues in the case. In substance, the statement of factual background in these applications stated the facts as the applicants would see them and not as they were found by the courts below. Indeed, the contrast between the findings of the trial judge and the statement of facts in the summary of argument is rather striking.

6 The statement of factual background in the summary of argument will not fulfil its function unless it states concisely but comprehensively the facts found or acted upon and considered relevant by the court whose order is the subject of the appeal. In the case of a jury trial, the statement of factual background should state the evidence as to every material fact that could support the jury's verdict. Indeed, the form provided for in the rules as to the respondent's summary of argument assumes that ordinarily the respondent will not state the facts of the case, but refer only to the facts stated by the applicant which are in dispute.

7 If the applicant disputes any finding of fact by the lower court or its relevance, the place to do it is the applicant's statement of argument, not the statement of factual background. Similarly, if the applicant wishes to assert that a fact should have been found, the place to do it is the statement of argument.

8 Unless the applicant states candidly, concisely and comprehensively the material facts as found in the lower courts, whether they are favourable or unfavourable to the applicant, this Court is likely to be misled as to the issues really arising in the application for special leave to appeal. Similarly, if a special leave question does not arise, unless some issue of fact or law is first determined in the applicant's favour, it is misleading to state that special leave question without indicating that these anterior issues have first to be determined.

9 Our remarks concerning the summary of argument are meant to have general application. They are by no means confined to this particular case.

10 Having said that, we are of opinion that the applications must be dismissed with costs.