[2003] QSC 125

State Reporting Bureau

Queensland Government
Department of Justice and Attorney-General

# Transcript of Proceedings



REVISED COPIES ISSUED
State Reporting Bureau
Date: 9 April, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MACKENZIE J

No 5151 of 2001

LORRAINE ELIZABETH HOBBS — Plaintiff

and

ROBERT ROLAND BALL — Respondent

BRISBANE

..DATE 25/03/2003

JUDGMENT





4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: On the 31st of January 2003 the respondent consented to orders that he would provide certain listed documents in paragraph (1)(a) to (j) of the order within 21 days. There was a further provision that, in the event that the defendant cannot provide any of the abovementioned documents, the defendant is to provide an affidavit setting out:

(a) due search and inquiries he has made in endeavouring to ascertain their location;

(b) when and if they were last in his possession and control; and

(c) where he believes the documents are now.

The evidence establishes that certain documents were not provided. No affidavit in terms of paragraph 2 was provided until today to explain the default. The point that no time for providing the affidavit was stated in the order has no validity because it is obvious from the context of the order that such an affidavit was to be provided either within the 21 days or, at the very worst, within a very short time after that to explain the failure to comply with the order.

The affidavit sworn today addresses some aspects of the documents which are in question. It is deposed, for example, that one document consented to never existed. Some documents, it is deposed, have already been provided although that is in

dispute. In another instance, a natural reading of the paragraph in the respondent's affidavit suggests that no records of particular businesses existed. However, there are produced non-consecutive numbered bank statements relating to one of the businesses and that statement cannot be correct, which now seems to be conceded.

There is also a question mark, and I put it no higher than that, over an explanation about the difficulty in obtaining documents from an accountant who has not been paid since there is in evidence a letter from the accountant stating that he had ceased to be the respondent's accountant almost 12 months ago and nominated, in that correspondence, another accountant as the accountant for the respondent and one of the companies that he is involved in.

Clearly, there has been a default by the respondent in relation to compliance with the consent order. It is inevitable, I think, that orders be made with a view to getting this matter back on track because it has been a long track that it seems to have taken to this point. It is a dispute between former partners, in the modern use of the word, and it may be that that is one of the difficulties about the matter.

What I propose to do is to make an order in terms of paragraph (1) of the draft order with the exception that I will allow 21 days for further compliance. The reason for allowing a longer period of time is that I have in mind that it may be necessary

to obtain some of the documents from Government authorities and no doubt there will be some delay which makes the shorter time proposed in the draft affidavit impractical in that regard.

If documents referred to in the original order do not in fact exist, the defendant can demonstrate that fact in any future consequential proceedings. If the documents are obtainable, the implication in the order is that the respondent is required to take appropriate steps as soon as possible to obtain the documents. If there is a dispute as to whether documents have already been provided, it is implicit in the order also that a further copy be provided so that there is not a sterile and pointless dispute about delay for that reason.

With regard to paragraph (2) of the draft order, I propose to make an order in terms of the draft. With regard to paragraph (3) of the draft order, the defendant's statement of financial circumstances is, in my view, not adequate compliance with the Practice Direction 33 of 1999. I will make an order in terms of paragraph (3) but, once again, substituting 21 days for the proposed period in the draft order.

With regard to the proposed order that, in the event of the defendant failing to comply with either of the previous orders, the defendant's defence be struck out, it seems to me that this is not really an appropriate case for a guillotine order. However, it may be said, and the respondent should

understand this, that time is running out to get his disclosure in order. It is an obligation for him to make proper disclosure and indeed also an obligation upon the applicant to make sure that the obligations concerning disclosure have been properly complied with. That obligation is a continuing one so if other documents, which are thought to be lost, turn up, there is an obligation to disclose them as soon as they are found.

The reality of the situation is that if there is a continuing failure to comply with the order, it is open to the applicant to apply to have the defence struck out and, if there has been continuing failure, it will have to be adequately explained or there will be a real risk that the respondent's defence will be struck out with the consequence that judgment by default could be obtained. But nevertheless, it seems to me it is not an appropriate case for a guillotine order because, presumably, whether there had been practical compliance would be raised as an issue in any event.

With regard to paragraphs (5) and (6) - they relate to costs - it seems to me that the applicant should have the costs of today's application. And with regard to the costs of the earlier application on the 30th of January which costs were reserved, the applicant should have those costs as well. However, I am not satisfied, on the material currently available, that the respondent has demonstrated a sufficient degree of wilful disregard of the order for indemnity costs to be ordered.

There is a degree of ad misericordium argument in the matter because it is said that the respondent himself is carrying out some of the aspects relating to the disclosure. The problem with that sort of excuse is that, having been used once, it may wear thin and if a pattern can be discerned of failing to comply with orders or other requirements of the rules on the basis of flimsy excuses, there will be a serious risk of orders for indemnity costs being made.

So the result of all that is that I make an order in terms of paragraph (1) of the draft order with the exception that 21 days is allowed.

Order in terms of paragraph (2) of the draft.

Order in terms of paragraph (3) in the draft with the exception that 21 days be allowed instead of the period referred to in the order.

I refuse the application insofar as it relates to what is sought in paragraph (4) of the draft order.

And I will make orders in terms of paragraph (5) and (6) but delete the references to indemnity costs. So the effect of that will be that the costs will be on a standard basis.

Insofar as it was submitted that there had been non-compliance with disclosure by the applicant, there is no application before the Court upon which I am prepared to act. However, I

have already indicated in my reasons for judgment the nature of the obligations which are no doubt well known in any event to the solicitors for the applicant and no doubt they will tender any appropriate advice in that regard.

So those are the orders I make.

---