



Transcript of Proceedings

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Date: 9 July, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MUIR J

No 5059 of 2002

QUEENSLAND CARPET DYERS PTY LTD
ACN 051 345 183

Plaintiff

and

PHILIP PATRICK CARTER

Defendant

and

RICHARD ANTHONY BARBER

Defendant

BRISBANE

..DATE 25/06/2003

JUDGMENT

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importance as, "Serious issue are raised about the integrity of receivers or receivers/managers in this proceedings". He mentions also, or asserts also, that the defendants are in a position of performing a public function and should act mainly in the discharge of their duties. Another central argument, raised on behalf of the applicant, is that the impecuniosity of the plaintiff results from the behaviour of the defendants and therefore should not be a matter which assists the defendants on the application.

The latter matter is always an important consideration in applications such as this, but here I consider that it is a matter which, of itself, cannot decide the outcome of the application.

There is evidence which strongly supports the conclusion that even 1994 and 1995 the plaintiff was in straitened financial circumstances, making small profits and having an excess of liabilities over assets. Consequently, there must be considerable doubt that the plaintiff's impecuniosity has been caused by the defendants.

Another argument raised, which has some substance I think, is the contention that the plaintiff's prospects of success in the action should be regarded as poor. The events in question took place in 1996. This action was commenced on 4 June 2002, shortly before the expiry of a relevant limitation period.

Mr Edmondson caused the action to be commenced after he obtained control of the company. It is of some significance that the previous controllers were not interested, it would seem, in bringing these proceedings. That has additional significance because there is no suggestion that those who formerly controlled the plaintiff were lacking in financial means.

There are other grounds relied on by Mr Kelly in support of the submission I am now addressing. One of them is to the effect that, at material times, the subject assets of the plaintiff were the subject of a registered charge in favour of Maund Investments Proprietary Limited. Maund, at relevant times, claimed to be entitled to immediate possession of those assets, and the defendants acted in relation to the property with the knowledge of Maund Investments, and its director, Mr Maund, who is also a director of the plaintiff.

It is submitted, and the material supports the submission, that the defendants parted with possession of the subject property in circumstances which were known to and consented to by Mr Maund, Maund Investments. Mr Edmondson disputes that he gave any such consent but, of course, at the time Mr Maund was a director of the plaintiff and capable of giving consent expressly or implicitly.

In this context it is relevant also to note that the statement of claim, when first issued, was a very rudimentary document lacking necessary particularity and that, since 4 June 2002,

three separate firms of solicitors have acted on behalf of the plaintiff.

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It has now no legal representation. The inference, I think, can be drawn properly that the completion of the interlocutory steps are likely to take some time and be rather more expensive than the defendants ought be entitled to expect.

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In my view the litigation does not give rise to issues of any particular public interest or concern, and I discount that argument. There is also an issue between the parties as to whether it has been established that the making of this order will stifle proceedings.

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I accept the submission that there is not a great deal of cogent evidence about the financial substance of Mr Edmondson, but I think that one may draw an inference from the fact that he was discharged from bankruptcy in November 1999 that he is rather unlikely to be a person of financial means.

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Mr Kelly sought to have struck out the paragraph in Mr Edmondson's affidavit in which he swore that he was impecunious on the basis that that was an expression of opinion, and not a statement of material fact. I do not uphold the objection.

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In the circumstances that I have outlined it seems to me that Mr Edmondson is merely using a shorthand way of factually describing his financial position. In summary then it is

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plain that the company is impecunious and that the defendants
are at risk in recovering costs should they be successful.

The other matters which I have mentioned support the
conclusion that there should be an order for security for
costs. The next question then is the amount of that security.
The figure sought is \$72,101. That is, as I understand the
affidavit of Mr Capilado would provide for, I should say
represents party and party costs to the conclusion of the -
where's the estimate of the length of the trial?

MR KELLY: Page 9, your Honour, under (i), first sentence.

HIS HONOUR: Right. Thank you. A two day trial. These
orders are not intended as a full indemnity even to the extent
of indemnifying against costs on a party and party basis.
Furthermore, it is sometimes desirable to set the amount of
the security at a lower level to give the opportunity to a
plaintiff to progress the claim to a certain point, and for
the matter to be then reviewed in the circumstances I propose
to order that there be security in the sum of \$40,000 and that
there be liberty to apply.

Do you have a draft order, Mr Kelly?

MR KELLY: No, I don't. I apologise, your Honour.

HIS HONOUR: Let me see. I think I have your application
here. I order that the plaintiff provide security for the
costs of the defendants of an incidental to these proceedings
to the satisfaction of the registrar, or as agreed between the
parties in sum of \$40,000. I order that these proceedings be
stayed until provision of such security. I order that the
plaintiff pay the costs of the defendants of an incidental to
this application to be assessed on the standard basis.

I order that the defendants not seek to enforce such order for
costs until the trial of this action, or earlier order. I
give liberty to apply in respect of the quantum of the
security ordered. Obviously that latter liberty to apply is
intended to refer to something well down the track when for
example, the matter is ready for trial, if it proceeds to that
extent.
