

State Reporting Bureau



Queensland Government
Department of Justice and Attorney-General

Transcript of Proceedings

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State Reporting Bureau

Date: 17 July, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Application No 464 of 2002

AUSTRALIAN SECURITIES AND INVESTMENTS Applicant
COMMISSION

and

DRURY MANAGEMENT PTY LTD
(ACN 089 253 958)

First Respondent

and

PIET CORNELIUS WALTERS

Second Respondent

and

MARK SAMUEL EVANS

Third Respondent

and

RANSOM HOUSE PTY LTD
(ACN 072 391 407)

Fourth Respondent

CAIRNS

..DATE 17/07/2003

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The respondents in this claim have made a number of applications, foremost amongst which is an application to adjourn the trial of the action which has been listed to commence in the Supreme Court at Cairns on 23 July 2003.

The other applications relate to the funding of legal representation for the respondents, the return of documents which have been seized by the Australian Federal Police, the return of the third respondent's passport, the payment by the receiver (who is not a party) of certain moneys held by him and an injunction to restrain the continuance of the District Court proceeding number 142 of 2003.

The most pressing issue is whether the trial should be adjourned. The purpose of the trial is to determine the issue of whether the payments made to the respondents by various people were paid as loans to the respondent or as contributions to an unregistered managed investment scheme. There are subsidiary issues such as whether the respondents are carrying on a securities business, an investment advice business or a financial service business without relevant licences.

The question of the adjournment has to be considered against the background that the second respondent has been charged with the offence of aiding and abetting the first respondent in its course of carrying on a financial service business to engage in dishonest conduct contrary to the provisions of sections 1041G(1) and 1311 of the Corporations Act.

The second respondent initially sought to stay these proceedings, pending the hearing of the criminal charges. That application has been abandoned, but he now seeks to adjourn the trial of these proceedings until he is provided with a brief of the evidence to be alleged against him in the criminal proceedings.

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The Commonwealth Director of Public Prosecutions indicated in a letter dated 11 June 2003 (Exhibit "ST1") that such a brief would be in the Director's office by 13 June 2003. There was no evidence before me of any unsuccessful attempt by the second respondent to obtain a copy of that brief.

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These criminal proceedings were to be mentioned in the Magistrates Court at Cairns on 14 July 2003 with an expectation that the hearing of the committal proceedings would not be undertaken until approximately November 2003. I infer that a copy of the criminal brief is now available or that the evidence to be alleged against the second respondent can be ascertained with sufficient particularity by the time this matter comes on for trial.

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In any event, Mr Flanagan, senior counsel for the applicant, argues that the issue in these proceedings is quite different from those raised in the criminal proceedings where the question of dishonest conduct for the purpose of section 1041G falls to be determined. I accept the force of that argument.

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The question of whether a person is carrying on a business without a licence is quite distinct from a question of whether the person is engaged in dishonest conduct.

The determination of the issue in this case does not carry any prospect of a civil penalty and consequently no stay arises by virtue of section 1317N of the Corporations Act. I have been referred to cases which suggest the appropriate considerations to which regard should be had in the exercise of my discretion on this application, particularly *McMahon v. Gould* (1982) 1 ACLC 98 and the cases which adopted the suggestions there. See *Yuill v. Spedleys Securities Limited* 8 ACLC 272.

I have been referred to comments on those cases in *Baker v. Commissioner of Federal Police* (2000) 104 FCR 359, and the general protection against self-incrimination in both criminal and civil proceedings in *Reid v. Howard* 184 CLR 1.

Because the proceedings before me involves limited issues, I am satisfied that given the nature of the issue to be determined, if there is identified by the respondent any prospect of self-incrimination at the trial, the matter will be adequately dealt with.

Mr Flanagan, in his outline of submissions, referred to a number of reasons for the trial not being stayed. I will not refer to these in detail, but they embrace the point that I have just mentioned, that the issues in this proceeding may be described as technical relating as they do to whether the

nature of the conduct and whether it was an unregistered managed scheme. He refers also to the fact that amongst the witnesses ASIC intends to call in the civil proceedings there is only one witness in common with the criminal proceedings. Further, that the second respondent has already undergone extensive section 19 examination and in this sense has had the opportunity to disclose his defence to the allegations and to the fact that considerable injustice would be done to the 118 persons who have provided money to the respondents and who now require a determination of the issue which is raised in these proceedings.

The question of the adjournment has to be considered against the background of the order made by Justice Moynihan on 27 September 2002, which included a number of practice directions concerning the conduct of these proceedings. Pursuant to those directions, the respondents are required to file affidavits in response to the applicant's material by 21 March 2003. The second respondent had not been charged with any criminal offence as at that date. No affidavits have been filed on behalf of any respondent.

Some points were taken that the Federal Police had seized various documents, limiting the opportunity to prepare affidavits. I am satisfied that the respondents have had access to those documents and have had photocopies available of any documents required.

Of more significance is the fact that the applicant does not object to the respondents now giving evidence orally at the trial if they choose to contest the allegations.

The next point raised was the impecuniosity of the respondents and the receiver's failure to provide funds for legal expenses contemplated by the order of Justice Moynihan. That order essentially appointed Ian David Jessup and Partners as receivers of the property and assets of the respondent.

By paragraph 10, it provided that:

"The orders made herein shall not prevent:

(c) the first, second, third and fourth respondents from incurring and paying costs reasonably incurred in these proceedings up to an amount of \$25,000 or such further sum that may be fixed by the Court or by the parties by agreement in writing."

An argument is raised whether sum of \$25,000 is to be allowed for each respondent or whether that sum is to be the total for all respondents. That point of construction of the order at this time is somewhat academic because no claim has yet been made of the receivers in an appropriate form for payment of legal fees. Claims have been made for global sums, but the receiver has properly insisted that the fees be claimed upon the presentation of a bill in taxable form.

Further to that, there is ample evidence in the affidavit of Mr Jessup that the respondents have already applied funds to legal fees. See paragraphs 14 to 22 of the affidavit of Ian Jessup, sworn on the 7th of July 2003.

I do not propose to canvass in detail the history of the conduct and the correspondence passing between receivers and lawyers concerning legal expenses. I am satisfied that the respondents have had access to sufficient funds to prepare their responses to the issues arising in this case and that they have the resources to raise further funds if they choose to do so.

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The other matters raised in the applications, namely the return of documents and passports, payment of superannuation fund and the restraint of the District Court action, do not impact on the conduct of the trial of this action next week. If necessary, these matters can be taken up at a later time.

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For the reasons that I have just given, I refuse the respondents' application for a stay of the trial.

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HIS HONOUR: I will direct that a transcript of my reasons be made available to Thompson & Royds Lawyers for distribution to the respondents.

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