



Transcript of Proceedings

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Date: 22 August, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 6350 of 2003

RAYMOND JOHN WHITBREAD

Applicant/Plaintiff

and

QUEENSLAND POLICE CREDIT UNION
LIMITED (ABN 79087 651 036)

Respondent/Defendant

BRISBANE

..DATE 18/08/2003

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.

HER HONOUR: This is an application by the plaintiff for an interlocutory injunction to restrain the purported termination of a financial planning consultancy agreement.

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By an agreement in writing made on or about 18 April 2002 and varied in October 2002, the applicant/plaintiff was engaged by the respondent/defendant to provide a professional financial planning consultancy service to members of the defendant (credit union) from 7 February 2002 until the termination of the agreement.

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By clause 3, the agreement was for three years unless terminated by either party in accordance with clause 9, with an option for renewal for a further three years.

The plaintiff's relationship with the defendant was to be that of independent contractor: clause 4.

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The defendant was to provide fitted-out premises from which the plaintiff would operate.

The plaintiff was to pay the defendant 18 per cent of commissions received.

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Under section 911A(1) and (2) of the Corporations Act 2002, someone providing financial planning advice must either hold a relevant licence or be the authorised representative of a licensee. Such authorisations are commonly referred to as "proper authorities".

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The plaintiff provided financial planning services to members of the defendant from July 2000. Until late 2001 he held a proper authority from Winchombe Carson. From January 2002 until 15 June 2003 he held a proper authority from BDO Kendalls Securities Limited (which I shall refer to as "KSL"). On 13 June 2003, he obtained a proper authority (subject to some limitations which I shall refer to below) from Garrisons Pty Ltd.

The agreement between the plaintiff and the defendant was linked to products provided by KSL, and systems, methods and procedures approved by KSL and the defendant:

"5.1.5 in particular, at all times duly and punctually comply with and observe all requirements of the FSR Act and all terms and conditions of the KSL agreement (in order to monitor compliance, the Consultant hereby authorises KSL to provide any information and documents the Credit Union requests in relation to the Consultant's performance of the KSL agreement);

5.1.6 recommend to members only those financial products that are authorised from time to time by KSL;

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5.1.8 at all times utilise and comply with systems, methods and procedures approved by KSL and the Credit Union in relation to the Consultancy Business, including, but not limited to:

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(a) responding to telephone and e-mail enquiries by members within eight (8) working hours; and

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(b) offering to visit members where reasonably practicable.

5.1.9 obtain the prior approval of the Credit Union and KSL to all marketing and publicity material relating to the Consultancy Business;

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5.1.12 effect and maintain during the continuance of the agreement the following insurances on the following terms:

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(a) Professional Indemnity insurance to cover the services provided under this agreement with such limits per occurrence

as the Credit Union or KSL reasonably
requires from time to time;

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(b) General - any other form of insurance
as the Credit Union or KSL requires from
time to time in amounts and for perils
which a prudent financial planner would
protect itself in similar circumstances;

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(c) The Consultant shall not, without the
prior written approval of the Credit Union
or KSL, alter the terms of any insurance
maintained pursuant to this agreement;

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(d) The Consultant shall provide
satisfactory evidence of the currency of
the insurances upon request by the
Credit Union;

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5.3 The Consultant shall not under any circumstances
charge or in any manner require payment from a
member for any products or services provided by the
Consultant in connection with the Consultancy
Business, except in accordance with the KSL

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agreement.

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7.1 In consideration for the benefits conferred upon the Consultant pursuant to this agreement, the Consultant shall cause the Credit Union to be paid eighteen per cent (18%) of all commissions payable by KSL on business written by the Consultant ("Consultancy Fee").

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7.2 The Consultant shall cause the Consultancy Fee to be paid to the Credit Union contemporaneously with commissions paid to him under the KSL Agreement."

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Clauses 9 and 11 provided as follows:

"9.1 This agreement may be terminated without notice by the Credit Union if:

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9.1.1 the Consultant commits a breach of this agreement or the KSL Agreement which, if capable of being remedied, remains unremedied for 30 days after receiving a notice specifying such breach;

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9.1.2 the Consultant commits any act, which amounts
to a repudiation of this agreement or the KSL
Agreement;

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9.1.3 the Consultant is guilty of any act which
brings the Credit Union into disrepute or is
prejudicial to the Credit Union's interests;

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9.1.4 the Consultant dies, becomes bankrupt or
suffers the appointment of any type of insolvency
administrator in respect of his property or affairs.

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Transfer of clients after termination:

11.1 Following the termination of this agreement, the
Consultant shall transfer the Consultancy Business,
including all financial planning business written
for any member during the term of this agreement, to
such person (the "Purchaser") as the Credit Union
may direct.

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11.2 Any such transfer of the Consultancy Business
shall be subject to and conditional upon the
Purchaser paying to the Consultant a transfer fee

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equal to 3 times the amount of the Recurring Income."

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The relationship between KSL and the plaintiff broke down.

The merits of that dispute are not for determination on this application. Suffice it to say as follows: on 28 January

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2003 BDO Kendalls Financial Planning Pty Ltd wrote to the plaintiff about "your transfer from BDO Kendalls Securities

Limited to BDO Financial Planning Pty Ltd", and listed

matters to be included in "renegotiating your Dealer

Agreement". In an e-mail dated 28 March 2003, Mr Bridger of

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BDO Kendalls referred to the proposed withdrawal of the proper authority from 7 April 2003 on the cessation of KSL's

professional indemnity cover. KSL raised questions about the plaintiff's professionalism and his compliance with statutory

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and regularity requirements. There were questions about the necessity for the plaintiff to upgrade his qualifications

and his willingness to do so. There was an audit of some of his files at the instigation of KSL. Ultimately the

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differences between the plaintiff and KSL were resolved, and a deed of mutual release was executed on 13 June 2003. This

provided for the termination of the proper authority with effect from 15 June 2003.

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This application concerns the relationship between the

plaintiff and the defendant credit union. To the knowledge of the defendant, the plaintiff had entered into

negotiations with Garrisons and another company about the provision of an alternate proper authority, and ultimately one was obtained from Garrisons.

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On 16 June 2003 the defendant purported to terminate the agreement between it and the plaintiff on the ground that the termination of his relationship with KSL rendered impossible any further performance of the agreement and amounted to repudiation.

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On 10 August 2003 the defendant entered into an agreement with Garrisons for Garrisons itself to provide financial planning advice to the defendant's members.

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The plaintiff contends that he was misled into terminating his agreement with KSL by representations by Messrs Wilson and Boyle (general manager and assistant general manager respectively) on behalf of the defendant to the effect that if he obtained a substitute proper authority from Garrisons, their relationship would continue as before. He contends that by clause 11 the defendant was to procure a purchaser of his business who would pay him three times the recurring income. He contends that the agreement was not "Kendalls (KSL) specific".

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I do not think that there is any serious question to be

tried as to the proper interpretation of the agreement. I
have already referred to those clauses by which the
plaintiff's obligations were linked to the products provided
by KSL and to the systems, methods and procedures approved
by it and the defendant. In my view, it was conditional
upon the plaintiff's continuing to hold a proper authority
from KSL.

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Further, I consider that on the proper interpretation of
clause 11, there was no obligation on the defendant to find
a purchaser who would pay the plaintiff three times the
recurring income. Rather, if the defendant directed the
plaintiff to transfer the business to a third party, that
direction would be effective only if the purchaser were
prepared to pay the plaintiff three times the recurring
income.

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Whether persons acting on behalf of the defendant
represented to the plaintiff that his relationship with the
defendant would not be affected by a change of proper
authority and whether he relied on such representations are
questions of fact for determination at trial. There is
evidence that they knew of the deteriorating relationship
between him and KSL, and that he was negotiating with
Garrisons and another licensee, and that they expressed
a preference for Garrisons. There is also evidence that the

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defendant was interested in providing its members an enhanced service - something more than the plaintiff could provide.

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According to Mr Wilson, on 26 May 2003 he telephoned the plaintiff and told him (inter alia) that the defendant would be negotiating with Garrisons to be the provider of financial planning services to its members, and that he should continue his own negotiations for an agreement to act as a Garrisons' financial planner at the credit union.

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On 29 May 2003 Mr Boyle refused to confirm that the agreement would be unaffected by the withdrawal or surrender of the KSL proper authority. He said he would "advise as soon as possible regarding the future direction of Financial Planning and arrangements QPCU will be making for the future appointment of a Dealer to service the Credit Union".

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Later that day he advised the plaintiff not to "action any matter contained in your e-mail". On 4 June 2003 Mr Boyle made it clear that the then current situation was unacceptable, and that the defendant's board had approved the commencement of negotiations for the appointment of Garrisons to provide financial planning advice to it. He said: "I would advise that QPCU will be conducting the negotiations with Garrisons." He went on to refer to

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negotiations between the plaintiff and Garrisons for the
issue of a proper authority.

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On 5 June 2003 the plaintiff's solicitor asserted that the
agreement would subsist regardless of whether the KSL proper
authority remained in place, but made no suggestion of
misleading conduct on the part of the defendant.

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While there may be a serious question to be tried in
relation to misrepresentation, I am not satisfied that the
balance of convenience favours the grant of an interlocutory
injunction. While conscious of the personal hardship to the
plaintiff if an injunction is refused, I am not satisfied
that damages would not be an adequate remedy.

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Further, the plaintiff does not have an unrestricted proper
authority from Garrisons. It is subject to limitations
which would prevent him from providing the same service to
the defendant and its members as he provided under the KSL
proper authority.

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"Limitations

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The Representative agrees with the following limitations:

- (1) That all financial plans and other reports/advice

for all clients to be prepared by Garrisons
para-planning until a Certified Financial Planner is
appointed to the office to review all plans prepared.

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(2) Training to be undertaken with the Garrisons
State Office on office procedures in the first week
of commencing as an Authorised Representative.

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(3) Fortnightly review meetings to be held with
Garrisons State Office personnel for a period of
three months."

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Finally, the plaintiff is really asking for specific
performance of an agreement of personal services - something
the Court will not usually order in the absence of special
circumstances.

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In all the circumstances, I dismiss the application for an
interlocutory injunction.

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The formal orders will be these:

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1. The application for an interlocutory injunction
is dismissed.

2. I order that the proceedings continue as if the originating application were a claim.

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3. I direct that the applicant/plaintiff file and serve a Statement of Claim by 4 p.m. on 1 September 2003.

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4. I direct that the defendant file and serve a Defence and Counterclaim, if any, by 4 p.m. on 15 September 2003.

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5. I direct that the plaintiff file and serve any Reply or Reply and Answer by 4 p.m. on 29 September 2003.

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6. I direct that both parties complete disclosure by 4 p.m. on 29 September 2003.

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7. I adjourn the matter for further directions on 3 October 2003.

8. I give the parties liberty to apply on two business days' notice.

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9. I reserve the costs of and incidental to the
application for interlocutory injunction.

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