



## Transcript of Proceedings

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State Reporting Bureau  
Date: 3 August, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No BS11204 of 2003

AGRICULTURAL RESEARCH DEVELOPMENT  
PTY LTD

Plaintiff

and

MICHAEL K ASTILL

Defendant

BRISBANE

..DATE 21/07/2004

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: This is an application by the plaintiff for summary judgment for part of its claim against the defendant.

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The application is unopposed although solicitors for the defendant have filed a notice of intention to defend. I am satisfied that the defendant has been duly notified of this application.

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The plaintiff's case is that the defendant misused his power as a signatory upon a bank account of the plaintiff so as to use funds from that account to be paid for various purposes for the defendant's benefit or for the benefit of someone other than the plaintiff.

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The transactions are particularised in paragraph 7 of the statement of claim and they involve amounts totalling \$514,475.54. In each case the transaction allegedly occurred by the defendant drawing a cheque upon that account.

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The plaintiff's pleaded case is that any cheques to be drawn by the defendant upon this account had to be first approved by a Mr Greg Kennedy, which these were not and as I've said that the defendant used the funds the subject of these cheques for his own use or some other improper use.

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The defence pleads that the defendant was entitled to sign cheques at least in circumstances where the cheque was for any purpose "necessary for the conduct of the plaintiff's business" (paragraph 4D of the defence filed 23 January 2004).

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The plaintiff requested particulars of certain matters pleaded in the defence and in particular the assertion in paragraph 6A of that pleading that the funds in no case were wrongfully converted for the defendant's use.

The requested particulars and the response to it are in evidence are exhibits to an affidavit by the plaintiff's solicitor. By what is described as an amended answer to a request for further and better particulars, the defendant, by his solicitors, delivered a schedule which refers to relevant cheques and asserts the nature of the transaction relevant to each cheque in terms which represent that the purpose of the cheque was a proper one.

The plaintiff, by its solicitors, has then set about inquiries of payees of those cheques to ascertain the truth of the defendant's assertion that the cheques were for company purposes. In relation to some of these cheques the plaintiff has reached the view that there can be no defence to the plaintiff's claim because there is no real prospect that the defendant could resist a case that the cheque was not for any purpose connected with the company. The plaintiff has then collected those cheques for which there is, it says, no arguable defence and they are the subject of this application for summary judgment.

They total an amount of \$91,237.25. The affidavit of the plaintiff's solicitor contains a detailed examination of the transactions involved in those cheques and in my view, the

evidence establishes that in each case the transaction was not  
in any sense one for the purposes of the plaintiff company.

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By way of example, there is an assertion by the defendant that  
a cheque paid to a dentist is one which was made for company  
purposes.

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The statement of claim claims a sum of \$435,475.54. That is  
an amount derived by subtracting from the total of \$514,475.54  
an amount of \$79,000 which the plaintiff pleads it recovered  
from a third party as part of the amount of a cheque paid to  
that party.

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The sum of \$435,475.54 is claimed as "damages for wrongful  
conversion of monies." Mr Amerena, who appears for the  
applicant but who is not the author of the statement of claim,  
rightly points out that the correct characterisation of the  
plaintiff's claim is for the conversion of the cheques and he  
cites, amongst others, Lloyds Bank and the Chartered Bank of  
India, Australia and China (1929) 1 KB 40 at 55-56 per  
Scrutton L.J., Hunter BNZ Finance Ltd v. Australia and New  
Zealand Banking Group Ltd (1990) V.R. 41 at 48 per Tadgell J  
and Foxeden v. ILOOF Building Society Ltd (2003) VSC 356 at  
para 325 per Habersberger J.

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The evidence, at present, does not exhibit the cheques or  
copies of them. However, my attention is drawn to copies of  
cheques appearing on the Court file which have been produced  
in response to notices for non party disclosure.

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Mr Amerena has instructions that an affidavit will be sworn and put before me as to the fact that each of the cheques, at least the subject of this application for summary judgment, was a bearer cheque. That being so, it is plain that the cheque whilst still in Mr Astill's hands at least, was the property of the plaintiff company and that by dealing with that cheque as Mr Astill did, that is, by delivering it to someone in circumstances unrelated to any business of the plaintiff, the defendant has dealt with the cheque so as to have converted it.

The facts leading to that legal conclusion are in my view clearly pleaded in this statement of claim. In particular each of the cheques is described as having been written by the defendant and not in relation to investments for the plaintiff and to have involved some dealing with it by the defendant which was for the defendant's own use and not for any purpose of the plaintiff.

In other words, on the facts pleaded by the statement of claim, it seems to me that the plaintiff would be entitled to judgment once those facts were established.

I am of the view that the material at least when supplemented by that affidavit as to the cheques would demonstrate that the defendant has no real prospect of successfully defending at least this part of the plaintiff's claim which is represented by the cheques totalling the sum for which judgment is sought today.

Those cheques and the respective causes of action represented by each cheque can be identified as the cheques in relation to the transactions scheduled or described with the two exhibits to the affidavit of Ms Stonier filed on 28 June 2004, those exhibits being KAS07 and KAS20.

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It follows from what I have said that I also conclude that there is no need for a trial of that part of the claim which is the subject of this application for judgment and that the plaintiff should have judgment against the defendant for that sum.

Accordingly I propose to give judgment for the plaintiff against the defendant in the sum of \$91,237.25 if and when the affidavit as to the cheques which I have described is filed and read.

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HIS HONOUR: I also propose, if judgment is given, to order that the plaintiff have its costs of this application to be assessed.

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HIS HONOUR: I am further of the view that it is appropriate that the plaintiff recover interest upon that sum of \$91,237.25 calculated at 9 per cent per annum for 13 months pursuant to Section 47 of the Supreme Court Act 1995.

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HIS HONOUR: This morning this matter was argued, there having been no appearance in response to the application for summary judgment by the defendant, and I then indicated that I proposed to give the plaintiff judgment for the sum of \$91,237.25, as per its application. I gave reasons for that decision but I declined at that stage to make any orders because I was awaiting an affidavit which exhibited the cheques, which are the subject of the transactions relied upon for this application. I now have that affidavit, which is a further affidavit of Ms Stonier sworn today and filed by leave this afternoon.

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Subject to two matters, the position is that there ought to be judgment, as I indicated as my conclusion this morning. The first of those matters is that one of the cheques is not a bearer cheque. It is a cheque made payable to "Homebuy" in the sum of \$8,000 and is dated 15 January 2003, but it appears to be not a bearer cheque, but a cheque payable to order.

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In the reasons I gave this morning, I concluded that at least if a cheque was a bearer cheque, it was plain that the cheque remain the property of the plaintiff, when the defendant dealt with it so as to convert it. I did not, however, express any conclusion as to whether the position would be different if the cheque was payable to order. The evidence as to this cheque, however, makes it necessary for me to do so.

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The position is, in my view, according to that set out in Byles on Bills of Exchange, the 25th Edition, at page 307, where it is said under the heading "True owner", that "The payee of a bill is the first true owner, once it is delivered to him, either actually or constructively." In other words the delivery of a cheque payable to order is the act upon which the payee becomes the owner of the cheque.

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The position, then, is that at the time of the relevant act with this cheque, as with the other cheques, the plaintiff company was its owner and, accordingly, for this cheque as with other cheques, the plaintiff had a title by which it could claim for conversion of its cheque. The claim is made out in relation to this cheque, as with the other cheques, the subject of this application.

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The other matter arising from the resumption of the hearing this afternoon, is that Mr Amarena very properly draws my attention to the fact that, within Exhibit KAS21 to the affidavit of Ms Stonier filed on the 28th of June, there is a calculation of what I would describe as the wages component of this claim; that is of the difference between the wages, or alleged wages, drawn by the defendant and the amount to which, on any view of the case, he was entitled.

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On the face of that calculation it appears that a cheque of \$2,000 has been counted twice. The consequence is that that part of the claim - and in turn the amount for which judgment is sought by this application - has been overstated by \$2,000.

Accordingly, and for the reasons already given in this morning's hearing, there will be judgment for the plaintiff against the defendant in the sum of \$89,237.25.

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HIS HONOUR: On account of that part of the plaintiff's claim, herein set forth in Exhibits KAS07 and KAS20-----

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HIS HONOUR: -----KAS21, to the affidavit of Kelly-Anne Louise Stonier filed herein 28 June 2004 and interest thereon in the sum of \$8,700.53.

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I further order that the defendant pay the plaintiff's costs of and incidental to this application to be assessed on a standard basis.

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