



Transcript of Proceedings

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Date: 20 October, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 6640 of 2004

BUTT HAULAGE
(ACN 081 526 589)

Plaintiff

and

JULIE-ANNE MAY JOLLIFFE

First Defendant

And

PHILLIP JOSEPH HOGAN

Second Defendant

And

NEVDOR PTY LTD
(ACN 095 394 371)

Third Defendant

BRISBANE

..DATE 11/10/2004

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.

HER HONOUR: This is an application by Julie-Anne May
Jolliffe, Phillip Joseph Hogan and Nevdor Pty Ltd to discharge
an injunction previously granted in favour of Butt Haulage Pty
Ltd and to strike out the statement of claim.

Although the proceeding was commenced by originating
application, Butt Haulage Pty Ltd (the original applicant) was
ordered to file a statement of claim and the other parties
have filed a defence. Accordingly, I shall refer to Butt
Haulage Pty Ltd as the plaintiff and to the other parties as
the first, second and third defendants respectively.

The first and second defendants worked for the plaintiff.
According to the plaintiff they were employees; according to
them they were engaged on a contract basis. The third
defendant is a company of which the first and second
defendants are shareholders and directors. The plaintiff
alleges that the first and second defendants misappropriated
moneys from its bank account and paid them into an account in
the name of the third defendant at Northern Inland Credit
Union and an account in the name of the first defendant with
Westpac Banking Corporation. It claims against the first and
second defendants damages for breach of contract and or
fiduciary duty, and against the first and third defendants
declarations that they are holding moneys on trust for it.

On 30 July 2004 the plaintiff obtained an interim injunction
ex parte restraining the defendants from "removing or
otherwise disposing or dealing with" moneys held by Suncorp

Metway Limited, Westpac Banking Corporation and Northern
Inland Credit Union on account on the first, second and/or
third defendants within the jurisdiction of the Court, and in
particular moneys in a certain Westpac account in the name of
the first defendant and moneys in a certain Northern Inland
Credit Union Account in the name of the third defendant.

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The matter came back before the Court on 3 August 2004. The
plaintiff had been unable to serve the first and second
defendants with the originating application, supporting
material and order. An order was made extending the
injunction until trial or earlier order. The plaintiff was
ordered to file a statement of claim.

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The statement of claim was filed on 17 August 2004. The
defendants filed a notice of intention to defend and defence,
as well as an application to discharge the injunction and to
strike out the statement of claim on 30 September 2004.

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(I mention that the application sought also to set aside a
default judgment against the third defendant. That was
misconceived as no judgment had been entered, and was not
pursued.)

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The first defendant performed administrative work including
payroll and bookkeeping duties and the second defendant worked
as a truck driver. They are now husband and wife. The first
defendant's duties included arranging payment to the bank
accounts of employees and contractors. A "list pay schedule"

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had to be completed showing the amount owing to each employee or contractor. This was sent to the plaintiff's bank which paid the moneys certified in the schedule to the various bank accounts.

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In paragraph 5 of the statement of claim the plaintiff alleged that, in breach of their duties to act honestly and in good faith at all times and not to misappropriate the plaintiff's assets, the first and/or second defendants misappropriated \$165,571.57 from its bank account between June 2002 and June 2004. This amount was particularised in a schedule compiled under the following headings, "week ending, payroll records, net amount owing to first [defendant], bank transfer or cheque payment, overpaid/underpaid amount". The moneys are all alleged to have been paid to the first defendant, except for four payments (two of \$5,000, one of \$15,000 and one of \$7,500) to the third defendant.

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In paragraph 6 it is pleaded that of the misappropriated funds, \$37,612 was paid into an account in the name of the third defendant at Northern Inland Credit Union and \$127,959.57 into an account in the name of the first defendant with Westpac Banking Corporation.

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By its prayer for relief the plaintiff sought:

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- (a) against the first and second defendants, damages for breach of contract and/or fiduciary duty in the sum of

\$195,571.57 (being the amount of the misappropriation plus \$30,000 incurred to rectify its books and records);

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(b) against the third defendant, a declaration that it holds \$37,612 on trust for the plaintiff;

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(c) against the first defendant, a declaration that it holds \$127,959.57 on trust for the plaintiff.

In their defence the defendants admitted the payments as alleged by the plaintiff but alleged:

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(a) that except for the four payments to the third defendant, the payments were duly authorised and properly made pursuant to the alleged contracts; and

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(b) that the payments to the third defendant were for the falsification of records in relation to an audit for Trucksafe accreditation.

From the affidavits read on this application there appears to be dispute about the rate of the first defendant's remuneration. According to Mr Lance Butt she was employed initially at a gross salary of \$576.92 per week which was increased to \$748 per week in May 2003. According to the first defendant she was initially employed at \$25 per hour plus GST and it was subsequently agreed in May 2003 that she would be paid a flat rate for 57.4 hours whether or not she worked those hours.

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The schedule in the statement of claim reflects payroll records of \$576.92 and \$461.92 weekly until May 2003 and thereafter \$579 weekly. But the actual payments were in many instances \$1,000 per week more than these amounts and there are other amounts which are unaccounted for in payroll records. Further, the first defendant has sworn that some of the payments recorded as being made to her were in fact the second defendant's remuneration, "paid in under [her] name and thus into [her] account." The second defendant has sworn a short affidavit confirming the contents of the first defendant's affidavit.

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Mr Butt has not responded to the first defendant's claim that some of the monies represented the second defendant's remuneration and indeed has provided no evidence about how much was due to the second defendant. As for the four payments to the third defendant, Mr Butt has denied the defendant's allegations of directing or authorising the perpetration of fraud on Trucksafe.

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Any allegation of fraud must be pleaded distinctly and with particularity. However, having regard to the contents of the defence, it is difficult to comprehend the submission of counsel for the defendants that the statement of claim is embarrassing for its lack of particularity and so should be struck out. If the defendants want further particulars, they should deliver a request for particulars. They have not done so. I decline to strike out the statement of claim.

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Counsel for the defendants submitted that the injunction was a Mareva injunction, which had been wrongly granted because there had been no evidence that they were likely to take any steps designed to remove assets from the jurisdiction and thus prevent satisfaction of any judgment. In any event, the first defendant deposed to their assets and proffered an undertaking on behalf of them both not to use their assets other than in the normal course of living and to pay legal expenses in relation to this proceeding.

In rule 260(1) of the UCPR a Mareva order is defined as "an order of a type that restrains someone from removing assets from Australia or dealing with assets either in or out of Australia." Thus, it is not to the point that there was no evidence of likely removal of assets from Australia. There was, however, no evidence of likely dissipation. But as counsel for the plaintiff submitted, what was sought was not a Mareva injunction, but rather an injunction to preserve the subject matter of the trust claims, and there is now evidence that substantial proportions of the monies are no longer in the accounts into which they were paid.

The first defendant has sworn:

"26. Presently my husband's and my assets and liabilities are as follows:

- (a) Suncorp Account - \$102,587.97;
- (b) Westpac Account - \$2,513.68;
- (c) Northern Inland Credit Union I believe there is between \$25,000.00 to \$28,000.00, however that organisation will not give me the details since the injunction.

(d) We have a house at Narrabri worth \$280,000.00 and owe \$221,000.00 on it. The monthly mortgage repayments are \$1,780.20. The premises are tenanted at \$1,075.00 per month, leaving a shortfall of \$750.20 per month.

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(e) The house at Cloncurry on which the caveat has been lodged is worth \$190,000.00 and we presently have a buyer for it. There is owing \$126,000.00 on it.

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(f) We also have a car payment of \$647.00 per month.

27. Neither of us are working at the moment. We were going to buy a business, when these proceedings commenced. With our accounts frozen we do not have day-to-day living money, nor money to make mortgage payments or to fund our defence.

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28. We are prepared to undertake to the Court not to use our assets other than in the normal course of living and to pay our legal expenses in relation to this action."

The defendants have admitted that \$127,959.57 was paid into the Westpac account. There is now only \$2,513.68 in that account. They have not explained what has become of approximately \$125,000. There is \$102,587.97 in the Suncorp account, but the defendants have not disclosed the source of those funds.

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They have admitted that \$37,612 was paid into the credit union account. There is presently between \$25,000 and \$28,000 in that account. There is no explanation for what has become of the balance.

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The amount allegedly misappropriated represents the difference between the amounts actually paid and what the plaintiff concedes was due to the first defendant. I cannot resolve the

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question of how much was properly due to the first and second defendants on this application. Nor can I resolve the credibility dispute between the first defendant and Mr Butt about her allegations of payments to the third defendant to perpetrate a fraud on Trucksafe.

There is a serious answer to be tried as to misappropriation by the first and third defendants. The second defendant has confirmed the contents of the first defendant's affidavit. This must include her evidence about their current assets and liabilities, which include the Suncorp account in which there is over \$102,000. (I note that at the time the injunction was granted the plaintiff had identified a Suncorp account in the records of the third defendant inadvertently left by the first defendant at its premises.) It is a reasonable inference at this point that the monies paid into the Westpac account have either been dissipated or paid into the Suncorp account. In the latter case they would be part of the monies in relation to which a declaration of trust is sought. Similarly, the credit union account is either the account of the third defendant into which monies were paid or an account belonging to the first and second defendants. Again, a declaration of trust has been sought in relation to the monies paid to the third defendant.

The balance of convenience clearly favours the preservation of these funds pending trial. The injunction should not be discharged.

I have some concern about whether some monies ought to be released to the first and second defendants to meet day to day living expenses and the costs of defending this proceeding. I will hear counsel on this point and on the form of the order and costs.

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HER HONOUR: You can include in the order that the costs of and incidental to the application should be reserved.

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