



Transcript of Proceedings

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Date: 12 November, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Application No 46 of 2004

SINAN OGUN

Applicant

and

BRAMSTON BEACH PLANTATION RESORT PTY LTD
(ACN 094 849 224)

First Respondent

and

CHRISTOPHER DOUGLAS MICHAEL and
KATHLEEN MICHAEL

Second Respondents

and

DEREK ERROL ZIMAN

Third Respondent

CAIRNS

..DATE 11/11/2004

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: On 20 October 2004 the applicant was granted judgment in his claim for the restitution of shares retained by the third respondent. The issue of costs of those proceedings remains to be determined.

The successful applicant contends that costs should follow the event, that he is therefore entitled to costs of the proceeding as defined by rule 689 of the Uniform Civil Procedure Rules.

Further, the applicant seeks that costs be assessed on an indemnity basis. This is claimed because of the third respondent's somewhat intransigent stance in not responding to requests for the return of the shares which, it is alleged, indicated some ulterior motive or at least was lacking a bona fide purpose.

The third respondent submitted that there should be no order for costs contending that the proceedings could have been litigated when the judgment of the local Court at Hornsby was set aside. He referred to section 6 of the Law Reform (Law and Equity) Act New South Wales 1972 identifying power in the local Court to do so.

The applicant concedes that a Court setting aside judgment may order restitution. As a consequence the third respondent contends that rule 698(2) of the Uniform Civil Procedure Rules should apply whereby the costs "must be assessed as if the proceedings had been started in the Magistrates Court".

I should observe at once that the terms of rule 692 (2) are qualified by subrule 1 which confers a discretion on the Court to make a different order for costs.

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In the circumstances of this case the setting aside of the Local Court default judgment only restored the status quo of the action in that Court which then proceeded to trial.

Whether a discretionary remedy of restitution would have been granted at the time of setting aside a default judgment is a matter for some speculation.

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In all events the applicant was entitled to expect that after the third respondent's claim was dismissed by the Local Court on 25 September 2003 that he would respond to a request that the shares be returned. In the light of a clear obligation to return the shares the third respondent refused a specific request to do so on 12 December 2003, and 16 April 2004.

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The institution of these proceedings resulted in the third respondent giving an undertaking not to dispose of the shares, but at no time did he raise a maintainable basis for not returning the shares. For these reasons I reject the argument that the costs should be limited to those applicable to the Magistrates Court.

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I am satisfied that the applicant acted properly in instituting the proceedings against the third respondent and in pursuing the claim to judgment. However, I am not

persuaded that any basis has been shown for indemnity costs.
I therefore find that the applicant is entitled to his costs
of and incidental to the application against the third
respondent to be assessed on the standard basis.

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