[2005] QSC 129

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Transcript of Proceedings

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Date: 12 May, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No S4139 of 2004

ATTORNEY-GENERAL FOR STATE OF QUEENSLAND	Applicant
and	
QUEENSLAND NEWSPAPERS PTY LTD (ACN 009 661 778)	Respondent

BRISBANE

..DATE 28/04/2005

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application for directions in relation to contempt proceedings brought by the Attorney-General for the State of Queensland against Queensland Newspapers Proprietary Limited.

Save for one matter the parties are agreed as to the directions which are appropriate. The matter which is controversial is whether there should be directions whereby the respondent would be required to file and serve any affidavit upon which it intended to rely at the trial in advance of the trial as proposed by the applicant.

The applicant's proposal is that neither party be permitted to lead any oral evidence at the hearing without the leave of the trial Judge. The effect of the applicant's submission is that the orders ought to put the respondent to its election as to whether it would call evidence at a point prior to the hearing and of course before it has had an opportunity to test the applicant's case by cross-examination.

The applicant argues that the directions proposed are convenient for the effective case management of these proceedings. The applicant also points out that it is at least not uncommon in similar proceedings for directions to be made to the effect of what is presently proposed.

In that respect the applicant's submissions also refer to what was said to be the English practice, which was to require a

respondent to put on its affidavits, if any, prior to the hearing. The English practice however was not particularly explored in the course of the submissions, and counsel for the respondent told me that there is a particular rule of Court in England, of which there is no equivalent here, which affects the English practice. There is no provision in the Uniform Civil Procedure Rules that specifically deals with this context.

For present purposes, I accept that there is a power to order a respondent in such proceedings to file and serve any affidavit as the applicant seeks here.

Assuming that there is such a power, the present question is whether I should in this case require the respondent in effect to elect whether to call evidence before having the opportunity to test the applicant's case. In exercising that discretion I am not asked to have regard to some distinguishing feature of these particular proceedings.

The respondent's argument is that in any contempt proceedings, the Court ought not to make orders of this kind because they are inconsistent with the fundamental nature of such proceedings by which orders for the punishment of the respondent are sought.

In Witham v Holloway (1995) 183 CLR 525 it was held that the standard of proof in proceedings of this kind is the criminal standard because the proceedings involve the potential for

punishment of the defendant. Witham was not a case concerned with the present question which is whether in the interests of justice a respondent to such proceedings should be forced to elect before being able to test the applicant's case. But the fact that the standard of proof is upon the criminal standard is a relevant matter in assessing whether the interests of justice do favour what is now sought by the applicant.

In Edensor Nominees Proprietary Limited v Anaconda Nickel Limited [2002] VSC 365 the present question was answered, at least for the purposes of that case, in favour of the party charged with the contempt.

The practice in relation to this point is likely to vary from place to place according to the particular content of the rules of the particular Court. I do not suggest that what the respondent proposes represents a usual practice but as Edensor Nominees demonstrates, the respondent's argument is not by any means a novel one.

Similarly, for example, in CCOM Proprietary Limited v Jiejing Proprietary Limited & Ors (1992) 36 FCR 524, Drummond J held that in proceedings of this kind a respondent should be allowed to make a no case submission at the end of the applicant's case without having to elect. The report does not set out his reasons which had been given earlier for that ruling but the fact of his ruling appears at page 527.

In my view, having regard to the essential nature of

proceedings such as these, in which the outcome sought is one of punishment, fairness requires that the respondent should not be put to an election as to whether to call evidence until at least the respondent has had an opportunity to test the applicant's case.

It is, of course, not uncommon for contempt proceedings in this Court to proceed in the way that is proposed by the applicant. But that is not to say that where a respondent objects to that course the applicant should have orders of the kind which are now sought.

The result is that the respondent's submissions as to the matters which are controversial in the proposed directions ought to be upheld. That will require some modification to the draft order handed up by counsel for the applicant.

Subject to further submissions it would seem to me to be appropriate to delete from that draft order paragraphs 3 and 4. I would be prepared to hear argument in relation to paragraph 5.

...

HIS HONOUR: So, paragraphs 1 and 2 are unchanged, 3 and 4 are deleted. The old five which is now three reads, "the applicant not be permitted to lead" etcetera. The next paragraph which is now four reads, "On completion of the steps in one and two above" etcetera. The next paragraph reads,

"The respondent advise the applicant which of the deponents are required." I have crossed through eight and nine.

...

HIS HONOUR: The further order will be costs in the proceedings.
