SUPREME COURT OF QUEENSLAND

CITATION:	*Dormway Pty Ltd & anor v Wichmann* [2018] QSC 277
PARTIES:	**DORMWAY PTY LTD (AS TRUSTEE FOR THE DORMWAY UNIT TRUST)** **ACN 010 359 001** (plaintiff) **v** **RAELENE MICHELLE WICHMANN** (defendant)
FILE NO:	SC No 5930 of 2018
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	4 September 2018 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2018
JUDGE:	Atkinson J
ORDERS:	**Upon the undertaking of Johannes Hermanus Jordaan, solicitor for the defendant:** **(a) not to disperse any monies from his trust account for legal fees without 2 business days' prior notice to the plaintiff's solicitors; and** **(b) to only disperse such monies for counsel's fees and legal fees properly and reasonably incurred; and** **(c) to lodge an appeal; and** **On the undertakings given by the plaintiff to the Court on 5 June 2018:** **The Order of the Court is that:** **1. The plaintiff be given judgment pursuant to rule 292 of the *Uniform Civil Procedure Rules* 1999 on part of the Claim so that the defendant pay the plaintiff the sum of $321,593.85 plus interest in the sum of $4,458.26.** **2. The defendant pay the plaintiff's costs of and incidental to the application on the standard basis.** **3. The order of Justice Boddice made on 5 June 2018 and as previously amended continue until the determination of the appeal and otherwise be amended by increasing the amount in paragraph**

13(b) to $42,000.00.

4. **The Court directs that ING Bank may immediately release the further sum of $30,000 from the mortgage account to be paid into the Trust Account of Go To Court Lawyers to be held on the undertakings of Mr Jordaan given above, for the payment of reasonable legal expenses in accordance with paragraph 13(b) of the Order.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – where the defendant is a former employee of the plaintiff – where the defendant's employment was terminated due to her using a business credit card for personal expenses – where, as part of the termination of the defendant's employment, the plaintiff and the defendant entered into a deed of agreement and confidentiality which released the defendant from claims in civil proceedings – where the defendant was involved in a fraudulent scheme, of which the plaintiff was not aware at the time the deed was entered into – where the plaintiff filed proceedings against the defendant to recover the monies stolen – where the plaintiff applies for summary judgment – whether the general terms of the deed apply to fraud or deceit such as to bar these proceedings

Uniform Civil Procedure Rules 1999 (Qld), r 292

Anderson v Australian Securities and Investments Commission [2012] QCA 301, cited
Ashton v Pratt (2015) 88 NSWLR 281, cited
Bank of Credit and Commerce International SA (in liquidation) v Ali [No 1] [2002] 1 AC 251, cited
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, cited
Fraser v The Irish Restaurant and Bar Co Pty Ltd [2008] QCA 270, cited
Grant v John Grant & Sons Pty Ltd (1954) 91 CLR 112, cited
IBM Australia Pty Ltd v State of Queensland [2015] QSC 342, cited
Qantas Airways Ltd v Gubbins [1992] 28 NSWLR 26, cited

COUNSEL: D D Keane for the plaintiff
P Hackett for the defendant

SOLICITORS: Russells for the plaintiff
Go To Court Lawyers for the defendant

[1] There are two applications before the Court: one filed on 2 August 2018 by the plaintiff and one filed on 23 August 2018 by the defendant. Both parties agree that, if the amended application by the applicant is successful, there will be no need to deal with the application by the defendant.

[2] The amended application filed by the plaintiff seeks the following orders:

> 1. Pursuant to rule 292 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), there be summary judgment in favour of the Applicant against the Respondent for a part of the Applicant's claim in this proceeding for the sum of $328,115.20 plus interest pursuant to section 58 of the *Civil Proceedings Act 2011* (Qld) and costs [of the claim] on the indemnity basis.

[3] The second order sought is in paragraph 3 which is that the Respondent pay the Applicant's costs of and incidental to this application on the indemnity basis, or alternatively on the standard basis.

[4] The last paragraph of the amended application seeks "such further or other orders as the Court deems fit". In a rather novel submission the defendant submitted that the last paragraph could be read as an application by it or at least give the authority to this Court to give judgment for the defendant. I would refer to such a submission as specious except that "specious" means it is superficially attractive and such a submission is not even superficially attractive. It is hard to believe that it could be submitted that a plaintiff could be taken to have inferentially applied for judgment against it by seeking consequential orders in its own application.

[5] The application before the Court which, as I have said, the parties submit need not be dealt with, depending on the outcome of the amended application, is the defendant's application for the requirement of the defendant to plead be restricted in a way that is consistent with the judgment of Justice Philip McMurdo in the Court of Appeal in *Anderson v Australian Securities and Investments Commission* [2012] QCA 301.

[6] Dealing then first with the amended application by the plaintiff, I should first refer to directions made in this Court on 22 June 2018. A freezing order had been made with regard to the assets of the respondent. Certain variations were made to that on an undertaking by the solicitor for the respondent. In addition, directions were made requiring the parties to continue as if started by claim; the applicant file and serve its claim and statement of claim by a certain date; the defendant file and serve her notice of intention to defend and defence by a certain date; and the plaintiff file and serve its reply by a certain date. In conformity with those directions, the plaintiff filed its claim.

[7] The claim was under a number of headings. It was for a sum of money as a debt, alternatively damages in the same amount for breach of fiduciary duty or the tort of deceit and/or conversion. The plaintiff also sought alternatively an account for moneys received as a result of the defendant's breach of fiduciary duty or duty of fidelity and loyalty to the plaintiff, an order that the defendant pay the plaintiff the sums due on the taking of such accounts, a declaration that the defendant held the sum which was the

same sum which was sued for as a debt or for damages was held on constructive trust for the plaintiff, and an order that the defendant pay that money by way of equitable compensation to the plaintiff.

[8] The plaintiff also sought an order that the defendant account to the plaintiff for moneys of the plaintiff converted by the defendant and for property held on constructive trust for the plaintiff as well as interest and costs.

[9] The notice of intention to defend and defence was filed on 12 July 2018. No application had been made at that time for any restriction on the way in which the defence needed to be filed in conformity with the rules of the type which would be sought on the application filed on 23 August 2018. Accordingly, that notice of intention to defend falls to be dealt with in accordance with the *Uniform Civil Procedure Rules*.

[10] The defendant made some admissions, some denials and some non-admissions. The reply of the plaintiff which was filed on 22 July 2018 takes the point that, as a consequence of the defendant's failure to comply with rule 166(4) of the UCPR by failing to provide a direct explanation for her belief that allegations cannot be admitted, by virtue of rule 166(5) of the UCPR, the allegations which are not admitted have been taken to be admitted and the plaintiff adopts those admissions. That point taken in the reply is correctly made.

[11] The statement of claim alleges, and it was admitted, that the defendant was employed by the plaintiff as its office manager from 31 March 2011 until 27 April 2018. It is taken to be admitted that, as office manager, she was responsible for the day to day management of the plaintiff including but not limited to payroll, bank reconciliations, processing payments of creditor invoices, staff supervision and management of the plaintiff's electronic document control system as well as overseeing the implementation of the plaintiff's quality assurance specifications to Australian Standards; was, until April 2018, a trusted employee of the plaintiff; as an employee of the plaintiff, owed the plaintiff a duty of fidelity and loyalty and, as an employee of the plaintiff, owed the plaintiff fiduciary duties.

[12] It is also taken to be admitted that between 19 November 2015 and 16 May 2018 she engaged in a fraudulent scheme whereby she transferred or caused to be transferred moneys totalling $328,115.20 from the plaintiff's bank with the National Australia Bank Limited to her bank account with the Westpac Bank and effected the scheme by describing payments in the plaintiff's payment system as payments to creditors of the plaintiff when, in truth, they were for the benefit of the defendant. Even if those matters were not taken to be admitted, there is undisputed evidence set out by the plaintiff which proves all of those matters, except that the last affidavit on behalf of the plaintiff, filed by leave, sets out that there was an error made in the statement of claim where there was a double counting, and another minor error so that the correct amount should be $321,593.85. The fraudulent payments are set out in paragraph 5 of the statement of claim subject to that matter to which I have just referred.

[13] The plaintiff denies in the Defence that she owes that money as a debt or as damages for the tort of deceit. She does not deny that she owed the plaintiff a fiduciary duty as set

out in the statement of claim. Nor does she deny that, in breach of that duty, she misused her position, knowledge or opportunity as the office manager and acted for her own or a third party's interest without the plaintiff's knowledge or the informed consent or as authorised by law. She does not deny that she wrongfully converted the moneys belonging to the plaintiff for the defendant or a third party's own use and benefit to the detriment of the plaintiff.

[14] I have now been informed by counsel that it is not necessary to rely upon the deemed admissions in the pleading in order to determine whether or not summary judgment should be given. As much appears in the submissions of the plaintiff in this matter.

[15] So I move to what is actually in dispute on the pleadings between the parties which is relevant to this application. That is found in the Defence as currently pleaded where the defendant relies upon a deed entered into between the parties which was made between 28 and 30 April 2018. It is not necessary to rely on any deemed admissions since there is undisputed material on the affidavits swearing to the course of conduct carried on by the defendant in the affidavit of John Giosue Sante Gri dated 2 August 2018 and the later affidavit filed by leave of Yuzo Araki setting out the correct amount of the moneys said to be misappropriated by the defendant.

[16] The defendant has been arrested and charged and was released to bail on 1 July 2018. The bench charge sheet is before me annexed to an affidavit of her solicitor. It shows that she has been charged with one charge under section 408C(1)(d) and (2)(b) and (2A)(a) of the *Criminal Code* being fraud – dishonestly gaining benefit/advantage by employee value of at least $100,000. That charge is that between the 1st day of November 2015 and the 18th day of May 2018 at Wacol in the State of Queensland one Raelene Michelle Wichmann dishonestly gained monetary benefit for herself, and Raelene Michelle Wichmann was an employee of Dorman Pty Ltd and the property Raelene Michelle Wichmann obtained from the dishonesty was of a value of at least a hundred thousand dollars, namely $328 115.20.

[17] The second charge is of fraudulently falsify/destroy/alter/damage a record pursuant to section 430(d) of the *Criminal Code* that between 1st day of November 2015 and the 18th day of May 2018 at Wacol in the State of Queensland one Raelene Michelle Wichmann with intent to defraud falsified a record, namely a financial document.

[18] The circumstances in which Ms Wichmann's employment was terminated are set out in an affidavit by Mr Gri which was filed by leave on 5 June 2018. He swears – and again this is not contradicted – that in the Easter holiday period in April 2018 he was coding the credit card statements of the business into the accounting system during which he noticed there were two entries which appeared unusual to him totalling $2,809.42. In particular he noticed that on 6 February 2018 the sum of $276 was paid using the company's credit card in the name of one of Dormway's staff, Errol Hector. On 22 February 2018, the sum of $2,532.67 was again paid to the same payee. When he conducted a Google search of the merchants, he noticed that they were not the usual creditors of Dormway and appeared to be a business that sold tiles.

[19] He asked Ms Wichmann about those transactions. She was not authorised, obviously, to use the company's credit card to pay for the personal expense of her tiles. He said that she was initially evasive in her response and then said, "I may have inadvertently put some personal expenses in relation to my renovation onto the business credit card due to confusion." She then said she would pay it back.

[20] He said that she then tried to repay him some money by giving it to him in cash, but he asked her to deposit the money into the company's bank account. As a result of this discovery – that is, the unauthorised use of a credit card to pay for a personal expense – he swore that he lost trust in her role as the office manager and decided to terminate her employment as at 27 April 2018.

[21] On the termination of her employment, the plaintiff and the defendant entered into a deed of agreement and confidentiality pursuant to which she was terminated on certain conditions as a genuine voluntary redundancy. She was paid an amount of $42,669.03 as a redundancy payment. The sum wrongly put on the credit cards of $2,809.42 was deducted from her redundancy payment to offset the money she took from the company by using its credit card.

[22] Only after her employment was terminated, and starting on 18 May 2018, a phone call from a creditor who said its money was outstanding led the plaintiff to uncover the extraordinary number of payments which it swears, and has evidence to prove, were paid not to creditors by the defendant but, rather, into her own bank account. This was not done by use of a credit card. It is not similar to the misuse of a credit card which led to the termination of her employment. So it was perhaps unsurprising that the defendant has been arrested and charged with the charges to which I have referred. They have not been, as yet, dealt with.

[23] Whether or not the plaintiff is entitled to summary judgment on this application depends on whether or not the deed of agreement and confidentiality means that the defendant is effectively released from this claim made against her in civil proceedings by the plaintiff.

[24] Rule 292(2) of the *Uniform Civil Procedure Rules* provides that:

> *If the Court is satisfied that the defendant has no real prospect of successfully defending all or part of the plaintiff's claim, and there is no need for a trial of the claim or part of the claim, the Court may give judgment for the plaintiff against the defendant for all or part of the plaintiff's claim or make any other order the Court considers appropriate.*

[25] As was submitted and set out in the Court of Appeal decision of *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, the words of that rule should be given their plain meaning although care is taken only to give summary judgment in clear cases.

[26] As the plaintiff submitted, it would appear that the defendant's only basis for a defence is her claim that her theft and fraud was released by operation of the deed of agreement and confidentiality which may be referred to as a deed of release. The deed is

apparently in very wide terms entered into as it was without any knowledge on the part of the plaintiff of the theft and fraudulent activity of the defendant of which of course she must have been aware.

[27] The recitals are as follows:

> *Whereas*
>
> *(a) WICHMANN was employed by DORMWAY as the office manager based in Wacol, Queensland and by agreement her employment is to cease at 4 pm on the 27 April 2018, by way of a genuine voluntary redundancy.*
>
> *(b) By agreement, the payments under this Deed to WICHMANN when made by mutual consent expunge all and any other entitlements in relation to the employment of WICHMANN.*
>
> *(c) WICHMANN is excused from the workplace on full pay with immediate effect.*
>
> *(d) By agreement, WICHMANN will not contact any current or former employees about her former employment situation with DORMWAY; or contact or discuss the circumstances of the redundancy, the existence of this Deed or its contents; with any other person or entity, including any contractors providing services to DORMWAY Pty Ltd or on any social media, save as required by Law.*
>
> *(e) The parties have agreed to settle all matters effective from the 30 April 2018 relating to the employment and the cessation of the employment of WICHMANN, and any matters arising therefrom save as to any statutory rights concerning superannuation or worker's compensation, or the subsequent enforcement by either party of the terms of this deed and without any admissions of liability by either party as set out herein.*
>
> *(f) WICHMANN acknowledges that a breach of this deed, including and especially recital (d), may lead to DORMWAY initiating action for breach of this deed of agreement and may seek orders, damages and costs against WICHMANN; if such a breach is proven.*

[28] The terms of the release are set out in paragraph 4 of the deed. The relevant one for these purposes is clause 4.2 which provides:

> *In consideration for the agreements herein, DORMWAY hereby releases and discharges WICHMANN from all causes of action, action suits, arbitrations, claims, demands, costs, debts, damages, expenses and legal proceedings whatsoever arising out of or in any way connected with:*
>
> *(a) The Employment or its termination or any circumstance relating to its termination; or*
> *(b) Any matter, act or circumstance occurring between the date of termination of the employment and the date of this agreement; save as to any unlawful act; and*
> *(c) Whether arising under statute, common law or equity,*

> *Or any of these which DORMWAY now has or had the right to bring against WICHMANN at any time hereafter, but for the execution of this agreement; save as to any matter relating to the enforcement of this deed.*

[29] Further, there is an undertaking by Dormway set out in clause 7.2 which provides that:

> *DORMWAY undertakes and agrees that it will not make any statement or comment to any person or entity regarding WICHMANN which is in any way disparaging or unfavourable.*

[30] This obligation extends to include any social media, Facebook et al comments. It can be seen that on one view of this deed it is in very wide terms. Indeed, on one view, the filing of the affidavits and the giving of information to the police would be to make statements which are at the very least unfavourable to Wichmann and therefore, if the contract or the deed was given its widest possible interpretation, and a wide interpretation of that clause is not pressed by the defendant, then the plaintiff would be in breach of that undertaking and in breach of the agreement. Of course, one of the reasons why such an argument is not pressed is that it would be clearly contrary to public policy to enter into an agreement which would prevent the plaintiff from reporting a criminal offence.

[31] The plaintiff argues that the deed does not release the plaintiff from the current claim on its proper construction. That is, that she is not released and discharged from these proceedings because they are not connected with her employment. I think it is necessary, however, in construing this agreement to keep steadily in mind that it is an agreement for release and that it is clear from the material that a critical fact – that is, that the defendant had committed fraud and stealing against the plaintiff in the way in which is set out in the affidavit material – was not known to the plaintiff when it entered into the agreement. There is a question then whether a release that appears to be in general terms should cover a release from an action such as this based on theft, the theft by the defendant against the plaintiff which was not within the contemplation of the plaintiff when it entered into the deed.

[32] In my view, one construes this deed in the context in which it was made. It could not be said to release the defendant from theft and fraud and breach of fiduciary duty which she committed whilst an employee. It was not within the lawful scope of her employment that she should steal from her employer. In my view, the words of the release should be read down so it is not construed so as to include a deed of release from such behaviour and such a claim. As the High Court held in *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 at 129:

> *From the authorities which have already been cited it will be seen that equity proceeded upon the principle that a releasee must not use the general words of the release as a means of escaping the fulfilment of obligations falling outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor. The facts stated in the third replication, if true, would show that the plaintiff company did not know of the*

> *defendant's liability it now seeks to enforce, did not intend to release it as part of the transaction and did not know of any intention on the part of the defendant that it should be released.*

[33] In *Ashton v Pratt* (2015) 88 NSWLR 281, Chief Justice Bathurst observed:

> *To the extent the agreement constituted a release, general words of a release will be constrained by the particular occasion on which it is given.*

[34] The Chief Justice then referred to the authority of *Grant*.

[35] In *Fraser v The Irish Restaurant and Bar Co Pty Ltd* [2008] QCA 270 at [48], Justice Muir referred to Grant in these terms:

> *In Qantas Airways Ltd v Gubbins*[1] *Gleeson CJ and Handley JA succinctly explained that Grant "sets out the principles by reference to which a Court will decide whether a general release will cover a particular dispute. The rule is that the general words of a release will in an appropriate case be read down to conform to the contemplation of the parties at the time the release was executed."*

[36] In *IBM Australia Pty Ltd v State of Queensland* [2015] QSC 342 Justice Martin referred, at [47], to the English case of *Bank of Credit and Commerce International SA (in liquidation) v Ali [No 1]* [2002] 1 AC 251 where Lord Bingham said that there is:

> *a long and in my view salutary line of authority which shows that, in the absence of clear language, the Court would be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.*

[37] Justice Martin also referred to the fact that his Lordship also said:

> *A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims of rights of which he is unaware and of which he could not have been aware, even claims which could not, on the facts known to the parties, have been imagined, if appropriate language is used to make plain that that is his intention.*

[38] There is no language in this deed of release which suggests that fraud or theft is to be forgiven by this deed of release. The words are general. But in order to forgive and release from that kind of liability, in my view, the language would have had to be plain to show that was the intention of the parties. There are no specific words which show that that is the case in this particular deed. The problem for the defendant would be that, if it were sufficient, then the deed would be contrary to public policy in any event and in my view unenforceable by the defendant.

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[1] [1992] 28 NSWLR 26 at 29.

[39] In the circumstances, I propose to grant summary judgment to the plaintiff pursuant to rule 292 of the *Uniform Civil Procedure Rules* on part of the claim so that the defendant pay the plaintiff the sum of $321,593.85 plus interest in the sum of $4,458.26 and costs on the standard basis.

[40] I further order that the Order of Justice Boddice made on 5 June 2018 and as previously amended continue until the determination of the appeal and otherwise be amended by increasing the amount in paragraph 13(b) to $42,000.00. I direct that ING may immediately release the further sum of $30,000 from the mortgage account to be paid into the Trust Account of Go To Court Lawyers to be held on the undertakings of Mr Jordaan for the payment of reasonable legal expenses in accordance with paragraph 13(b) of the Order.