SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v 1st State Home Loans P/L & anor* [2002] QSC 055
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (Applicant) **v** **1ST STATE HOME LOANS PTY LTD** ACN 069 399 426 (First Respondent) **ROCCO FERRANTINO** (Second Respondent) **TANYA ANNE SCHAFER** (Third Respondent) **AYNAT GOLD NOMINEES PTY LTD** ACN 079 874 132 (Fourth Respondent) **FERNDUNE PTY LTD** ACN 081 685 976 (Fifth Respondent) **UNITED PROJECT DEVELOPMENTS PTY LTD** ACN 079 860 192 (Sixth Respondent) **FAVSTOR PTY LTD** ACN 091 047 746 (Sixth Respondent)
FILE NO:	S 6301 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	19 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2002
JUDGE:	Wilson J
CATCHWORDS:	PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – whether order prohibiting opening of bank account and/or dealing with property without receiver's consent had been breached by respondent – whether terms of order clear and unambiguous – whether respondent intended to defy the authority of the court *Corporations Act* 2001 s 780, s 781, s 1323, s 1324

Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (1986) 161 CLR 98 at 108, followed.
Australian Consolidated Press Ltd v Morgan (1965) 112 CLR 483 at 503, 506 and 515-516, followed.
Pelechowski v Registrar, Court of Appeal (1999) 198 CLR 435 at 484-485, followed.
Witham v Holloway (1995) 183 CLR 525 at 530, followed.

COUNSEL: RW Gotterson QC and C Wilson for the applicant
K Howe for the second respondent and the fifth respondent

SOLICITORS: The Solicitor for the Australian Securities and Investment Commission for the applicant

Redchip Lawyers for the second respondent and the fifth respondent

[1] **WILSON J**: This is an application by the Australian Securities and Investments Commission ("the applicant") against Rocco Ferrantino ("the second respondent") and Ferndune Pty Ltd ("the fifth respondent") that they be dealt with for contempt of court in failing to comply with an order made by Mullins J on 25 July 2001.

[2] Mullins J restrained the first, second, third and fourth respondents from carrying on any unlicensed securities business and/or any unlicensed investment advice business in contravention of sections 780 and 781 of the *Corporations Act*. Her Honour appointed Stephen Leonard Denby (a member of the firm Prentice Parbery Barilla) as receiver and manager of the property of each of the seven respondents to the proceedings, and granted a number of further injunctions against some or all of the respondents. In particular, Her Honour ordered -

> "**3.** The First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondents, pursuant to section 1323 and/or section 1324 of the *Corporations Law*, by themselves, their servants and/or agents however described, be restrained from disposing of, further encumbering, charging, mortgaging, parting with possession of, removing from present location, diminishing or otherwise dealing with any asset or monies, including all assets or monies held on trust for any other person or entity, other than in the case of the Second and Third Respondents, for the payment of reasonable living expenses of $923.00 per week, or otherwise in any case as agreed to in writing by the applicant prior to such expenditure.
>
> …
>
> **8.** Pursuant to section 1323 of the Corporations Law, the Second Respondent be prohibited from paying or transferring any moneys or other property, in particular but not limited to: -

(a) property situated at 12/7-9 Robert Street, Labrador, Queensland and more particularly described as Lot 12 on Building Unit Plan 103839, County of Ward Parish of Nerang being the whole of the land contained in Certificate of Title Reference 50110415;

(b) property situated at Haig Street, Reservoir, Victoria and more particularly described as Lots 77 and 78 on Plan of Subdivision No 7444, Parish of Jika Jika County of Bourke contained in Victorian Certificate of Title Volume 5235 Folio 955;

and the Second Respondent be prohibited from operating, receiving, transferring or otherwise dealing with any bank accounts operated and controlled by the Second Respondent (except a bank account opened with the consent of the Receiver) including but not limited to accounts with Suncorp-Metway Limited, particularly, but not limited to:

(a) account number 040781339 in the name of Rocco Ferrantino;

and the Second Respondent be prohibited from, by himself, his servants, agents or otherwise, howsoever from disposing of or dealing with any of his assets, whether such assets to be within or outside the jurisdiction, or from removing any such assets from the jurisdiction, other than in the payment of reasonable living expenses and legal costs incurred in relation to this Application, or as agreed in writing by the Applicant, or by further order."

[3] The applicant alleges that the second respondent –

(i) failed to comply with order no 8 in that without consent of the Receiver he opened a bank account with ANZ Bank on 17 August 2001 and subsequently operated that account until 10 September 2001 receiving total deposits of $9,437.50 and total withdrawals of $9,740.56; and

(ii) failed to comply with order no 3 in that on 12 September 2001 he executed a contract of sale of property at 61 Benowa Road Southport for and on behalf of the fifth respondent.

It alleges that the fifth respondent failed to comply with order no 3 in that by a contract in writing dated 12 September 2001 it purported to sell the Benowa Road property.

[4] The applicant is alleging breaches of various injunctions. Prima facie, a person who knows that an injunction has been granted and who breaches it commits a civil contempt. However, the Court will not make a finding of contempt if the terms of the order are not clear and unambiguous: *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 503, 506, 515-6. The breach may be technical; it

may be wilful but unaccompanied by a specific intent to defy the authority of the Court, or it may be contumacious (ie accompanied by a specific intent to defy the Court's authority): *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at 484-5 per Kirby J. If the conduct is contumacious, it will amount to criminal contempt: *Witham v Holloway* (1995) 183 CLR 525 at 530; *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 108. Whether it be classified as civil or criminal contempt (a distinction criticised by the High Court in *Mudginberri* and *Witham v Holloway*), the same strict standard of proof applies, namely beyond reasonable doubt: *Witham v Holloway*. However, the nature of the intent (if any) with which the person breached the injunction will be relevant to penalty.

[5] **Evidence and Objections**

The applicant relied on the following –

1. Amended Application filed 7 March 2002
2. Affidavit of Stephen Leonard Denby filed 19 November 2001
3. Affidavit of Gabrielle Therese Hurley filed 19 November 2001.
4. Affidavit of Karen Elizabeth Hamilton filed 19 November 2001.
5. Affidavit of Julie Ann Williams filed 19 November 2001.
6. Affidavit of Shane Blomfield filed 19 November 2001.
7. Affidavit of Brett Bartlett filed 21 January 2002.
8. Affidavit of Julie Ann Williams filed 24 January 2002.
9. Affidavit of Rodney Gray Johanson filed 25 January 2002.
10. Order Mullins J made on 25 July 2001.

The second respondent and the fifth respondent relied on –

1. Affidavit of John Andrew Robert Walker dated 18 January 2002.
2. Affidavit of Brett Bartlett dated 18 January 2002.
3. Affidavit of Rocco Ferrantino dated 18 January 2002.
4. Affidavit of Tanya Schafer dated 18 January 2002.
5. Affidavit of Shane Blomfield dated 18 January 2002.

Counsel for the second and fifth respondents took a number of objections to evidence.

(i) Affidavit of Shane Blomfield filed 19 November 2001 para 3. The objection was that the deponent's understanding that the second respondent owned the Benowa Road property was irrelevant. Senior counsel for the applicant countered that this was not relied on in his client's submissions and so was not a matter for serious consideration. In the circumstances it is not necessary to rule on the objection.

(ii) Affidavit of Julie Ann Williams filed 19 November 2001 paras 23 and 24. The objection was on the ground of hearsay. Senior counsel for the applicant renounced reliance on these paragraphs, the contents being proved by the affidavit of Rodney Gray Johanson filed on 25 January 2002.

After argument, I allowed the applicant to rely on that affidavit of Mr Johanson as well as an affidavit of Brett Bartlett filed on 21 January 2002 and a further affidavit of Ms Williams filed on 24 January 2002.

(iii) Affidavit of Brett Bartlett filed 21 January 2002 para 4. The objection was that the contents were "vague and not properly sourced" and would in any event be hearsay. Senior counsel for the applicant countered that this was not relied on in his client's submissions and so was not a matter for serious consideration. In the circumstances it is not necessary to rule on the objection.

The Bank Account

[6] The second respondent had notice of the order of Mullins J. He was present in Court when it was made, and a copy was served on his solicitors later that day. He admits that he opened bank account 5153 - 16274 in his name with the Australia and New Zealand Banking Group Ltd - Ashmore branch on 17 August 2001, and that he subsequently operated that account by making deposits and withdrawals. The transactions continued at least until the close of business on 18 September 2001 when there was a debit balance of $347.20. During the period the account was operated deposits totalled $9,437-50 and withdrawals totalled $9,784-70. According to unchallenged evidence of the second respondent the account was opened for the sole purpose of banking moneys from his business activities and to pay household and business expenses.

[7] The receiver, Mr Denby, was not asked for his consent to the opening or operation of this account; nor did he give his consent. There is a dispute as to whether the receiver's manager, Julie Ann Williams, consented. On this point I must consider the affidavit evidence of Ms Williams and the second respondent, their cross-examination and relevant documentary evidence. Ms Williams denies having any conversation (by telephone or otherwise) with the second respondent at any time after the order was made on 25 July 2001 in relation to his opening or operating any bank accounts. The second respondent's evidence is that he had such a conversation with Ms Williams on 8 August 2001.

[8] The second respondent attended at the offices of the first respondent or those of the receiver on seven occasions between 27 July and 7 August 2001. He also had STD telephone contact with the receiver's office on 25 July, 8, 9, and 10 August 2001. His evidence of such telephone contact is corroborated by his Telstra account for the relevant period. According to that account, on 8 August 2001 there was a call to the number which is that of the receiver's office at 9.27 am lasting 4 minutes and 11 seconds. The second respondent says that he spoke with Ms Williams. Ms Williams denies this, saying that between 9.00 am and 10.10 am on that day she was attending a Work in Progress meeting with partners of Prentice Parbery Barilla. She has produced a copy of her timesheet for that day where her attendance at the meeting over that period is recorded.

[9] In paragraph 37 of his affidavit filed on 18 January 2002 the second respondent swore -

> "37. Again on or about the 8th August, 2001 in the course of a telephone conversation with Ms Williams I told her that I would be opening a bank account. Ms Williams did not object on either occasion to me opening an account."

Despite the expressions "again" and "on either occasion", there is nothing elsewhere in that affidavit to suggest that there was some other occasion on which he told Ms Williams of his intention to open an account (which he did on 17 August 2001).

[10] In cross-examination the second respondent -

(i) said he did not work closely with Bobby Montesalvo (an employee of the receiver) and he did not know Michael Costello (another employee of the receiver);

(ii) denied the suggestion that his telephone conversation on 8 August 2001 may have been with someone at the firm other than Ms Williams;

(iii) said Ms Williams did not merely not object to his opening an account: she made the positive response : "That's okay";

(iv) said there were two occasions when he raised with Ms Williams the opening of a bank account - the first in a face-to-face meeting at the first respondent's premises at Surfers Paradise and the second on the telephone. He did not mention the first occasion in the affidavit because it was "not relevant". In the telephone conversation he did not tell her where he would be opening the account because it had not been decided, and he did not tell her why because "there was no reason to divulge why".

[11] In cross-examination Ms Williams -

(i) denied that she spoke with the second respondent on 8 August 2001;

(ii) denied that she left the Work In Progress meeting to take his call. She said it would have been extremely unusual for her to have been called out of such a meeting because she was "the main person holding that meeting" - which I took to be a reference to her evidence in chief that she supervised the practice management of the accounting for the firm and was responsible for the collation of time sheets, preparation of accounts on particular files and their write-up or write down;

(iii) said that she had had a number of conversations with the second respondent about bank accounts opened before the appointment of the receiver, but denied having a conversation about the opening of an account after the appointment;

(iv) said that had there been a conversation such as that alleged by the second respondent, she would have required details, and she would have required the consent of a partner before activating such a matter on a file;

(v) denied having a conversation with the second respondent about a bank account on 8 August or any other day, and said she "most certainly would not reply that it would be okay";

(vi) denied having any knowledge that the second respondent had opened any bank account until a conversation with his solicitor, Mr Walker, which she said occurred on 4 September 2001.

[12] There is conflict between Ms Williams and Mr Walker as to whether their conversation took place on 4 or 5 September 2001, but nothing turns on the precise date. According to Ms Williams, Mr Walker told her that the second respondent was working for himself and also living on borrowings from friends and family; she suspected that he may have opened bank accounts to bank his earnings and requested details. According to Mr Walker, Ms Williams told him that the second and third respondents had opened and were operating new bank accounts and were required to obtain her consent; he disputed that they were required to disclose accounts opened and operated for daily living expenses. Ms Williams denies that such a dispute arose on that occasion. Her diary note is somewhat elliptical. It reads –

" PRENTICE PARBERY BARILLA

RECORD OF INTERVIEW
TELEPHONE CALL

1ST State 4/9/01
JW
Andrew Walker
Redchip Lawyers

- Update required by Andrew on positions for 1st State

AW: Andrew's instruction from Rocco were he had complied with all the orders.
JW: No there are matters outstanding. I will get back to you tomorrow with detail.
AW: Rocco is working for himself not the same type of work though.
JW: Hard to get a hold of him.
RF: Living on borrowings from family and friend.
JW: Requested details of bank account for Tanya and Rocco as per orders."

Ms Williams followed up that conversation with written requests faxed on 12 and 17 September 2001. There is nothing in either of those requests to suggest that she had consented to or acquiesced in the opening of any bank account. In a fax sent on 19 September 2001 Ms Williams said with reference to the ANZ account -

> "Your clients agreed to not opening or operating a bank account without the consent of the Receiver pursuant to Supreme Court order S.6301 section 4(iii) dated 25 July 2001 [sic], yet they have chosen to ignore this order."

On 25 September 2001 Mr Walker sent Ms Williams copies of bank statements. He disputed her interpretation of the Court's order, but did not assert that she had consented to or acquiesced in the opening of the account. On 27 September 2001 Ms Hamilton, a legal officer employed by the applicant, asserted in a letter to Mr Walker, with reference to accounts opened by the second and third respondents -

> "The Receiver has advised that at no time has he consented to the opening or operation of these accounts, nor has he ever been approached to give such consent.
>
> ASIC regards the opening and operation of these accounts with ANZ Bank by your clients as a clear contempt of the court orders."

In his response of 4 October 2001 Mr Walker challenged the interpretation of the orders, but did not assert that consent had been given or sought.

[13] Senior counsel for the applicant submitted paragraph 8 of the order relates to accounts opened and operated after the receiver's appointment: to hold otherwise would be to rob the words in parenthesis of all practical meaning. Counsel for the respondents submitted that paragraph 8 relates only to accounts in existence before the receiver's appointment; alternatively, that it is ambiguous - that it may relate to accounts opened after the receiver's appointment or it may relate only to accounts in existence at the time of his appointment. He submitted that the words "operated" and "controlled" were past tense and referred to accounts which the second respondent operated and controlled before the receiver's appointment. Senior counsel for the applicant countered that those words had a functional rather than temporal content.

[14] In my opinion paragraph 8 of the order is clear and unambiguous: it refers to accounts in existence before and after the receiver's appointment. The words in parenthesis obviate any suggestion that it is limited to pre-existing accounts. The words "operated" and "controlled" do not have any temporal content.

[15] Counsel for the respondents made a supplementary submission that in any event the second respondent "comes within the ambit of the last paragraph of Order 8 ie 'other than in the payment of reasonable living expenses and legal costs incurred in relation to this Application ..."'. Paragraph 8 imposes three broad prohibitions on the disposition of property - a prohibition on paying or transferring any moneys or other property, a prohibition on operating, etc bank accounts and a prohibition on howsoever disposing of or dealing with assets. I am inclined to think that the exception relating to reasonable living expenses and legal costs does not relate to the express prohibition on operating bank accounts. However, it is not necessary to

come to a conclusion on this, since on the second respondent's own evidence, the ANZ account was used for business expenses in addition to living expenses.

[16] I am satisfied beyond reasonable doubt that the second respondent opened and operated the account without the receiver's consent. Further, I am satisfied beyond reasonable doubt that he did so in deliberate defiance of paragraph 8 of the order. The receiver himself never consented and Ms Williams lacked authority to do so. I reject the second respondent's evidence that he raised the issue with her in a face to face meeting at Surfers Paradise. He did not mention that in his affidavit, and first raised it in a disingenuous attempt to explain the meaning of paragraph 37 of his affidavit under the pressure of cross-examination. While I accept that he made a telephone call to the receiver's office on 8 August 2001, I reject his evidence that he spoke with Ms Williams on that occasion and that she either consented to or acquiesced in his having opened the bank account and operating it. His evidence that she said "That's okay" was not contained in his affidavit, but given orally in cross-examination in an attempt to embellish his tale. The alleged conversation was never raised in subsequent communications between Ms Williams and the respondents' solicitor Mr Walker or in those between the applicant and Mr Walker. Ms Williams denied that the issue had been raised in a face to face meeting at Surfers Paradise and denied having spoken with the second respondent on 8 August 2001. Her timesheet for 8 August 2001 corroborates her evidence that she did not speak with the second respondent that day. She was business-like and direct in answer to questions in cross-examination, conscious of the limitations on her authority, and thorough in her record keeping. I prefer her evidence to that of the second respondent.

[17] There is another matter in relation to the second respondent's breach of paragraph 8 of the order which I record for the sake of completeness. The exception expressed in the words in parenthesis related to accounts <u>opened</u> with the receiver's consent. However, there was an error in the recitation of the order in paragraph 1 of the application, where <u>operated</u> was substituted for <u>opened</u>. Although I drew attention to the error in the course of counsel for the respondents' address, he did not make any submissions upon its consequences (if any). In the circumstances, I have not taken it into account in reaching my decision.

Benowa Road Property

The second respondent

[18] The fifth respondent was the owner of a residential property at 61 Benowa Road, Southport. On 12 September 2001 the second respondent signed a standard form contract purportedly on behalf of the fifth respondent to sell the property to NT and O Carlos.

[19] The applicant alleges that, in so doing , the second respondent was in contempt-

(a) by himself breaching paragraph 3 of the order by dealing with the property of the fifth respondent; and

(b) by knowingly assisting the fifth respondent to breach paragraph 3 of the order by causing it to deal with its property.

(These particulars were supplied in a letter from the applicant to the respondents' solicitors dated 7 February 2002.)

[20] The contract provided for payment of a deposit of $10,000.00. It contained a special condition: "This contract is cash and unconditional, not subject to either finance or building clauses." Both a date and a place for settlement were stipulated. It was accompanied by another document by which Stefano Battaglia, the father of one of the purchasers, agreed to pay a "finder's fee" of $10,000.00 to Comzat Pty Ltd upon bank approval of a home loan and "subject to execution of substitution contract". It was initialled by the second respondent. Comzat Pty Ltd was a shelf company of the respondents' solicitors. There had been discussions about passing "ownership" of it to the second respondent or his nominee. The applicant did not rely on that "side deal" as an element of contempt, but rather as an aggravating circumstance adding to the gravity of the alleged contempt.

[21] The second respondent's evidence about the circumstances in which he signed the contract was uncontradicted. Essentially he said that he knew he had no capacity to enter a binding contract for the sale of the property. However, he was concerned that the applicant would sell it for an undervalue. The mortgagee of the property had given notice of intention to exercise power of sale, but time was still running under that notice. He signed the contract so that the purchasers could make an application for finance. It was anticipated that the mortgagee would enter into a substitute contract with the purchasers as soon as time had expired under its notice.

[22] I turn to a consideration of the terms of paragraph 3 of the order.

[23] I am satisfied that even though the second respondent did not (and could not) enter into a binding contract for the sale of the property, in arming the purchasers with a document they would use in applying for finance he did "deal with" it.

[24] The case against the second respondent is that he dealt with the property of the fifth respondent. However, paragraph 8 of the order is ambiguous in that it is capable of meaning -

(a) that each respondent is restrained from dealing with his, her or its respective property only; or

(b) that each respondent is restrained from dealing not only with his, her or its own property, but also with the property of the other respondents.

[25] In view of the ambiguity, I decline to consider further whether the second respondent breached paragraph 3 of the order.

The fifth respondent

[26] The applicant alleges that the fifth respondent breached paragraph 3 of the order by purporting to sell the Benowa Road property.

[27] The sole director of the fifth respondent was the third respondent, the de facto wife of the second respondent. There is no evidence that the fifth respondent authorised the second respondent to sign the contract. Accordingly, the application against the fifth respondent must fail.

Conclusions

[28] I find the second respondent in contempt of court for his breach of paragraph 8 of the order of Mullins J made on 25 July 2001.

[29] I find that the second respondent acted in deliberate defiance of paragraph 8 of the order.

[30] I will adjourn the proceeding to a date to be fixed to allow counsel to make submissions on penalty.

[31] Otherwise the application against the second respondent should be dismissed.

[32] The application against the fifth respondent should be dismissed.