

SUPREME COURT OF QUEENSLAND

CITATION: *Nicholl Holdings Pty Ltd v Williams* [2003] QSC 473

PARTIES: **NICHOLL HOLDINGS PTY LTD**
(ACN 063 703 748)
(Applicant)
v
GRANTLEY KENNETH WILLIAMS
(First Respondent)
ASHLEE TAYLOR PTY LTD
(ACN 082 144 312)
(Second Respondent)

FILE NO/S: 129 of 2001

DIVISION: Trial

PROCEEDING: Application for summary judgment

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 18 November 2003

DELIVERED AT: Cairns

HEARING DATE: 22 July 2003

JUDGE: Jones J

ORDER: **Judgment for the applicant in the sum of \$241,525 together with interest thereon for that part of the claim relating to payments recorded as being made to Y. Nanoka.**
A declaration that the second respondent holds the property at 5/14 Upward Street, Cairns and described as Lot 5 on BUP 70940 County Nares, Parish Cairns on trust for the applicant as to 90.3% thereof and for the second respondent as to 9.7% thereof.
I order that the second respondent do all acts and sign all documents necessary to transfer to the applicant, within 28 days of the order, his interest in the said property at Upward Street, Cairns so that the Certificate of Title to the property records the applicant and second respondent being tenants in common in the shares of 90.3% to the applicant and 9.7% to the second respondent.
I direct that, in the event of the failure or refusal by the second respondent to execute any necessary documents within the time aforesaid, the Registrar be authorised to execute such documents in the place and stead of the second respondent. An affidavit by the applicant or his solicitor deposing to such failure shall be sufficient

evidence thereof.

I make the following further directions:-

That an Amended Defence be filed within 28 days of the date hereof.

That a Reply (if any) be delivered within 14 days from the receipt of the Amended Defence.

That disclosure of documents occur within 14 days of the close of pleadings.

That this matter be entered on the list of matters awaiting trial.

I give to each of the parties liberty to apply upon two days notice to other parties.

I order that the first and second respondent pay the applicant's costs of and incidental to this application to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – where application filed pursuant to UCPR r 292 for summary judgment against the defendant – whether defendant had any real prospect of successfully defending all or a part of the plaintiff's claim

Uniform Civil Procedure Rules r 292, r 439

Queensland Pork Pty Ltd v Lott, CA No 204 of 2003, 4 July 2003

COUNSEL: J D Henry for the applicant

SOLICITORS: Williams, Graham & Carman for the applicant
Mellick Smith & Associates for the respondent

- [1] This is an application by the applicant for summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* (UCPR).
- [2] By its Amended Statement of Claim the applicant claims, pursuant to various money counts, the sum of \$697,615 which it alleges the first respondent misappropriated from the applicant's business. The applicant seeks also a declaration that a property situated at 5/14 Upward Street, Cairns is held on constructive trust for both the applicant and the second respondent in shares of 90.3% as to the applicant and 9.7% as to the second respondent. A further order is sought requiring the second respondent to transfer his interest in the property to the applicant so that the certificate of title records the respective interests in the above ratio as tenants in common. These claims were fully particularised in the Amended Statement of Claim delivered on 30 November 2001. The respondents have not yet delivered an Amended Defence to these claims. By their original defence the respondents simply denied the allegations contending that until there was disclosure of documents they could not traverse the applicant's allegations. Since then the respondents, on 7 December 2001 received the full documentary brief on criminal charges relating to these same matters. They do not presently suggest any difficulty by reason of not having access to documents.

- [3] By this application the applicant seeks to have the declaration made and seeks judgment in respect of part of the money claimed, namely, the sum of \$241,525 being the proceeds of certain cashed cheques drawn on the applicant's business purportedly in payment for translation services to one, Yusuko Nonaka.

Background facts

- [4] The applicant company has since May 1997 conducted the business of a 24 hour medical centre under the direction of Dr Evan Nicholls who is the controlling mind of the company.
- [5] The first respondent was at material times, employed by the applicant as the business manager. In this position the first respondent had responsibility for the financial dealings relating to the conduct of the medical centre including the preparation of documents, payment of accounts and the keeping of records.
- [6] The second respondent is a company controlled by the first respondent. The second respondent is the sole registered owner of the residential unit situated at 5/14 Upward Street, Cairns and described as Lot 5 on BUP 70940, county Nares, Parish of Cairns, Title Reference 21410084. The second respondent purchased this property in January 1999 for the price of \$128,500.
- [7] Between 5 July 1998 and 4 March 2000, 75 cheques were drawn upon the applicant's bank account purportedly in payment of translation services provided to that practice. The total value of such cheques, which were issued for varying amounts, was approximately \$280,000. The majority of cheques showed the payee as Yusuka Nanoka and these cheques totalled \$241,525. These cheques were marked "Please pay cash" and were honoured in this way. Ms Nanoka never worked for the Medical Centre and she never received any money from it.¹
- [8] The cheque forms were, in fact, signed by Dr Nicholls but thereafter they remained in the control of the first respondent. It is common ground between the parties that there was a practice in the Medical Centre for Dr Nicholls to sign cheques in blank which would be completed by the first respondent as required for the conduct of the business. The applicant alleges that it was the first respondent who received the proceeds from the cheques.
- [9] The first respondent answers this allegation by agreeing that he did, in fact, cash the cheques, but asserts they were drawn at the direction of Nicholls for the purposes set out in the affidavit of Habib Abraham Mellick sworn 16 July 2000. They were used to pay the following persons:-

"24.1 All of such cheques were drawn at the direction of Dr Nicholls;

24.2 Such cheques were cashed by Mr Williams and were utilised to pay:

23.2.1 Cash payments to Doctors totalling \$700.00 per week
(\$100.00 per night);

24.2.1 Cash bonuses to reception staff of \$500.00 per week;

¹ See Ex "DT13" to Affidavit of Dale Treanor sworn 16 May 2002

24.2.2 Cash payments to the bus drivers of \$140.00 per night (usually two nights per week);

24.2.3 Such other cash payments as directed by Dr Nicholls; and

24.2.4 The balance funds were then placed in an envelope and handed to Dr Nicholls, generally by myself.”

This assertion is confirmed by the first respondent. He denies receiving any part of the money for the benefit of the respondents.

The hearing

[10] Before dealing with this conflict in evidence and the manner in which it impacts upon the application for summary judgment, attention should be drawn to the fact that none of the deponents to the affidavits relied upon have been subject to cross-examination. At the commencement of this hearing Mr Henry of Counsel for the applicant sought to cross-examine the first respondent. His affidavit was filed on the eve of the hearing and consequently in accordance with r 439 of the UCPR he ought to have been available for cross-examination. Relevantly, his affidavit referred to the affidavit of Mr Mellick, the respondents’ solicitor, filed a year earlier which contained on a hearsay basis the first respondent’s responses to the allegations in the Amended Statement of Claim. In his more recent affidavit the first respondent deposed to the correctness of those responses. The first respondent is terminally ill, as appears from the report of Dr Dawson tendered at the hearing (Ex 1). It was not possible for the first respondent to travel to Cairns and thus be available for cross-examination. Since the only effect of the late filed affidavit was to confirm the truth of the matters previously raised, I exercised my discretion to receive the affidavit, notwithstanding the first respondent’s non-compliance with r 439. Although the first respondent’s inability to attend the hearing is explained on the grounds of his ill health, his failure to file an Amended Defence to meet the allegations in the pleadings and his failure to meet comprehensively serious allegations in the affidavits filed on behalf of the applicant are matters which can be taken into account in determining the overall force of the respondents’ evidence.

[11] Certain facts are not in dispute. Foremost among these are the arrangements, between Nicholls and the first respondent, whereby the latter had control of the relevant cheque books and relevant financial records. It is not contested that the first respondent frequently had at his disposal blank cheques which were signed by Nicholls and which further carried the endorsement that such cheques should be honoured in cash. The first respondent also admits that on occasions he forged Nicholls’s signature but claims to have done so at Nicholls’s directions. That is not a matter relevant to the issues arising on this application.

The Nanoka cheques

[12] With respect to the cheques made out to Ms Nanoka the only issue is whether Nicholls gave specific directions for this to be done and for the cash to be used in the manner described above. The subject cheques are listed in para 144 of the Statement of Nicholls². These cheques bear dates one week apart though in a few instances a fortnight apart. In one instance two cheques were issued on the same

² See Ex “DT14” to Affidavit of Dale Treanor sworn 16 May 2002

day. The amount of each cheque varied from week to week but over time showed a significant increase from \$1,340 in July 1998 to \$6,500 in May 2000. It is common ground that the subject cheques were not for translation services.

- [13] The notion that the subject cheques were used as a source of cash for the payment of tax deductible wages for a number of different employees requires some explanation. There is no conceivable advantage to the applicant or to the first respondent in undertaking such a time-consuming and detectable activity. If the suggestion is that wages were included so as to cloak the non-wage payments for the purpose of avoiding tax then such an illegal purpose could have been achieved less obviously by simply having those lesser payments described as translation fees. The sheer size of the payments purportedly for translation fees would be likely to attract the interest of any efficient auditor.
- [14] On behalf of the applicant Mr Henry of Counsel suggests that the explanation given by the first respondent is inherently implausible for a number of reasons. One of these – the repeated use of the Nanoka name when the use of a variety of names would have made detection less likely – he suggests was to facilitate the payment of the cheque in cash by someone intent on defrauding. Also Mr Henry asks why would Nicholls, who stood to derive such a small benefit, take such a risk and why would he expose himself to greater risk by reporting the matter to the police. Mr Henry goes on to submit that the behaviour is consistent with that of a fraudster who knows his employer would not closely scrutinise the financial records.
- [15] There are other issues which were raised which go to the credit of the first respondent. Ordinarily if the determination of the issue, whether judgment should be entered, depends on the credit of a party or a witness then that issue should be resolved at trial. For the applicant to succeed, it bears the onus of satisfying the court of the matters referred to in r 292(2) of UCPR. Once the applicant has adduced evidence to satisfy those matters, the evidentiary onus falls upon the respondent to identify circumstances which would disentitle the applicant to its judgment. See *Queensland Pork Pty Ltd v Lott*.³ The approach is to take the respondents' evidence, to the extent that it is credible, at its highest. Taking the respondents' evidence at its highest makes unnecessary any general assessment of the credibility of witnesses such as would allow findings of the various matters in dispute. What is required here is a determination of whether the respondents' assertions are credible at all.
- [16] Having considered the uncontested evidence about the role of the first respondent, his exclusive control over the books of account, his relationship with Nicholls and Nicholls' lack of supervision of the financial affairs of the practice, I find the suggestion that the first respondent was acting upon the detailed directions of Nicholls as being quite incredible. There was no point to Nicholls giving such directions and further the manner of its execution would expose him to a serious risk of detection and punishment. It is unlikely Nicholls would have reported the matter to the police if the circumstances were as the first respondent outlined them to be. I find the factual bases put forward by the first respondent on the matter of the Nanoka cheques are entirely without substance.

³ [2003] QCA 271; CA No 204 of 2003, 4 July 2003

- [17] The applicant has satisfied me that the various sums of money, purportedly paid for translation fees to Ms Nonaka were misappropriated from the applicant's funds and that in all the circumstances the first respondent has no real prospect of successfully defending this part of the claim against it. I would therefore order that summary judgment be entered against the first respondent in the sum of \$241,525.

Upward Street property

- [18] The uncontested evidence is that the property was purchased in the name of the second respondent, with the deposit being provided from the second respondent's bank account, but the balance purchase price and legal costs with a combined total of \$119,500 was drawn from the applicant's account. The cheque written out by the first respondent who recorded that the cheque was payable to Dr Papps for his fees.⁴
- [19] Dr Nicholls swears that he gave no authority for such use of the applicant's money. At an earlier time he and the first respondent had discussions about the joint purchase of a residential unit. Ultimately Nicholls agreed to the joint purchase on the basis that the first respondent would pay half the purchase price and outlays.
- [20] The first respondent asserts that the \$119,500 used to complete the purchase was part of his employment remuneration. This sum was purportedly to compensate for the inadequate salary he had received prior to 1 July 1998 when a contract of employment was agreed in writing. The first respondent further asserts that the record of the payment showing Dr Papps's name was done to make the payment deductible for tax purposes. Such an explanation makes no sense since the payment would have been deductible for the applicant even if it had been accurately described.
- [21] The first respondent's assertion caused me to examine the document which was relied upon by him as the contract of employment⁵ to increase his remuneration from \$100,000 to \$200,000 per annum. The document bears the signature of Nicholls who described the circumstances in which he was asked to sign it in his statement to police⁶. In short he thought the document he signed had to do with an application for finance some years earlier. The document does not have the appearance of a single complete agreement. There is discontinuity between the first and second pages. The latter page which bears the signature is more appropriate to a financial dealing than an employment contract. Mr Mellick on behalf of the respondents asserted that the document was prepared by Nicholls and produced for the first respondent's signature without prior notice.⁷ Whilst this seems rather unlikely, given its purpose was to double the first respondent's annual remuneration, there is no need to make findings about the origins of the document.
- [22] In terms of assessing the force of the evidence raised by the respondents, the written document is important because it establishes the time frame involved. The written agreement is dated 1 July 1998 indicating the commencement of the new wage regime. The payment of \$119,139 was made in January 1999. This led Mr Henry of Counsel to suggest that, if the document's purpose was to adjust remuneration,

⁴ See Ex "DT14" to Affidavit of Dale Treanor sworn 16 May 2002

⁵ See Ex "A" to the affidavit of Habib Abraham Mellick sworn 17 July 2002

⁶ See Ex "DT14" para 153-155

⁷ Para 10 Affidavit of H.A. Mellick sworn 16 July 2002

one would have expected it to have done so at the time that it was signed or within a reasonable time thereafter.

- [23] Mr Henry also refers to the affidavit of Ms Bundesen, chartered accountant, sworn 16 December 2002. Ms Bundesen examined the tax files of the first respondent and his wife. The tax returns did not disclose the payment of \$119,439 as income either for him or his wife. Other considerations reached by Ms Bundesen to which I have been referred go to matters of general credit. They are based on assumptions which have not been tested and cannot be regarded on this application.
- [24] As to the force of the first respondent's explanation, Mr Henry again argues that it is simply implausible for a number of reasons, including the inconsistency between the purpose of the payment and its timing; the purpose of the deception being tax fraud and the likelihood of Nicholls reporting the fraud to the police; and the consideration that, if tax fraud was the purpose, it would have been less obvious to claim the payment as legal expenses. Mr Henry submits the use of the doctor's name is more consistent with the first respondent trying to conceal his activity from his employer than the applicant attempting to conceal the activity from the tax authorities.
- [25] I am satisfied that the respondents' explanation for the use of the applicant's funds is entirely without substance. It is inconceivable that the applicant would engage in the deception by substituting the identification of the tax deductible remuneration for one employee for a tax deductible remuneration for another employee. Further, even if there were some taxation advantage to be gained by this fraudulent activity, then the question has to be asked why would Dr Nicholls report the matter to the police and thereby risk punishment for his fraudulent activity. The evidence put forward by the first respondent lacks basic credibility.
- [26] I have come to the view that the respondents have no real prospects of successfully defending this part of the claim and I would grant the declaration sought by the applicant. The relative shares of the property reflected by the value of the contributions referred to above is 90.3% (applicant) and 9.7% (respondents). This is the proportion, then, in which the interests in the property shall be held and the proportions in which the interest should be recorded on the Certificate of Title.

Directions

- [27] The parties have sought directions for the speedy determination of the outstanding issues between them. The basis for this request is the state of the first respondent's deteriorating health and his increasing dependence upon narcotic medication. There is the further complication that the criminal charges on related issues appear to have been delayed for the same reasons. If the first respondent is to be given an opportunity to be heard, it is necessary that the matter be listed for trial with priority. I am prepared to so order.

Orders

- [28] I make the following orders:-
1. Judgment for the applicant in the sum of \$241,525 together with interest thereon for that part of the claim relating to payments recorded as being made to Y. Nanoka.

2. A declaration that the second respondent holds the property at 5/14 Upward Street, Cairns and described as Lot 5 on BUP 70940 County Nares, Parish Cairns on trust for the applicant as to 90.3% thereof and for the second respondent as to 9.7% thereof.
3. I order that the second respondent do all acts and sign all documents necessary to transfer to the applicant, within 28 days of the order, his interest in the said property at Upward Street, Cairns so that the Certificate of Title to the property records the applicant and second respondent being tenants in common in the shares of 90.3% to the applicant and 9.7% to the second respondent.
4. I direct that, in the event of the failure or refusal by the second respondent to execute any necessary documents within the time aforesaid, the Registrar be authorised to execute such documents in the place and stead of the second respondent. An affidavit by the applicant or his solicitor deposing to such failure shall be sufficient evidence thereof.
5. I make the following further directions:-
 - (a) That an Amended Defence be filed within 28 days of the date hereof.
 - (b) That a Reply (if any) be delivered within 14 days from the receipt of the Amended Defence.
 - (c) That disclosure of documents occur within 14 days of the close of pleadings.
 - (d) That this matter be entered on the list of matters awaiting trial.
6. I give to each of the parties liberty to apply upon two days notice to other parties.
7. I order that the first and second respondent pay the applicant's costs of and incidental to this application to be assessed on the standard basis.