

SUPREME COURT OF QUEENSLAND

CITATION: *Marinades Pty Ltd v Kellahan* [2003] QSC 479

PARTIES: **MARINADES PTY LTD**
ACN 088977 217
(Applicant)
v
LESLIE GOERGE KELLAHAN and
SANDRA LILLIAN KELLAHAN
(Respondents)

FILE NO/S: 184 of 2003

DIVISION: Trial

PROCEEDING: Application for an Injunction

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 19 December 2003

DELIVERED AT: Cairns

HEARING DATE: 15 July 2003

JUDGE: Jones J

ORDER:

- 1. That the respondents within fourteen (14) days of the service of this order upon their agent, Drew Adrian Kellahan, execute and deliver to the solicitors for the applicant, an Australian and Securities Investment Commission Form 312 in respect of ASIC charge No 748942 in the form delivered to the respondent by the applicant's solicitors.**
- 2. That the respondents pay the costs of and incidental to this application to be assessed if not agreed on an indemnity basis.**
- 3. That the parties have liberty to apply on seven (7) days written notice.**

CATCHWORDS: CORPORATIONS – CORPORATE FINANCE – CHARGES – REGISTRATION OF CHARGES – GENERALLY – where pursuant to *Corporations Act* s 269(1) no memorandum of acknowledgment of satisfaction of, and release of premises from, a charge had been made – whether the Court should require that this be done pursuant to *Corporations Act* s 1324(1)
Corporations Act 2001 (Cth) s 269(1), s 1324(1)

COUNSEL:

SOLICITORS: Cameron A Price Lawyers for the applicant
No appearance by or on behalf of the respondents

- [1] This is an application pursuant to s 1324(2) of the *Corporations Act* (“the Act”) seeking an injunction requiring the respondents to comply with s 269(1) of the Act – namely that they or their duly appointed agent execute and deliver to the Australian Securities and Investment Commission (“ASIC”), in the prescribed form, notice of the discharge of a Registered Charge No. 748942 (“the charge”).
- [2] When the matter came on for hearing the respondents did not appear to oppose the application. The affidavit of service by Christopher Rose refers to a personal service of the relevant documents on Andrew Kellahan (also known as Drew Kellahan) who was said to hold a Power of Attorney on behalf of the respondents. The affidavit further refers to facsimile confirmation from the respondents of their receipt of the application and supporting document. I am satisfied on this material that the application has been properly brought to the attention of the respondents.
- [3] The charge was registered on 22 May 2000 (see ex “A” to the affidavit of C H Rose sworn 15 April 2003) to secure performance by the applicant of the terms of the lease of business premises from the respondents.
- [4] The premises were subject to a mortgage in favour of National Australia Bank (“NAB”) which ultimately became mortgagee in possession and thereby entitled to the benefit of the charge.
- [5] By contract dated 11 December 2001 the land, the subject of the lease, was sold by NAB making the charge redundant.
- [6] Despite these events ASIC requires the release of the charge in form 312 signed by the respondents to give effect to the release. Requests by the applicant made both orally and in writing to the respondents and their agent, Drew Kellahan, had not been effective in achieving this outcome.
- [7] In the absence of any explanation from the respondents as to why the charge should remain, the evidence indicates that it is no longer of any effect and the formal process of discharge should be completed. Section 269(1) provides:-
 - “Where, with respect to a charge registered under this Part:
 - (a) the debt or other liability the payment or discharge of which was secured by the charge has been paid or discharged in whole or in part; or
 - (b) the property charged or part of that property is released from the charge;
 the person who was the holder of the charge at the time when the debt or other liability was so paid or discharged or the property or part of the property was released must, within 14 days after receipt of a request in writing made by the company on whose property the charge exists, give to the company a memorandum in the prescribed form acknowledging that the debt or other liability has been paid or discharged in whole or in part or that the property or that part of it is no longer subject to the charge, as the case may be.”

- [8] It is this obligation with which the respondents wilfully and, apparently without cause, refused to fulfil. Their conduct thus is a direct contravention of the Act.
- [9] The means by which the respondents' refusal can be dealt with is pursuant to an application under s 1324(1) which is in the following terms:-
 "Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
 (a) a contravention of this Act; or
 ...
 the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing."
- [10] In order to bring the matter to finality and to allow the records of ASIC correctly to record the relevant interests affecting the company, I propose to grant the injunction sought.
- [11] Further, the unexplained, uncooperative attitude of the respondents has resulted in the need for this application. This is a matter which has properly to be taken into account on the question of costs which, in the circumstances, I propose to award against the respondent to be assessed on an indemnity basis.
- [12] I make orders in terms of the draft initialled by me and placed with the papers.
- [13] 1. That the respondents within fourteen (14) days of the service of this order upon their agent, Drew Adrian Kellahan, execute and deliver to the solicitors for the applicant, an Australian and Securities Investment Commission Form 312 in respect of ASIC charge No 748942 in the form delivered to the respondent by the applicant's solicitors.
 2. That the respondents pay the costs of and incidental to this application to be assessed if not agreed on an indemnity basis.
 3. That the parties have liberty to apply on seven (7) days written notice.