

SUPREME COURT OF QUEENSLAND

CITATION: *International Jockey School v Walsh & Ors* [2007] QSC 227

PARTIES: **INTERNATIONAL JOCKEY SCHOOL PTY LTD**

(ACN 085 035 383)

(Plaintiff/Respondent)

v

JUSTIN WALSH

(First Defendant/Applicant)

and

JOHN GEORGAKIS

(Second Defendant/Applicant)

and

RAY MOLONY

(Third Party)

FILE NO/S: S723 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court

DELIVERED ON: 30 August 2007

DELIVERED AT: Supreme Court Townsville

HEARING DATE: 27 August 2007

JUDGES: Cullinane J

ORDER:

The application for judgment is dismissed with costs to be assessed.

CATCHWORDS: PROCEDURE - SUMMARY JUDGMENT – where defendant/applicants seek an order against plaintiff/respondent under Rule 293 of the *Uniform Civil Procedure Rules* – whether summary judgment can be entered.

Uniform Civil Procedure Rules 1999, r 293.

Alghussein Establishment v Eaton College (1988) 1 WLR

587, considered.

Doe d Brian v Bancks 106 ER 984 at 987, considered.

Grant v John Grant & Sons Pty Ltd (1954) 91 CLR 112, followed.

Torrens Aloha Pty Ltd v Citibank NA (1997) 77 FCA, cited.

COUNSEL: R.N Traves SC, with R J Anderson for the applicant.

S.J English for the respondent.

SOLICITORS: Ebsworth and Ebsworth Lawyers for the applicant.

V J Butler & Associates for the respondent.

[1] The defendants apply pursuant to Rule 293 of the UCPR for judgment against the plaintiff. This rule permits a more robust approach than was permissible under the superseded rules.

[2] The plaintiff respondent has instituted proceedings against the defendant applicants claiming damages for intimidation and on other grounds.

[3] The following is a brief summary of the relevant history.

Ray Molony (the third party in these proceedings) and the respondent company instituted proceedings against a company, Fred Marsh Pty Ltd. Some time after the institution of those proceedings that company went into liquidation. The applicant, Georgakis is the liquidator of the company. The applicant, Walsh, was a partner in a firm of accountants with Georgakis and is sued upon the basis of his personal dealings with Molony, who was the respondent's agent. It is the respondent's claim that the defendant, Walsh, at all times acted on behalf of the defendant, Georgakis.

[4] The respondent was ordered to pay an amount by way of security for costs in those proceedings and because it was not able to do so the action was stayed but the action brought by Molony proceeded to a hearing before a Judge and jury. This occupied a significant number of days and resulted in a verdict for the defendant, Fred Marsh Pty Ltd, then in liquidation. It appears that this was essentially because of a failure on the part of Molony to establish any damages.

[5] Approximately a month after the jury's verdict the respondent paid into court the amount ordered to be paid by way of security and this cleared the way for the respondent's action to proceed.

[6] Molony appealed and the applicants foreshadowed an application to the Court of Appeal for security for costs. All of these matters were overtaken by the negotiations which then commenced between the parties in relation to a possible settlement of all claims.

[7] I was taken to some of the correspondence which passed between the parties during this period. This correspondence is set out in an exhibit to the affidavit of Phillip Anthony Hunter filed on 8 May 2007. Each of the parties claimed in this correspondence that they had been made the subject of threats by the other.

- [8] Molony swore an affidavit and made a statutory declaration, copies of which he sent to the defendant, Walsh. These (particularly the affidavit) set out threats which Molony claims were made by Walsh and which he says were recorded.
- [9] In a letter of 10 August 2005, the solicitors for the applicants wrote to Molony complaining inter alia about the threatening nature of his correspondence.
- [10] Molony, in a later letter of 25 August 2005 to the solicitors for the applicants, sought (amongst other things) confirmation that certain threats which he claimed had been made to him would not be carried out.
- [11] It is common ground that the negotiations resulted in a compromise of the actions against Fred Marsh Pty Ltd.
- [12] A sum of \$175,000 was paid pursuant to the compromise.
- [13] The deed of release, discharge and indemnity is the first document exhibited to Mr Hunter's affidavit.
- [14] It is desirable if I set it out in full:

“Deed of Release, Discharge & Indemnity

IN CONSIDERATION of:

- (a) the payment by the persons described in the First Schedule (“the Releasees”) to the persons described in the Second Schedule (“the Releasers”) the sum of money referred to in the Third Schedule (“the settlement money”);
- (b) the waiver by the first-named Releasee of the right to enforce the costs orders which the first-named Releasee has obtained against the Releasers in the proceeding described in the Fifth Schedule and the related proceedings described in the Sixth Schedule;

in full and final settlement satisfaction and discharge of all claims whatsoever which the Releasers, or any person on behalf of the Releasers may have (including but not limited to those arising as a result of or in any way connected with the Matter as defined in the Fourth Schedule) the Releasers, jointly and severally, hereby:-

1. Release discharge and forever hold harmless jointly and severally the Releasees with respect to (and agree to indemnify and keep indemnified the Releasees in respect of any and all loss arising as a result of) any and all causes of action, claims (including, but without limiting the generality of the foregoing, claims for legal costs and consequential loss of profit), demands, actions, suits or proceedings (including, but without limiting the generality of the foregoing, the proceeding described in the Fifth Schedule (“the present proceeding”)) of whatsoever nature, which the Releasers, or any person on behalf of the Releasers, may now have or at any time heretofore had or at any time hereafter may have or but for the execution of this Deed of Release, Discharge and Indemnity could have against the Releasees (and each of them).
2. Agree that this Deed of Release, Discharge and Indemnity may be pleaded as a bar to any action, suit or proceeding (including the present proceeding) commenced now or taken at any time by the Releasers against the Releasees (and each of them) with respect to or in any way connected with the Matter.
3. Agree to file a Notice of Discontinuance in relation to the present proceeding.
4. Agree to consent to orders in Court of Appeal proceeding 5231 of 2005 to dismiss that appeal with no order as to costs.

5. Agree that, pursuant to this Deed of Release, Discharge and Indemnity, the proofs of debt that they lodged in the liquidation of ACN 009 697 367 Pty Ltd (in Liquidation) on or about 12 December 2001 will be rejected by the Liquidator and that they will not lodge any further proofs of debts or claims in the liquidation of ACN 009 697 367 Pty Ltd (in liquidation).
6. Acknowledge and agree that the payment of the settlement money is made without any admission of liability on the part of the Releasees (or any of them).
7. Acknowledge that the purpose of this Deed is to achieve finality of the Matter as between the Releasors and Releasees because:
 - (a) Mr Fred Marsh died on 8 October 2001 and his estate will be finalised following execution of this Deed;
 - (b) ACN 009 697 367 Pty Ltd (formerly Fred Marsh Pty Ltd) (ACN 009 697 367) is in liquidation and, after execution of this Deed and payment of the settlement money, will be deregistered

In the circumstances and for the sake of clarity, the Releasors acknowledge and accept that this Deed extends to any other matters that the Releasors may have against the Releasees of whatsoever nature whether arising out of the Matter or otherwise.

8. Indemnify and keep indemnified the Releasees from any loss and damage (including legal costs on a solicitor and client basis) suffered as a result of any other party making any claim or bringing any action against the Releasees in relation to the matter.
9. Warrant that they have received independent legal advice in relation to this Release Discharge and Indemnity prior to them signing this Deed of Release, Discharge and Indemnity.
10. Warrant that they have not assigned their rights of action against any of the Releasees to any other person.
11. Warrant that International Jockey School Pty Ltd is, at the date of the signing of this Deed of Release, Discharge and Indemnity, solvent and that the directors have passed the necessary resolutions to enter into this Deed of Release, Discharge and Indemnity.
12. Direct that the settlement money be paid to International Jockey School Pty Ltd and that Mr Ray Molony's receipt for payment of the settlement money, on behalf of International Jockey School Pty Ltd, shall constitute a valid discharge.
13. Covenant with the Releasees that the terms of the settlement of the present proceeding shall remain confidential as between the Releasees, the Releasors and their respective solicitors and shall not be disclosed either directly or indirectly by the Releasors or their solicitors except to the extent required by law or for the purpose of enforcement of the terms of this Deed of Release, Discharge and Indemnity or with the written authority of the Releasees.

In the construction and interpretation of this Deed of Release, Discharge and Indemnity, where the circumstances so require:

- The singular shall include the plural and vice versa; and
- The neuter shall include the personal gender and vice versa; and
- The word 'person' shall include natural persons, Bodies Corporate or voluntary associations and also the person's heirs, executors, administrators, successors and/or assigns.

- The Releasees:
- ACN 009 697 367 Pty Ltd (formerly Fred Marsh Pty Ltd)
 - (ACN 009 697 367) (in Liquidation);
 - The directors of ACN 009 697 367 Pty Ltd (Formerly Fred Marsh Pty Ltd (ACN 009 697 367) (in Liquidation));
 - The shareholders of ACN 009 697 367 Pty Ltd (formerly Fred Marsh Pty Ltd) (ACN 009 697 367) (in Liquidation);
 - The Liquidator, ACN 009 697 367 Pty Ltd (formerly Fred Marsh Pty Ltd) (ACN 009 697 367) (in Liquidation);
 - The partners, officers, employees and agents of Ernst & Young, Chartered Accountants and Business Advisors regarding the liquidation of ACN 009 697 367 Pty Ltd (formerly Fred Marsh Pty Ltd)
 - (ACN 009 697 367) (in Liquidation);
 - The executors and beneficiaries of the estate of the late Mr Frederick Percy Marsh;
 - Mr Alwyn Bailey.

THE SECOND SCHEDULE

The Releasers: RayMolony
International Jockey School Pty Ltd (ACN 085 035 383)

THE THIRD SCHEDULE

The Settlement Money: \$175,000.00 (ONE HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS ONLY) inclusive of legal costs and interest.

THE FOURTH SCHEDULE

The Matter: The facts, matters and circumstances giving rise to the claims made by the Releasers against the first-named Releasee as particularised in the pleadings and amended pleadings commenced by claim no. 85/2001 in the Supreme Court of Queensland, Cairns Registry and the proofs of debt lodged by the Releasers with the Liquidator of ACN 009 697 367 Pty Ltd (formerly Fred Marsh Pty Ltd) (ACN 009 697 367) (in Liquidation);

THE FIFTH SCHEDULE

The Proceeding: The proceeding commenced by the Releasers against the first-named Releasee in the Supreme Court of Queensland, Cairns Registry (no 85/2001).

THE SIXTH SCHEDULE

The Related Proceedings: Supreme Court of Queensland, Court of Appeal proceedings no 6356/2002, 12014/2003 and 5231/2005.”

[15] In its statement of claim by paragraph 31 the respondent alleges:

“The settlement deed extinguished all the Plaintiff’s causes of action, claims, demands, entitlements and suits in proceeding S85/01.”

It is alleged that the deed was entered into because the defendants tortiously intimidated Molony on behalf of the respondent with intent to cause harm to the respondent. Claims are made also upon the basis of abuse of process.

- [16] Damages are claimed upon the basis of what the plaintiff lost as a result of entering into the deed, namely the chance of a judicial determination which would result in a substantial award of damages less the sum of \$175,000. There is also a claim for exemplary damages and interest.
- [17] It is common ground that the issue between the parties will be whether the release for which the deed provides extends to the claim made by the respondent company against the defendants for intimidation and abuse of process.
- [18] As will be seen the matter referred to in the deed is defined as “the facts and matters and circumstances giving rise to the claims made by the releasors against the first named releasee as particularised in the pleadings and amended pleadings commenced by claim number 85/2001 in the Supreme Court of Queensland, Cairns Registry and the proofs of debt lodged by the releasors with the liquidator of ACN 009 697 367 Pty Ltd formerly Fred Marsh Pty Ltd (in liquidation)”.
- [19] The deed is said to extend to all “claims whatsoever which the releasors, or any person on their behalf may have (including but not limited to those arising as a result of or in any way connected with the matter as defined in the fourth schedule)”.
- [20] Clause 2 is expressed in the form of an acknowledgment that the deed extends to any action, suit or proceeding “with respect to or in any way connected with the matter”.
- [21] Clause 7 if accepted at face value has an import of extraordinary width.
- [22] Notwithstanding the width of the language used in the deed it has to be construed in accordance with well-established principles.
- [23] The leading Australian case is *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112.
- [24] In that case Dixon CJ, Fullagar, Kitto & Taylor JJJ in their joint judgment put the matter this way at pages 125 - 126:

“From a very early time the Court of chancery applied its special doctrines to the unconscientious reliance upon the general words of a release. In his Historical Sketch of the Equitable Jurisdiction of the Court of Chancery at p. 246, Sir Duncan Kerly said: ‘The peculiar construction of releases in equity, which restricts their operation to matters within the contemplation of the parties, rests also partly on mistake of expression, and partly on mistake going to the substance of the transaction. This construction accorded with principles settled before the present period, and was, in fact, a development of the rule that words are to be understood secundum subjectam materiam, for the ‘chief and governing rule of construction is drawn from the end or cause.’ He refers to ‘A Treatise on Equity’, published anonymously in 1737, which Sir William Holdsworth attributed to Henry Ballow (see History of English Law, vol. 12, p. 191) and quotes the following: ‘General words in a release of all demands, or the like, shall be restrained by the particular occasion, and shall be intended only of all demands concerning the thing released.’: see Fonblanque’s Fifth Ed. of the Treatise, p. 440. Story in his Equity Jurisprudence, s. 145, said simply that the

court restrains the instrument to the purposes of the bargain and confines the release to the right intended to be released or extinguished. Sir Frederick Pollock, in his *Principles of Contract*, 13th ed. (1920), p. 412, after referring to the power assumed by courts both of law and equity to put a restricted construction on general words when it appears on the face of the instrument that it cannot have been the real intention of the parties that they should be taken in their apparent sense, proceeds: Courts of equity went farther, and did the like if the same conviction could be arrived at by evidence external to the instrument.’ The learned author then says: ‘This jurisdiction in modern times a well established one, is exercised chiefly in dealing with releases. ‘The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given.’ This includes the proposition that in equity ‘a release shall not be construed as applying to something of which the party executing it was ignorant.’ There is at least much reason to think that it matters not whether such ignorance was caused by a mistake of fact or of law.’

Two statements of Lord Hardwicke may be quoted. In *Cole v Gibson* (1) he spoke of ‘it being common in equity to restrain a general release to what was under consideration at the time of giving it’, and in *Ramsden v Hylton* (2) he said: ‘it is certain that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited which was under the contemplation of the parties, and intended to be released’ (3). Turning to equity, his Lordship continued: ‘It is impossible ... to imply within the general release that which neither party could have under consideration and which it is admitted neither side knew of.’

These principles have been applied many times. See for example *Torrens Aloha Pty Ltd v Citibank NA* (1997) 77 FCA.

- [25] The respondent relies upon this case and contends that on a proper construction of the deed in accordance with the principles enunciated in that case a court would read it down and confine its effect and thus deny the applicants the immunity claimed.
- [26] It seems to me that this must be arguable.
- [27] In addition I think it is open to contend that a more general principle comes into play in circumstances such as those which are said to exist here. As Holroyd J said in *Doe d Brian v Bancks* 106 ER 984 at 987: “Besides, I take it to be an universal principle of law and justice, that no man can take advantage of his own wrong. Now it would be most inconsistent with that principle, to permit the defendant to protect himself against the consequences of this action by afterwards setting up his own wrongful act at a former period.”
- [28] See *Alghussein Establishment v Eaton College* (1988) 1 WLR 587 in which the House of Lords surveyed the authorities dealing with this general principle. It is of course unnecessary here to determine whether there is any obstacle to the reliance of the respondent on this principle. On the respondent’s case the applicants seek to rely upon the terms of a deed procured by the intimidatory conduct which is the essence of the respondent’s case against them.

- [29] In these circumstances the matter must in my view proceed to trial.
- [30] The application for judgment is dismissed with costs to be assessed.