[2007] QSC 325

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ATKINSON J

No 2959 of 2005

Y	Applicant
and	
NI	Respondent
And	
SI	Defendant
And	
MAINRIVER PTY LTD	Respondent
And	
FUJISAWAIKAKOBYO PTY LTD ACN 059698255	Defendant

BRISBANE

..DATE 22/10/2007

ORDER

HER HONOUR: The hearing today concerned a number of applications made in a part 19 of the Property Law Act matter which concerns the property settlement on the breakdown of a de facto relationship between the applicant Y and the first respondent NI.

This matter commenced in 2005 and has been making a slow and sometimes tortured progress through this Court. Many orders have been made in this matter, including a declaration that there was a de facto relationship between the couple, opportunities for the first respondent Mr NI to obtain expert evidence as to his apparently extensive assets in Japan which in the end proved wholly unsatisfactory, and orders made by me on 8 March 2007, then consent orders for directions in this matter made on 12 July 2007.

I shall endeavour to deal with each of the applications in this matter seriatim.

The first matters I shall deal with are the applications made by the first, second and third respondents. The second and third respondents are companies under the control of the first respondent.

The first, second and third respondents seek an order that pursuant to section 333 or 341 of the Property Law Act that they pay the outstanding invoice of Ernst & Young out of the Australian assets restrained by an order made on the 13th of May 2005 on account of the current invoices rendered with

respect to the report being prepared by Ernst & Young with respect to the valuation of the Japanese assets.

To understand that application one has to go to the order of the Court made on 8 March 2007. On that date the Court ordered that in relation to the assets held by the first respondent, including any company or trust with which he was associated which were held in Japan, Grant Murdoch of Ernst & Young was to be engaged as a joint expert to undertake a valuation of each asset.

There were other subsidiary orders, but with regard to the cost of obtaining that expert report, particularly in view of the history of the matter, it was ordered that in relation to the various appointments of a single expert witness the costs of such valuation could be borne initially by the first respondent provided that the issue of the costs and proportionate liability of the same be an issue reserved to the trial Judge.

The first respondent now essentially seeks a variation of that order. I accept that the Court has the power to vary an interlocutory order which has been made; see *R v. Pettigrew* [1997] 1 QdR 601 at 608 to 610; *Fylas Pty Ltd v. Vynal Pty Ltd* [1992] 2 QdR 593 at 599; and *re Rothwells Limited* [1990] 2 QdR 181 at 187. That power is exercised where the administration of justice requires it or where it is in the interests of justice to do so. See also *O v. L* [2005] Family Court of Australia.

So accepting that I have the power to do so, the question is ought I do so in this case having made that order after hearing argument on the previous occasion?

In support of the application the first respondent has provided what can only be described as the barest of material. He has exhibited an invoice for $70,000 which has been received from the expert, but does not exhibit the document which was an attachment to that invoice which sets out the work that's been done. The invoice is dated 26 July 2007 and has 14 days for payment. No explanation has been given for any attempts to pay it, of any correspondence about nonpayment. The material which has been provided from Ernst & Young was not provided to the Court by the first respondent, but some of that material was provided to the Court by the plaintiff over the objection of the first respondent.

Essentially the first respondent argues that he cannot afford to pay for the accountant's report. The evidence of that is found only in his affidavit filed on the 3rd of October 2007. In paragraph 10 he asserts that he does not have sufficient cash moneys to meet his current day-to-day living expenses and "to fund the report of Ernst & Young and my own legal costs as well as the legal costs associated with the other parties to these proceedings", and at paragraph 21 he more or less repeats that statement. He exhibits no documents in an endeavour to try and make good what is essentially an assertion.

The plaintiff has exhibited a copious amount of material which suggests that the first respondent is, in fact, extremely wealthy with a large amount of property in Japan. The preliminary investigations by Ernst & Young appear to support that. I am not satisfied on the evidence presented to me that the interests of justice require me to vary the order as to the payment of the costs of the expert made by me on 8 March 2007.

The second application made by the first, second and third respondents is that they receive $300,000 from the Australian assets restrained by the order made on 13 May 2005 on account of their anticipated legal costs and outlays. There are circumstances, of course, in which the legal costs of a party who has moneys restrained ought to be paid out of those restrained moneys. However, of course, it is necessary for proper evidence to be put before the Court to justify such a claim.

In this case there is no affidavit from a solicitor as to the likely legal costs. The only estimate appears to be provided by the first respondent who is not a solicitor and does not reveal the source of his estimates. His estimates vary widely. The preparation for attendance in mediation he estimates to be from 20 to $50,000, engaging and briefing junior counsel with respect to settlement negotiations in the mediation 20 to $30,000, and preparing a brief and jointly instructing a mediator for the purposes of formal mediation,

including paying the mediator for mediation up to two days, estimated further costs approximately 20,000 to $40,000.

...

HER HONOUR: I deviate to mention that the fourth respondent has also sought her costs through to the end of the mediation and for the most part that is properly supported by an affidavit from her solicitor and seems to me to be in the terms of quantum entirely reasonable.

It therefore seems to me that it would be reasonable to allow $50,000 to the first, second and third defendants for their anticipated legal costs to the end of the mediation.

I should mention, lest it be thought that this is the thin end of the wedge, that by the time of the mediation the expert report from Ernst & Young should have been received and any doubts as to the first respondent's financial position in Japan should have been resolved. This is not meant to be the first of a series of rolling orders for the payment of the legal costs out of the Australian assets, but it is intended that the matter is able to be financed through to the end of the mediation.

I should say with regard to the legal costs that any suggestion that the Court would order the payment out of the Australian assets of $100,000 to review the expert report is misconceived.

The third order sought is the payment of further funds from

the Australian assets which have been restrained to meet "the expenses associated with the report being prepared by Grant Murdoch of Ernst & Young". That matter has already been covered in these reasons and for the reasons given will not be allowed.

The fourth order sought is that the first respondent receive sufficient funds from the Australian assets restrained to meet his land tax liabilities or any taxation liabilities as may be assessed by the Australian Tax Office or the relevant land tax regulatory body from time to time.

In my view, it is appropriate to order that the land tax assessed on the property which has been restrained be able to be paid from the assets which have been restrained. Those liabilities are known and are in the amount of $38,636.40 and $27,490.60 and I will order that those land tax liabilities are able to be paid from the restrained sum.

Any liability of the taxation office has not been crystallised and I will not make any order with respect to it.

The plaintiff seeks an order for further disclosure against the first respondent. Not many arguments were raised in oral argument against this application and no answer was given to the rule 444 letter that was sent with regard to that. The arguments raised in oral argument today were that various financial records and statements relating to the first respondent and his companies in Japan didn't need to be

provided to the plaintiff because they had been provided to the expert. That argument is, of course, lacking in substance. Of course, a duty of disclosure applies to them.

I am prepared to make all the orders for disclosure which are sought by the applicant with the exception of subparagraph (j).
I'm not convinced that the way in which those documents have been described , if they exist, makes them disclosable by the first defendant. Mr Hackett conceded that they could have been better described, which is perhaps a gentle way of saying that they have been wrongly described and I will make no order with regard to paragraph (j), but the other orders for disclosure will be made in accordance with the submission made by counsel for the applicant. The respondents will have till the 21st of December 2007 to make such disclosure.

A guillotine order was sought in respect of nondisclosure and given the history of this matter, it is certainly a case in which the parties should be put on strict compliance, however, given the complexity of the disclosure requirements a judicial decision would, in my view, have to be made that the disclosure had not been made in accordance with the order. If such disclosure is not made, then the applicant should apply to the Court to have the first, second and third respondents' defence struck out.

The applicant has also sought an order for the payment of the

sum of $7,000 ordered to be paid by way of costs on 17 May 2007 and an order that the first, second and third defendants defence be struck out if no such payment is made. It seems to me that that payment ought be made.

The first, second and third defendants have not made that payment in spite of the fact that the order was made by me on 17 May 2007.

The first, second and third respondents have a duty to make that payment and in my view if it is not made within a reasonable time then it is appropriate to strike out the first, second and third defendants' defence.

...

HER HONOUR: In accordance with the submissions made by counsel on behalf of the first and second and third respondents, the first respondent has until 4 p.m. on the 16th of November 2007 to make that payment. If the payment is not made to the solicitors for the applicant by that date, upon the solicitors for the applicant filing an affidavit to that effect, the first, second and third defendants' defence will be struck out.

The next application is an application for disclosure against the fourth defendant. The fourth defendant does seem to be in a different position to the first, second and third defendants. So far as her attempts to comply with her duty of disclosure, her solicitors appear to have been endeavouring to comply with the requirements.

There does appear to be some documents which still need to be disclosed, but the rule 444 request made by the applicant has some difficulties with it in that it describes some documents which prima facie appear to be privileged and there has been a detailed response to it. There are still some matters to be worked out between the parties, but with professional diligence on both sides it appears to me there should be no difficulty in that disclosure being made and I order that the fourth respondent make any further disclosure by 21 December 2007.

The reason for the length of time given for that is that it was submitted by counsel for the fourth respondent that given the distance and language difficulties further time would be required to do that and so I have given the fourth respondent all the time that should be necessary to comply with the duty of disclosure.

I have also been asked to allow the fourth respondent to receive money out of the restrained moneys to allow her to fund the litigation through to the end of the mediation. As I previously observed, that application is supported by an affidavit from her solicitor and I accept that the costs estimates are reasonable and that she appears to have no assets and that the pleadings to date disclose that she has an arguable interest in the assets in Australia.

In those circumstances, I am prepared to allow for $50,000 to

be paid out of the restrained assets in the first instance to fund her appearance in this litigation through to the end of the mediation.

...

HER HONOUR: I will order that the costs of the mediator be paid out of the restrained funds.

I direct that the plaintiff provide a case plan to me containing all of these orders plus any other orders to get the matter through to the end of mediation with the consent of the other parties, if possible, if not, then the case plan proposed by the plaintiff in addition to the orders made by me today. If the respondents do not agree to a reasonable case plan and I find that that consent was not reasonably given, then the respondents will have to pay the costs of any application to me to make that case plan the order of the Court.

...

HER HONOUR: I order that the costs of today be the plaintiff's and the fourth respondent's costs in any event.

...

HER HONOUR: The case plan should include an order that if it doesn't settle at mediation, the directions that need to be given to take it right through to request for trial dates.

...

HER HONOUR: What I am saying to the plaintiff's solicitor in preparing up the case plan is that you would have to work on the assumption that all parties will comply with orders made by the Court.