

SUPREME COURT OF QUEENSLAND

CITATION: *D v H & Ors* [2008] QSC 35

PARTIES: **D**
(applicant)
v
H
(respondent)
CHANNEL SEVEN BRISBANE PTY LTD
(non-party)

FILE NO/S: BS 3514 of 2007

DIVISION: Trial Division

PROCEEDING: Originating Application

DELIVERED ON: 4 March 2008

DELIVERED AT: Brisbane

HEARING DATE: 3 March 2008

JUDGE: de Jersey CJ

ORDER: **That the application be dismissed, with costs to be assessed on the standard basis.**

CATCHWORDS: REAL PROPERTY – GENERAL PRINCIPLES – INCIDENTS OF ESTATES AND INTERESTS IN LAND – Where statutory limitation on publication of account of a de factor property proceeding – where one party gave information to media outlet – whether any publication based on that information would breach statute – whether media outlet should be required to seek court approval of any proposed publication – whether court should intervene where in any event media outlet affirmed its intent to honour the statutory restraint – whether the party who gave information to media should be required to depose to what was communicated – role of court in the establishment of any contravention.

Family Law Act 1975 (Cth), s121
Property Law Act 1974 (Qld), s268, s342, s343, s344

Hinchcliffe v Commissioner of Australian Federal Police
(2001) 118 FCR 308
In the Marriage of Gibb (1978) FLC 90
In the Marriage of Schwarzkopff; Fitzgibbon v Barker (1992)
16 Fam LR 539

COUNSEL: P Hackett for the applicant
A Cooper for the respondent
P Applegarth SC for the non-party

SOLICITORS: Evans and Co. for the applicant
Barry and Nilsson for the respondent
Freehills for the non-party

- [1] **de Jersey CJ:** The applicant D and the respondent H are parties to a proceeding in this Court for a property adjustment order pursuant to Part 19 of the *Property Law Act 1974*. It is consequent upon the breakdown of their de facto relationship.
- [2] In an affidavit filed in that proceeding, H refers to a deed into which she and the applicant entered in June 1993. The deed provided for a division of property should the de facto relationship come to an end. H also referred in that affidavit to a house built by the applicant which was said to encroach onto forestry land, rendering it liable to a demolition order.
- [3] The applicant's solicitor, Mr Evans, deposes to a conversation with H last Friday, 29 February, in which H informed him that she had contacted Today Tonight (a program aired on Channel 7) and provided them with information 'about the applicant and the issues in the proceedings', adding: 'Why would it affect the proceedings, it is just the truth?'
- [4] The solicitor made that contact with H following upon events on Thursday, 28 February. The solicitor deposes to then being informed by the applicant of an attempt to interview him on 28 February at a building site. He was approached by a cameraman, a person holding a recording device and another male person. One of the men 'started to confrontationally interview him and made reference to "H" (being H, the respondent in these proceedings) and made references to "a previous deed" and "building a house on the wrong land". The solicitor continues: 'The applicant informed me that the interviewer was waving documents around which looked like an affidavit and a document which he called "a deed".'
- [5] The *Property Law Act* limits the publication of 'an account of a de facto proceeding'. That is defined (s 268) as 'an account of all or part of a proceeding under this part'. Section 344 provides that 'a person must not publish an account of a de facto proceeding other than under s 342 or s 343'. Contravention of that prohibition is an offence, and a proceeding in respect of such an offence 'may be started only with the written consent of the Director of Public Prosecutions' (subsection (2)).
- [6] Section 342 authorises publication in certain situations. Examples are communication to a body responsible for 'disciplining members of the legal profession', and to a legal aid authority 'for use in deciding whether legal aid should be provided'. None of the situations referred to in s 342 would apply here. Section 343 authorises the publication of an account of a de facto proceeding provided the

account does not identify a party, a witness, other persons involved in relevant matters, or related or associated persons.

- [7] The solicitor for the applicant asserted to the respondent Channel 7 that the network had been supplied with an account of a de facto proceeding in contravention of s 343, and that follow-on publication by the network would infringe the legislative prohibition. The solicitor sought ‘a written undertaking that your network and/or its subsidiary media outlets will not air or publish in any way, any story about our client’. In response, the solicitor for Channel 7 said that his client was ‘well aware of its obligations to ensure that it does not report matters so as to breach the provisions of the *Property Law Act*’. The final position reached last Friday, was Channel 7’s offer of ‘an undertaking not to publish any story’ until 5.00 pm on Tuesday, 4 March 2008.
- [8] In his application filed by leave at the hearing yesterday, the applicant sought a broadly cast injunction against Channel 7, restraining it from publishing ‘information about or pictorially depicting the respondent ... and/or the applicant ... and/or about any matter raised in the affidavits filed ... in this proceeding’. The applicant also sought an order that the respondent file an affidavit setting out ‘whether she has supplied information to the non-party or in the case of a claim by her for privilege against self-incrimination, a deposition that she makes the claim for privilege ...’.
- [9] Mr Hackett, who appeared for the applicant, made clear that the applicant sought to forestall only any breach of s 344. The applicant’s affidavits may have suggested an attempt to restrain alleged defamation (for example, see para 31 of his 39 paragraph affidavit); and para 23 of Mr Hackett’s outline of argument referred to avoiding ‘scandalization’ of court processes, suggesting contempt of court. But as I say, the matter was argued on the express basis that only s 344 of the *Property Law Act* was in issue.
- [10] Mr Applegarth, who appeared for Channel 7, emphasised that on the material before the Court, his client had not yet determined whether to run any relevant segment on the program ‘Today Tonight’, and that his client, well aware of its obligations under the legislation, intends to comply with them and ‘ensure that it does not report matters so as to breach the provisions of the *Property Law Act*’.
- [11] In this context, the applicant sought an order that Channel 7 ‘be restrained from publishing any matter of and concerning this proceeding without the leave of the Court ...’. Obviously enough, this is an attempt to compel Channel 7 to disclose to the Court, in advance of any publication, the content of any intended publication, so that the Court may form a view whether the publication would contravene s 344 of the *Property Law Act*.
- [12] A comparable statutory regime under the *Family Law Act* 1975 authorises ‘publication of accounts of proceedings, where those accounts have been approved by the Court’ – s 121(9)(g). The only similar provision in s 342 of the *Property Law Act*, which sets out situations in which publication is authorised, is ‘publishing

a notice or report about the de facto proceeding by direction of a court' (subsection 1(d)). There is a plain distinction between the Court's 'approving' the content of an intended publication under s 121 of the *Family Law Act*, and the Court's actually 'directing' that a publication be made, under s 342 of the *Property Law Act*. In respect of the latter provision, I very much doubt the legislature had in mind a situation like this.

- [13] The application amounts to an attempt to compel Channel 7 to seek what would amount to an advisory opinion from the Court whether the publication of a particular segment would infringe s 344. It would not be appropriate for the Court to entertain such an application, especially where Channel 7 has affirmed its consciousness of the statutory limitation and its intention to observe it, and where Channel 7 has not indicated a willingness to seek such guidance from the Court. If Channel 7 should happen to breach the prohibition, then it may be prosecuted, subject to the written consent of the Director of Public Prosecutions. But there is no ground for inferring that Channel 7 is heading towards a breach of the prohibition.
- [14] In any event, there is a tenable view that a threatened breach of such a statutory prohibition should not lead to the grant of an injunction. Section 121 of the *Family Law Act*, comparably with s 342 of the *Property Law Act*, provides that a prosecution for contravention 'shall not be commenced except by, or with the written consent of, the Director of Public Prosecutions'. The Full Court of the Family Court, dealing with the case of *In the Marriage of Schwarzkopff; Fitzgibbon v Barker* (1992) 16 Fam LR 539, 547 affirmed a statement made in a 1978 case, *In the Marriage of Gibb* (1978) FLC 90/2-405, that 'it was not intended by Parliament that this Court should enforce the provisions of s 121 relating to restriction of publication of evidence, as s 121(4) specifically provides that proceedings for any offence against the section should not be commenced except by, or with the written consent of, the Attorney-General ...'. In *Schwarzkopff*, the Court added that 'except in special circumstances it is not desirable that this Court should enforce by way of contempt or otherwise the obligations arising under s 121'.
- [15] The applicant faces an even more fundamental problem. All we know of the content of any possible publication is that it may relate to the deed between the applicant and H, and the building of a house 'on the wrong land'. That could not give rise to reasonable apprehension of the intended publication of 'an account of (the) de facto proceeding' between the applicant and H. That is because it would not, if it eventuated, amount to 'an account of all or part of a (Part 19) proceeding'.
- [16] I respectfully agree with the analysis of Kenny J in *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, 323-4, with reference to the family law provision, as follows:
- '... Before s 121(1) can be contravened, there must be a dissemination of an *account* of proceedings, or part of them, under the Act ... an "account", for this purpose, is a narrative, description, re-telling or recital of such proceedings. ... There is no account of proceedings merely because some allegations made in the proceedings are reiterated outside the Court. Before there can be an account of proceedings in the relevant sense, a communication must

purport to narrate, describe, re-tell or recite something that has happened in the proceedings, or something about the proceedings.’

- [17] The application brought against the non-party respondent, Channel 7 Brisbane Pty Ltd, must be dismissed.
- [18] The applicant seeks a separate order against H, that she ‘be ordered to file and serve an affidavit detailing the information she has provided to the non-party’. Mr Cooper, who appeared for H, opposed such an order, and he supported Mr Applegarth’s articulation of the bases for that opposition.
- [19] Mr Applegarth essentially submitted that there was no basis for compelling H to make any such disclosure. In any event, H would be entitled to claim privilege against self-incrimination, so that in a practical sense the exercise may turn out to be pointless. It would also amount to a type of ‘fishing expedition’ directed towards determining whether or not H had contravened s 344 of the *Property Law Act*.
- [20] Mr Hackett sought to justify the application by reference to what he submitted was the analogous approach of the Court in requiring disclosure in *Mareva* and *Anton Pillar* type situations.
- [21] The important point of distinction is that requiring this disclosure would amount to the Court’s attempt to assemble evidence as to whether or not H committed an offence under s 344 of the *Property Law Act*. That is a matter for the organs of executive government, not the courts of law. It is not the role of the Court to seek to gather evidence bearing on the possible prosecution of a citizen for a criminal offence.
- [22] The application should also be dismissed insofar as it seeks relief against the respondent H.
- [23] There is no reason why costs should not in each case follow the event.
- [24] In confirming Channel 7’s position last Friday, its solicitor indicated an intention to seek costs on the indemnity basis should the application proceed on Monday and fail. While I consider Channel 7 acted reasonably in the matter, and in circumstances of some urgency, and while the application has foundered on a number of bases, I do not regard the circumstances overall as sufficiently distinct to warrant departing from the ordinary basis of assessment.
- [25] There will be an order that the application be dismissed, with costs to be assessed on the standard basis.