

SUPREME COURT OF QUEENSLAND

CITATION: *ASIC v Jorgensen & Ors* [2008] QSC 233

PARTIES: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
(applicant)

v

ALAN BRADLEY JORGENSEN
(first respondent)

ZHI LI also know as LYNA JORGENSEN
(second respondent)

JIM'S WATER TANKS PTY LTD ACN 123 918 721
(third respondent)

ROBERT WILLIAM MORTON
(fourth respondent)

THE BANKRUPT ESTATE OF ALAN BRADLEY JORGENSEN
(fifth respondent)

FILE NO/S: 7032 of 2007

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Queensland

DELIVERED ON: 26 September 2008

DELIVERED AT: Brisbane

HEARING DATE: 22 September 2008

JUDGE: de Jersey CJ

ORDERS: **1. That the applicant be granted leave to discontinue the claim for relief set out in paragraph 9 of the amended originating application filed 28 November 2007.**

2. That the first respondent pay the applicant's costs of and incidental to the proceeding constituted by the amended originating application, to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – COSTS – applicant granted leave to discontinue claim for relief – claim reasonably pursued but an order now made would lack utility – who should bare costs

Corporations Act 2001 (Cth), s 184, s 588G, s 1323, s 1324

Uniform Civil Procedure Rules 1999 (Qld), r 304(2)

COUNSEL: J W Peden for the applicant
The first respondent appeared on his own behalf
C A Johnstone appeared for the third respondent

SOLICITORS: Australians Investments Securities Commission for the applicant
The first respondent appeared on his own behalf
Minter Ellison for the third respondent

- [1] **de Jersey CJ:** In para 9 of its originating application filed 28 November 2007, the applicant sought orders permanently restraining the respondents from dealing with their property, comprising payments received in respect of the third respondent's tank supply business, and monies in a number of specified bank accounts. The orders were sought under ss 1324(1) and/or 1323(1) of the *Corporations Act 2001* (Cth).
- [2] Section 1324(1) provides that the court may, on the application of ASIC, enjoin a person from engaging in conduct involving a contravention of the Act. Section 1323(1) provides that where ASIC is carrying out an investigation, in order to protect creditors, the court may restrain persons from dealing with their property. ASIC's application was based in part on s 184, which relates to the duties of directors, and s 588G, as to the duty of directors to prevent insolvent trading.
- [3] The applicant seeks leave to discontinue its claim for relief under para 9 of the application, under rule 304(2) of the *Uniform Civil Procedure Rules 1999 (Qld)*. If that leave is granted, then subject to costs, the originating application will have been fully disposed of. The respondent to this application, Mr Jorgensen, did not oppose the effective termination of the claim for relief in para 9, but sought an order that the applicant pay his costs of the proceeding, to be assessed on the indemnity basis. The applicant seeks an order that the first respondent pay its costs. The court's discretion as to costs in this situation is unfettered (rule 307(2)).
- [4] On 13 August 2007 the applicant secured the grant of ex parte injunctions. It filed its originating application the following day. On 22 August 2007, a contested hearing led to interlocutory orders. They were continued following two further contested hearings, and then three sets of consent orders, which resulted in the extension of the interlocutory orders until 29 January 2008. On 31 December 2007, the first respondent, as sole director, had resolved to appoint voluntary administrators to the third respondent company. On 16 March 2008, the company entered into a deed of company arrangement.
- [5] In the result, the property which has been identified has been marshalled and secured. The bank accounts of the natural person respondents are empty. The applicant acknowledges that there is no longer any point in seeking permanent injunctions against the respondents. Its contention is that it "was entitled to bring the application, and proceed with it through 2007 (when the costs were all incurred). The intervening voluntary administration resulted in the company's funds being

brought under the control of the administrator. There are no funds in the other bank accounts of the first and fourth respondents. ...The fact that there is no utility in the granting of final relief now does not deprive the applicant of its costs of bringing and pursuing the proceedings.” The applicant contends that its approach has been vindicated by uncontested evidence adduced at the trial of a contempt application against the first respondent, and the numerous possible contraventions of the *Corporations Act* identified by the deed administrators.

- [6] On the other hand, Mr Jorgensen submits that because the applicant is effectively abandoning its claim for relief, the ordinary consequence of discontinuance should follow: the applicant should be ordered to pay the respondent’s (his) costs. He vigorously disputed the assertions in the applicant’s counsel’s outline of argument, and presented a comprehensive set of submissions himself. The oral hearing concluded with his request for confirmation from the applicant that it would no longer pursue alleged breaches of s 184 and s 588G. It was a matter for the applicant, of course, whether it gave such assurances.
- [7] The contempt proceeding was unsuccessful, and the applicant was ordered to pay Mr Jorgensen’s costs. A perusal of the reasons for judgment indicates that the applicant had not prosecuted its case with the precision necessary for a successful prosecution of that character. In dealing with costs, Douglas J said this:
- “It seems to me that the conduct of Mr Jorgensen gave rise to legitimate concern in the applicant that his conduct was in breach of the orders made against him even if it failed, for a number of reasons, some of which may be described as technical, to establish that he was in contempt of court.”
- [8] It is useful to give one example of the sort of conduct which confronted the applicant. Following interlocutory injunctions granted in late 2007, the first respondent set up a bank account to process the as then unprocessed credit card transactions provided to the company earlier in the year. As observed by Douglas J in his reasons:
- “After this processing had been commenced, several of the managers at (the company’s) business became concerned about their conduct and independently checked (the applicant’s) website and obtained a copy of an order of the Chief Justice. Forming the view that the order appeared to prohibit the processing which they were undertaking, one of them, Mr Hutchinson, raised the issue of potential contempt of court with Mr Jorgensen, specifically drawing to his attention that what they were doing was in contempt of the Chief Justice’s order to which Mr Jorgensen’s response was said to be: ‘it’s only a hundred thousand dollars.’”
- [9] The report of the external administrators, dated 18 August 2008, details a large number of “possible contraventions” of the *Corporations Act*. Acknowledging that it has been prepared by independent external administrators, the report provides considerable support for the view that the applicant was responsible and reasonable in preserving this proceeding until it was plain that pursuing the relief claimed under para 9 would be pointless.

- [10] The basis of Mr Jorgensen's contrary submission is that "the applicant pursued this entire case without any really legitimate grounds and conducted themselves in an unreasonable manner in that ASIC did not act in the manner expected of a government agency, once it recognized its case was doomed for failure."
- [11] Mr Jorgensen criticized the applicant's counsel at an earlier hearing for alleging that he had convictions for fraud, and the applicant for launching the proceeding on the basis merely of suspected contraventions. Mr Jorgensen asserted that the applicant was driven by an improper agenda, which was simply to put him out of business. He asserted that the applicant was poisoned against him by separate proceedings he brought against the applicant in Victoria. He also points to the applicant's failure to respond to a comprehensive letter of complaint submitted by his company by letter dated 24 October 2007. I prefer, however, to rely in these circumstances on the independent assessment of the external administrators, when approaching the question of whether the applicant has acted reasonably in its prosecution to this point of the application.
- [12] While it is unusual to contemplate ordering a respondent to pay an applicant's costs, where the applicant chooses not to proceed with the application, such an order may be warranted where the application was reasonably brought and prosecuted, the further prosecution becoming unnecessary because of intervening events. This is such a case. Further, having regard to the issue of public protection, which the applicant is obliged to address, and its being publicly funded, the public should not be penalized, but rather assisted with a costs order, where the applicant has acted reasonably in the matter.
- [13] There will therefore be orders granting the applicant leave to discontinue the claim for relief set out in para 9 of the amended originating application filed 28 November 2007, and an order that the first respondent pay the applicant's costs of and incidental to the proceeding constituted by the amended originating application, to be assessed on the standard basis.