SUPREME COURT OF QUEENSLAND

CITATION:	*Clean Homes Pty Ltd & Anor v Petulia Pty Ltd & Anor* [2012] QSC 424
PARTIES:	**CLEAN HOMES PTY LTD** ABN 050 406 614 (first plaintiff) **ABSOLUTE DOMESTICS** ABN 133 658 152 (second plaintiff) **v** **PETULIA PTY LTD** ABN 063 863 909 (first defendant) **FERIHA BILIK** (Second defendant) **KERIM BILIK** (Third defendant)
FILE NO/S:	BS 10016 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 December 2012
JUDGE:	Daubney J
ORDERS:	**1. The application for a stay pending appeal is dismissed.** **2. The defendants to pay the plaintiffs' costs of and incidental to this application, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where interlocutory injunction in effect – where terms of franchise agreement subject of interlocutory injunction – where defendant argued injunction was beyond ambit of relief to which plaintiffs entitled – where defendants alleged to suffer financial loss – whether stay pending appeal should be granted. *Australian Broadcasting Corporation v O'Neill* [2006] 227

CLR 57, applied.

Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618; *Slevin v Associated Insurance Brokers of Australia (Qld) Pty Ltd* (1996) 40 AILR 9-6049; *Elphick v MMI General Insurance Limited* [2002] QCA 347, considered.

Murray Pest Management Pty Ltd v A & J Bilske Pty Ltd [2012] NTSC 05, distinguished.

COUNSEL: K E Downes SC with B Hooper

J Griffin SC

SOLICITORS: Mullins Lawyers for the plaintiff

Michael Flemming & Associates for the defendant

HIS HONOUR: This is an application for a stay pending appeal of an interlocutory injunction ordered by Justice Douglas on the 6th of December, 2012.

The background to this matter can relevantly be stated in brief: the plaintiffs were at different times the franchisor under a particular franchise agreement. The first defendant was the franchisee, the second and third defendants are directors of the first defendant and guarantors of its obligations under the franchise agreement. The business operated under the franchise agreement was a cleaner placement agency.

The original term of the franchise agreement expired in 2006 but the original parties continued to perform the agreement by its terms until 2009 at which time the second plaintiff became the franchisor. The parties then continued to perform the agreement by its terms until its termination on 5 October, 2012.

From 6 October, 2012 one or more of the defendants operated another cleaner placement agency called iCare Home Services. Material put before Justice Douglas demonstrated that the business used information concerning the franchised business, being the names of, and other information relating to, cleaners and customers of the franchised business. Indeed, on the pleadings the second and third defendants admitted to copying that information prior to the termination date of 5 October, 2012. It was common ground before Justice Douglas

that the defendants, or some of them, used the information in order to attempt to continue carrying on a cleaner placement business with those customers and cleaners.

The plaintiffs' application for interlocutory injunctive relief was heard by Justice Douglas on 6 December, 2012. The hearing occupied most of a day on the civil list. At the conclusion of the hearing Justice Douglas gave ex tempore reasons for judgment and made a number of orders. Relevantly for present purposes is the order in respect of which a stay pending appeal is sought. That was order number three by which his Honour ordered: "The defendants whether by themselves, their servants or agents be restrained until trial or further order of the Court from:

(a) providing cleaner placement services to; or

(b) canvassing, soliciting, inducing, enticing or encouraging away, or attempting to canvass, solicit, induce, entice or encourage away by use of letter, facsimile, text message, email or any other means the custom or business of:

any of the person identified in the exhibit to the affidavit of Ronald Vess, filed on 6 December, 2012".

In his ex tempore reasons for judgment Justice Douglas canvassed the matters that had been put before him and argued in respect of the plaintiffs' application for interlocutory injunctive relieve. His Honour adopted the completely conventional approach, as endorsed by the High Court in Australian Broadcasting Corporation v. O'Neill [2006] 227 CLR 57 (see especially the judgment of Justice

Gummow and Hayne at [65]) by which his Honour examined whether the evidence disclosed a prima facie case in respect of which were contended to be serious questions and then turned to consider the balance of convenience.

In his Honour's reasons for judgment he identified the relevant terms of the franchise agreement which were the subject of the dispute on the application for an interlocutory injunction. I shall return to those shortly. He traversed some of the relevant factual background and then turned to the two matters which had principally been argument before him with respect to the serious questions to be tried. The first of those issues was whether particular information contained in computers was information owned by the first plaintiff or whether because of the particular circumstances of the case the ownership of the information had passed to another entity called Runnymeade. In that regard his Honour's conclusion for the purposes of the interlocutory application was: "While I do not wish this to be taken as a final conclusion, because this is merely an application for interlocutory relief, there seems to me to be a strong prima facie case that the information relating to clients and cleaners was information held by the first plaintiff not by Runnymeade and that the business sale agreement between Runnymeade and the first defendant, Petulia Proprietary Limited, did not include any agreement in respect of that information because Runnymeade did not own it".

The second matter argued as a serious question for the purposes of satisfying the test for the grant of an

interlocutory application concerned a factual issue surrounding the introduction of the second plaintiff into the factual and contractual matrix of dealings between the parties. Relevantly for present purposes, his Honour found: "The question is whether there was an assignment or a novation, or perhaps an estoppel by convention leading to the result that legally the second plaintiff stepped into the shoes of the first plaintiff in the sense that it could adopt the benefit of the franchise agreement. Again, on a prima facie level there seems to be a strong case that that has occurred".

His Honour consequently found: "Therefore there seems to me to be a good prima facie case that the second plaintiff is entitled to the benefit of the franchise agreement and to seek to enforce its clauses requiring the delivery up of this information, the records and the data files held by the first defendant pursuant to the franchise agreement.". By adopting the words "good prima facie case" his Honour was of course precisely echoing the words of Justices Gummow and Hayne in ABC v. O'Neill, who in turn had adopted and reapplied the long-standing principles explained in Beecham Group Limited v. Bristol Laboratories Proprietary Limited [1968] 118 CLR 618.

Justice Douglas then turned to consider at some length the balance of convenience. Again, I shall return to his Honour's reasons in that regard shortly. I should also note at this point that, after concluding that the material before him disclosed sufficient prima facie cases of serious questions to

be tried with respect to the two matters I have mentioned, his Honour said: "Having regard to the apparent damage being done to the nature of the plaintiffs' business by the confusion that has been generated by the actions of the defendants in continuing to use this information it seems likely to me to be a case where it will be difficult to quantify the plaintiffs' damages to the extent that an interlocutory injunction should, on the balance of convenience, issue (see Slevin, v. Associated Insurance Brokers of Australia (Qld) Proprietary Limited (1996) 40 AILR 9-6049).

It was sought on the basis that it would be a springboard injunction pending trial which is presently set down for March 2013. **It seems to me to be appropriate to give such relief pending trial in respect of the lists of persons identified in exhibit RTV1 to the affidavit of Mr Vess filed by leave today."** (emphasis added).

On about 17 December, 2012 the defendants filed a notice of appeal against the orders made by his Honour on 6 December. As I have said, the present application is for a stay pending appeal of order number three, which I have quoted at length above. The defendants advanced two principal arguments in support of the application for a stay of order number three pending appeal. It was argued that his Honour erred in making that order because it went beyond the ambit of the relief to which the plaintiffs were entitled. In particular, it was said that the exercise of the discretion miscarried by his Honour casting an order in terms which restrained the

defendants absolutely from, in effect, having any contact with the individuals identified in the list. It was further argued that, whilst the identities of the persons on the list may have been confidential information, they did not constitute "trade secrets" sufficient to attract the sort of injunctive relief granted by his Honour.

The defendants placed significant reliance on the judgment of Justice Mildren in Murray Pest Management Proprietary Limited v. A & J Bilske Proprietary Limited [2012] NTSC 05, and particularly observations by Mildren J at [45] that "Nobody can own customers" and "Customers are free to go where they like". The matters in issue in that case however were quite different from the present case. For a start, that case concerned, relevantly, a claim for damages for alleged breach of a restraintive trade clause. The decision by Justice Douglas in the present case did not turn on the existence or interpretation of a restraint of trade clause.

In the Murray Pest Management case it was necessary, for the purpose of determining the validity and ambit of the restraint of trade clause, for Mildren J to determine the nature and extent of the relevant businesses which were the subject of the restraint (see for example, paragraph 46 of the judgment), and in that context also to consider whether good will formed part of the business the subject of the restraint. It was in that context that Justice Mildren made findings that: "(a) the intent of the franchise agreement in that case was to return

to the franchisor assets which the franchisor had effectively leased to the franchisee, and to strip the franchisee of the means to carry on business in the franchise territory by requiring the franchisee to give over its telephone numbers, business records, customer lists et cetera; and that

(b) the purpose of those provisions in the franchise agreement was to strip the franchisee of those of its valuable assets which would enable it to remain in the relevant business;

(c) the result was to ensure that any "goodwill" attaching to the franchised business name returned to the franchisor and also to strip the franchisee of any goodwill it had generated while operating the franchised business".

It was in that context, and specifically in determining the ambit of the obligation of the franchisee to return computer programs containing customer lists, that Mildren J made the observations concerning customers on which the defendants in the present case placed so much reliance. The arguments in the present case proceeded on completely different contractual bases. The relevant contractual provisions were canvassed by Justice Douglas. In particular, his Honour referred to clause 36.1 of the relevant franchise agreement by which the defendants agreed that, on termination of the franchise agreement, the defendants would "cease immediately the use of any confidential information".

Accepting for present purposes that the identities of the persons referred to in the list which is the subject of order three are items of "confidential information" (as that term is

itself defined in the franchise agreement) it seems to me that an injunction to restrain an apprehended, if not actual, contravention of clause 36.1 in the terms of the injunction granted by Justice Douglas were well within the ambit of his Honour's discretion.

There are two others matters to be mentioned: first, it must be said that this issue about the allegedly impermissible ambit of order three is not raised in any of the grounds of appeal. It is therefore a little odd that this was the primary argument relied on in seeking a stay. Secondly, to the extent that it was submitted that his Honour was effectively led into error by simply signing off on a form of order tendered to him by the plaintiffs, such an argument does not withstand scrutiny. It is clear enough on the face of the reasons for judgment that his Honour gave careful consideration to the form of orders. In any event, reference to the transcript of the hearing reveals that there was considerable argument before his Honour concerning the terms of the order.

The second argument raised in support of the stay was that if the injunction stands the defendants will suffer considerable financial loss. There are two short answers to this contention. First, his Honour carefully weighed the balance of convenience between the parties. It is clear that he had regard to the matters which are now again raised by the defendants. In the course of his reasons for judgment his Honour said: "There were other aspects of the balance of

convenience addressed by Mr Carew on behalf of the defendants pointing out that the business is said to be their whole livelihood as compared to the apparent situation of the plaintiffs where they have franchises in other states as well as the franchise here, and it seems to me that that issue is not one which operates significantly against the strength of the prima facie case I have assessed.".

Secondly, the defendants have the benefit of the undertaking as to damages. The whole point of requiring the plaintiffs to provide the undertaking as to damages is to provide protection for the defendants in the eventuality that they are vindicated and are entitled to recover for the losses about which they now complain. This second argument raised in support of the stay was, in my view, nothing more than an attempt by the defendants to re-argue a matter already properly accounted for and determined on the interlocutory application by Justice Douglas.

I am not persuaded that the defendants have demonstrated that there is a good arguable case that order three made by Justice Douglas was too wide in its ambit (see Elphick v. MMI General Insurance Limited [2002] QCA 347 per Jerrard JA at paragraph 8). In any event, as I have noted, this contention is not raised in the notice of appeal which has been filed by the defendants. Accordingly, the defendants have failed to satisfy me that order three ought be stayed pending appeal. The application is dismissed.

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HIS HONOUR: There is no reason in my view why costs of this discrete application should not follow the event. Accordingly it will be ordered that the defendants pay the plaintiffs' costs of and incidental to this application, to be assessed on the standard basis.
