

SUPREME COURT OF QUEENSLAND

CITATION: *Hydrofibre Pty Ltd v Australian Prime Fibre Pty Ltd and Anor (No 3)* [2013] QSC 246

PARTIES: **HYDROFIBRE PTY LTD**
ACN 120 252 628
(plaintiff/first respondent)
v
AUSTRALIAN PRIME FIBRE PTY LTD
ACN 092 742 991
(first defendant/first applicant)
and
PAUL DOUGLAS WOOSLEY
(second defendant/second applicant)

FILE NO/S: BS 5498 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 15 August 2013

DELIVERED AT: Brisbane

HEARING DATE: 15 August 2013

JUDGE: Philip McMurdo J

ORDERS: **1. The amended application, filed on 5 August 2013, will be dismissed.**
2. The applicant defendants pay one-half of the costs of Nathan and Joshua Magnus of the amended application.

CATCHWORDS: PROCEDURE – JUDGMENTS AND ORDERS – IN GENERAL – OTHER MATTERS – where second and third respondents each gave an undertaking to meet the costs awarded against the first respondent – where applicants seek orders to join the second, third and fourth respondents to proceedings – where application brought upon basis that the undertakings of the second and third respondents placed them under a duty of continuous disclosure regarding any changes in their financial positions – where applications is brought against the fourth respondent to prevent them from recovering their costs of acting for the plaintiff in the

proceedings – whether the orders sought should be made

COUNSEL:

D Tucker (*sol*) for the plaintiff/first respondent

J W Lee for the defendants/applicants

D Tucker (*sol*) for the second and third respondents

D Dowd (*sol*) for the fourth respondents

SOLICITORS:

Tucker & Cowen for the plaintiff/first respondent

Griffiths Parry Lawyers for the defendants/applicants

Tucker & Cowen for the second and third respondents

Dowd & Company Lawyers appeared on its own behalf for the fourth respondent

5 HIS HONOUR: On 24 July, the defendants in these proceedings made an application for
a variation of costs orders which I had made on 17 July. Those orders entitled the
defendants to be paid their costs of the proceedings by the plaintiff in some respects on the
indemnity basis. The variation which was then sought was to have the directors of the
plaintiff, namely Nathan and Joshua Magnus, also ordered to pay those costs. At the
10 hearing on 24 July, I declined to make those orders because the position, absent those
orders, was that Nathan and Joshua Magnus were already liable to pay costs ordered
against the plaintiff. That was because the undertaking which each of them gave to the
court, in the context of an application for security of costs which the defendants had made
against the plaintiff. As they were already bound by their undertakings to the court to
15 meet the costs ordered against the plaintiff, there was no utility in the orders then sought
by the defendants.

I was then told that the defendants were concerned that one or both of these gentlemen had
been rearranging his financial affairs in order to avoid the burden of that undertaking. The
20 undertaking is in unconditional terms and, in the event that it could not be complied
because of the poor financial circumstances of the person who gave it, it would be
incumbent upon that person to seek to be discharged, in whole or in part, from the
undertaking. Nevertheless, the concern that there had been such deliberate changes in
financial circumstances was raised by the defendants and the defendants were directed to
25 file any amended application arising out of that concern. It is that amended application
which is before the court today.

It seeks leave to join Nathan and Joshua Magnus, as well Dowd Lawyers Proprietary
Limited, trading as Dowd & Company Lawyers, who were the lawyers who acted for the
30 plaintiff in the proceedings. The amended application seeks orders that Nathan and Joshua
each file and serve affidavits identifying their current asset and liability positions and
explaining any change from that set out in a letter from Dowd & Company dated 20
August 2012. It also seeks orders against Dowd & Company to prevent it from
prosecuting proceedings in this court to recover their costs of acting for the plaintiff in the
35 proceedings, those costs having been the subject of an agreement with not only the
plaintiff company, but also Nathan and Joshua Magnus. The amount claimed by Dowd &
Company is of the order of \$270,000. Pursuant to an agreement which they made with the
plaintiff and its directors shortly before the commencement of the trial, they were
permitted to caveat over a house of which Nathan Magnus is the registered owner.

40 The application, at least against the brothers Magnus, is brought on the basis of a
proposition to the effect that the brothers Magnus were under some duty of continuous
disclosure, in that they were obliged to volunteer information as to any material change in
their financial positions from that set out in the letter from Dowd & Company of 20
45 August 2012. It was said that they had failed in that duty because it is claimed that, upon
the present evidence, there have been such changes. The legal proposition, in my view,
cannot be accepted. There was no continuous duty on the part of them to volunteer
information about changes in their financial position. That is not to say that they were free
to set about engineering changes to their finances in order to avoid the burden of their
50 undertakings. But the proposition advanced in the defendants' argument, in my view, is
unsupported by authority and cannot be accepted as a necessary implication from the
undertakings which were given.

A further difficulty for the defendants today is in the state of the evidence as to the change
55 or changes, if any, in the financial positions of Nathan and Joshua Magnus. Now there is

5 an understandable concern on the part of the defendants in respect of Joshua Magnus
because, in the letter of 20 August 2012, it was said that his assets included his place of
residence, valued at approximately \$1 million. According to a search of that property, he
was not then and has never been its registered owner. The registered owner is his wife. It
10 may be that the claim made in the letter of 20 August 2012 was correct, in that it is his
house beneficially. It may be that he is beneficially entitled to half of it or it may be that
there was simply a misstatement, although a very serious misstatement, in the letter of 20
August and that he has no proprietary in the house at all.

15 But the present question is whether there has been some material change and, on the
evidence here, that is not demonstrated. Nothing else is offered in the evidence as to a
change in his financial position. As for Nathan Magnus, as I've mentioned, a caveat has
been lodged over his house in relation to his agreement to pay the fees of Dowd &
Company. That is, undoubtedly, a material change in his financial circumstances but,
quite properly, it is not said that this transaction with Dowd & Company was one which
20 was in the nature of some deliberate attempt to defeat the operation of the undertakings
given in favour of the defendants.

What I have just said is relevant in relation to the relief sought by this amended
25 application against Dowd & Company. There is and could be no suggestion from the
present evidence that that firm has engaged in any impropriety and, in particular, in any
conduct which has been calculated to avoid the burden of the undertakings given by the
directors.

30 Therefore, there is no demonstrated basis for the orders sought against any of the proposed
respondents and it follows that they should not be joined. The amended application, filed
on 5 August 2013, will be dismissed and I'll hear the parties as to the costs.

...

35 HIS HONOUR: Well, the order will be that the applicant defendants pay one-half of the
costs of Nathan and Joshua Magnus of the amended application. The reason why they did
not simply follow the event is that the defendants made the application upon a genuine and
understandable concern about the present position of the ownership of the house in which
40 Joshua Magnus lives, a matter which Joshua Magnus has not sought to clarify by evidence
here. I've indicated the order I've proposed to make in favour of Dowd Lawyers, subject
to the submission you can put in, Mr Lee.