IN THE COURT OF APPEAL [1998] QCA 432

SUPREME COURT OF QUEENSLAND

Brisbane

Appeal No. 5805 of 1997

[Bigjig P/L & Ors. v. Millennium Federation P/L]

BETWEEN:

BIGJIG PTY LTD (ACN 067 537 964) and
PHILIP GEBAUER and LISA FLETCHER
(Defendants) Appellants

AND:

MILLENNIUM FEDERATION PTY LTD
(ACN 067 632 884)
(Plaintiff) Respondent

Appeal No. 5788 of 1997

[Millennium Federation P/L v. Bigjig P/L & Ors.]

BETWEEN:

MILLENNIUM FEDERATION PTY LTD
(ACN 067 632 884)
(Plaintiff) Appellant

AND:

BIGJIG PTY LTD (ACN 067 537 964) and
PHILIP GEBAUER and LISA FLETCHER
(Defendants) Respondents

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Pincus J.A.
Thomas J.A.
Mackenzie J.

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Judgment delivered 18 December 1998

Separate reasons for judgment of each member of the Court, each concurring as to the orders made.

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**APPEAL NO. 5805 OF 1997**
**ORDER NO. 1 VARIED BY ADDING "PROVIDED THAT THIS ORDER DOES NOT GIVE THE PLAINTIFF A PROPRIETARY INTEREST, BY WAY OF SECURITY OR OTHERWISE, IN THE SAID SUM"; OTHERWISE APPEAL DISMISSED WITH COSTS.**

**APPEAL NO. 5788 OF 1997**
**APPEAL DISMISSED WITH NO ORDER AS TO COSTS.**

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**CATCHWORDS:** **MAREVA INJUNCTION - breach of fiduciary duty as employee and director of plaintiff - order required payment of money into solicitors' trust account - whether primary judge erred by requiring plaintiff to pay money into an account rather than restraining dissipation of assets - formal order made no mention that amounts to be provided as security - whether sufficient evidence of a danger that property of the defendants might be put beyond reach of plaintiff.**

**Jackson v. Sterling Industries Limited (1987) 162 C.L.R. 612**
**C.B.S. United Kingdom Ltd v. Lambert [1983] Ch. 37**
**Polly Peck International plc v. Nadir & Ors. (No. 2) [1992] 4 All.E.R. 769.**

Counsel: Mr R N Wensley Q.C. for the respondent (Appeal No. 5805 of 1997) and for the appellant (Appeal No. 5788 of 1997).
Mr P J Roney for the appellants (Appeal No. 5805 of 1997) and for the respondents (Appeal No. 5788 of 1997).

Solicitors: Barker Gosling for the respondent (Appeal No. 5805 of 1997) and for the appellant (Appeal No. 5788 of 1997).
Colwell Wright for the appellants (Appeal No. 5805 of 1997) and for the respondents (Appeal No. 5788 of 1997).

Hearing Date: 17 August 1998.

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Brisbane

Before Pincus J.A.
Thomas J.A.
Mackenzie J.

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(Defendants) Respondents

**REASONS FOR JUDGMENT - PINCUS J.A.**

**Judgment delivered 18 December 1998**

1 This is an appeal from an order made in the Supreme Court, by Derrington J, on an application for a Mareva injunction. The judge's reasons indicate that it was intended that security would be given for any judgment which might be given in the action, to the extent of $200,000. However, the sealed order makes no mention of security, and in other

respects it does not accord with the order orally pronounced. The sealed order requires that the defendants, now appellants, pay $200,000 to the trust account of a firm of solicitors to be held with a specified bank in the name of that firm "to be held there pending an order of this Court or other payment in accordance with the joint direction in writing of the solicitors for the defendants and the plaintiff". The $200,000 was part of the proceeds of a sale to Smiths Snackfood Limited ("Smiths") of a product called lenticular jigsaws, the vendor being Bigjig Pty Ltd.

2 The defendants' notice of appeal challenges the primary judge's conclusion on certain grounds which are essentially factual, and in addition asserts that the judge erred by requiring the defendants to provide security in the sum of $200,000; as to the latter submission, reliance was placed on the decision of the High Court in Jackson v. Sterling Industries Limited (1987) 162 C.L.R. 612.

3 The plaintiff, also, has appealed against the judgment, on the ground that the judge should have ordered that $500,000 rather than $200,000 be paid and dealt with in the way I have mentioned. It appears to me that the substantial question in the case is whether the primary judge was right to make an order requiring the defendants to pay $200,000, rather than an order in the more conventional Mareva form, restraining the dissipation of assets. It is however convenient to deal first with other issues raised, those which I have described as being essentially factual.

4 The action in which the application was made is based on an assertion that the defendants Gebauer and Fletcher misconducted themselves as directors and employees of

the plaintiff company, in that they took from the company a concept of "lenticular jigsaws". In June 1995 the plaintiff was owned by Gebauer, Fletcher and others. One Lee became interested in the company in that month and it is said that his company Gabsmack Pty Ltd bought shares in it. The evidence also shows that in some fashion Lee "injected" substantial amounts of capital into the plaintiff.

5 The plaintiff's case is that in 1996 it pursued the possibility of becoming involved in the sale of what are called lenticular products. It is common ground that on 17 October 1996 an agreement was made to which Lee, Fletcher, Gebauer and others were parties, under which Fletcher and Gebauer agreed to sell their shares in the plaintiff to Gabsmack Pty Ltd and to resign as directors. Before that agreement was made, it is alleged, Fletcher and Gebauer became directors of the defendant company Bigjig Pty Ltd, began to use that company as a vehicle for business in lenticular jigsaws, and they did so using information and work which had been initiated while they were directors and employees of the plaintiff. The defendants say that those interested in the company agreed to sever their relationship in August 1996 and that very shortly after that the notion of lenticular jigsaws first occurred to Gebauer.

6 Mr Wensley Q.C. for the plaintiff particularly relied upon evidence of one Pritchard about a meeting he had with Fletcher on 29 July 1996, at which there was discussed, in general terms, the possibility of arrangements between the plaintiff and a company of which Pritchard was a director, for the sale of a product apparently described as the plaintiff's "next big product", which later turned out to be the lenticular jigsaw. Pritchard was not then told the nature of the product. On 5 September 1996, Pritchard

had another meeting with Fletcher at which Fletcher disclosed that the product was lenticular technology. She told Pritchard that the plaintiff had discussed the concept with Coca-Cola in Sydney. These and other contacts led to an agreement relating to the matter which had been discussed between Pritchard's company and Bigjig which was, it appears, signed by Fletcher and Gebauer on 10 October 1996, a week before the agreement for the sale of shares to which I have referred above. Pritchard says that his contacts with Fletcher ultimately led to a substantial sale of the lenticular jigsaws to Smiths. His affidavit includes a letter relevant to the negotiations to which I have referred, that of 10 August 1996, addressed by Pritchard to "Lisa Fletcher Millennium" and to correspondence in September and October 1996 relating to these negotiations, written by Fletcher on the plaintiff's letterhead. One Mikkelsen engaged in correspondence with Fletcher in September 1996 relating to the same subject, some of which was sent by or to the plaintiff company. There is other correspondence in this category in the record, for example, letters written by Fletcher in August and September 1996, apparently relating to lenticular products. Of particular significance is that Fletcher represented herself to one Roche, in September 1996, as speaking on behalf of the plaintiff and then used a business card to substantiate that; the subject discussed between Roche and Fletcher was the lenticular jigsaw.

7 The strong impression created by evidence of the character to which I have briefly alluded is that, towards the end of Fletcher and Gebauer's employment with the plaintiff, Fletcher began to work towards the development of lenticular jigsaws for sale and that the two decided to make this business their own, using Bigjig as a vehicle. It does not appear to me that the evidence adduced on behalf of the defendants advances any adequate

explanation of Fletcher's contacts with Pritchard, or of the relevant correspondence to and from the plaintiff, sufficient to dispel the impression I have mentioned. It is I think important to note that Fletcher was at relevant times not only a director, but an employee of the plaintiff and it seems reasonably clear that the negotiations which ultimately led up to the transaction with Smiths were initiated by Fletcher in the course of her employment with the plaintiff. The primary judge was satisfied that the plaintiff had a case that there was a breach of fiduciary duty entitling the plaintiff to some or all of the profits made by the sale to Smiths.

8 Counsel for the defendants criticised the primary judge's use of the expression "case to be answered" as indicative of the strength of the plaintiff's evidence, arguing that something more would have to be shown to justify the grant of relief of the kind which the plaintiff obtained. But however the test is expressed, it appears to me that there was sufficient shown to entitle the plaintiff to protection of the Mareva kind. Counsel for the defendants also suggested that there was not enough evidence of a danger that property of the defendants might be put beyond reach of the plaintiff. As to that, I am content to adopt the test of "more than the usual likelihood", mentioned in Hortico (Australia) Pty Ltd v. Energy Equipment Co. (Australia) Pty Ltd (1985) 1 N.S.W.L.R. 545 at 558, and, it appears, approved by Gleeson C.J. in Patterson v. BTR Engineering (Aust) Ltd (1989) 18 N.S.W.L.R. 319 at 322, 325. It is in my view a fair inference that if steps were not taken to protect the plaintiff, it would be subject to a risk that a judgment in its favour in the action for all or part of the profits made would not be satisfied.

9 In short, I see no reason to disagree with the primary judge's conclusion that the

plaintiff should have some relief. A more difficult question is whether the relief granted was within the range of a proper exercise of discretion.

10 I have already drawn attention to the fact that the judge's reasons contemplated that amounts would be provided by way of security, but the formal order issued from the court made no mention of that. In the absence of any application to alter the terms of the formal order, it appears to me that the discrepancy to which I have referred becomes irrelevant; it is the formal order which is the order of the Supreme Court and the one the plaintiff must defend.

11 In Jackson v. Sterling Industries (above) an action was brought in the Federal Court making claims against Jackson which were held to have a good chance of succeeding and of producing a judgment for about $3M. It was ordered that Jackson provide "security in the sum of $3,000,000.00 in such manner and form as the parties may agree, or in default of agreement, the Court or its Registrar may approve". That order was later modified by an order directing that security be in the form of payment of $3M to any registrar of the court or provision of security in the sum of $3M in such other manner or form as the court or its registrar may approve.

12 The court held by a majority that the order for security should not have been made. The essential question in the case was whether the order made was within the power granted by s. 23 of the *Federal Court of Australia Act* 1976 (Cth) "to make orders of such kinds, including interlocutory orders **. . .** as the Court thinks appropriate". The principal reasons were those of Deane J., who made a number of criticisms of the Federal Court's order, some of which related to the point that the money was to be provided by way of

security; it does not appear to me that those criticisms can apply in the present case. But his Honour also made other remarks, which bear upon the propriety of the order made here. I quote from pages 625 and 626:

> ". . . [these combined orders] . . . required the appellant to pay into court not money identified as being within his possession but money which he was required to provide or obtain regardless of source . . . [the purpose of such an order is not] . . . to introduce, in effect, a new vulnerability to imprisonment for debt, or rather for alleged indebtedness, by requiring a defendant, under the duress of the threat of imprisonment for contempt of court, to find money, which he may or may not have (whether or not at some point of time it may have been available to him), to guarantee to a plaintiff that any judgment obtained will be satisfied. It is to prevent a defendant from disposing of his actual assets . . . so as to frustrate the process of the court by depriving the plaintiff of the fruits of any judgment obtained in the action. It may be appropriate in a rare case that such an order requires the defendant actually to deliver assets to a named person or even to the court itself . . . Even in such cases however, the order must be confined to preserving assets until after judgment or, arguably, until there has been an opportunity to seek execution . . . any order requiring the delivery of assets should make clear that the assets will be held on behalf of the defendant until after judgment or further order and will then be re-delivered to the defendant unless they are made the subject of some other claim . . .".

It will be seen from these observations that Deane J.'s concerns went beyond the idea that there should not be an order for provision of security. His Honour's reasons tended to confine the scope of Mareva injunctions, in general, to orders restraining the disposition of the defendant's assets.

13 But it is I think important to notice that his Honour referred with apparent approval, at 622 and 623, to C.B.S. United Kingdom Ltd v. Lambert [1983] Ch. 37 That case related to a proposed action for breach of copyright. The English Court of Appeal itself granted a Mareva injunction, including an order that the defendant deliver to the plaintiff's solicitors three motor vehicles. In giving the court's reasons, Lawton L.J.

remarked:

> "For nearly a 100 years now it has been the established practice of the courts to refuse injunctions to freeze the assets of a defendant in anticipation of the plaintiff obtaining judgment against him: see Lister & Co. v. Stubbs (1890) 45 Ch.D. 1 **. . .** there was reason to think that the first defendant had put such profits as he had made from infringing the plaintiffs' copyrights into easily removable and disposable chattels such as motor vehicles". (43)

At 44 and 45, Lawton L.J. set out guidelines for the making of orders for delivery up of chattels.

14 In the present case the order was not for delivery up of chattels, but for payment of money. The important difference between the one order and the other is that a chattel such as a motor car is precisely identifiable and distinguishable as an asset of a defendant; the order made here did not purport to deal with any particular asset and could have been satisfied by payment of money from any source. But in fact, there was evidence which showed that the defendants had the funds to make the payments ordered. It would therefore, as it seems to me, be wrong to set aside the order made on the ground that there was a possibility that the defendants might not have been able to comply with it. Any doubt there might have been on this subject has been dispelled by affidavits produced to us on behalf of the defendants, explaining that the money in question is held in a solicitor's trust account and giving reasons why the defendants should not be ordered to pay any more than the $200,000.

15 It will have been noticed that Deane J. in Jackson v. Sterling Industries (above) described as "rare" the case in which it might be appropriate to order a defendant to deliver assets to a named person. The advantage of the order made in the present case is

plain enough; it sets aside a specific fund out of monies which, on the plaintiff's case, were obtained by breach of the duty the defendants Fletcher and Gebauer owed to the plaintiff. More conventional orders of the Mareva type sometimes suffer from the disadvantage that they contain broadly defined exceptions to protect the defendant's right to carry on business and to pay out monies in the ordinary course - for living expenses and the like. Such an order may require third parties having notice of the order to make fine judgments as to what is and what is not permissible under it. The present order cannot, as far as I can see, create any possible embarrassment for a person not party to the dispute, nor can there be any room for doubt as to what does, and what does not, constitute compliance with the order.

16 In Polly Peck International plc v. Nadir & Ors (No. 2) [1992] 4 All E.R. 769, a Mareva injunction of the ordinary kind was refused, but a fund of £8.9M owned by a central bank (the Central Bank of the Turkish Republic of Northern Cyprus) was the subject of an order requiring the bank to "earmark" that sum in a separate account and restraining the bank from dealing with it, with certain exceptions. (784, 785) This was done on the basis of an allegation that the £8.9M was the subject of a tracing claim against the bank. The order requiring it to "earmark" the £8.9M in a separate account which was made, it appears, on the basis that the plaintiff might ultimately be able to establish an equitable right to the money, is not much different in principle from what was done by the formal order here. In each case the purpose of the order was to preserve a fund of money derived from dealings made in such circumstances that equity could recognise a right in the plaintiff to trace that money. The Court of Appeal made its order against the bank, not as a Mareva injunction, but as an order for preservation of an asset. (787)

17 To return to the judgment in Jackson, it is fair to say that the principal ground upon which the Federal Court's order was set aside was that it sought to provide security for the plaintiff; the present order does not, for the reasons I have explained, fall into that category. But the plaintiff's difficulty is that the reasons of Deane J. support the proposition that, in the exercise of their discretion, courts should ordinarily be confined to making Mareva orders of what might be called the initial type - restraining dealings with assets. That aspect of Jackson is not, however, of the essence of the decision. It does not appear to be right, since the High Court is likely to touch this subject infrequently, for intermediate appellate courts to treat all suggested limitations on the exercise of the relevant discretion, expressed in the Jackson reasons, as absolutely binding. To do so would unreasonably stultify the development of this branch of the law. It would in particular discourage such useful extensions of the scope of the Mareva injunction as that approved by the Full Court of the Federal Court in LED Builders Pty Ltd v. Eagle Homes Pty Ltd (1997) 148 A.L.R. 247. There, despite the lack of any encouragement to do so to be found in the judgments of the majority in Jackson, the Full Court of the Federal Court held that a Mareva injunction might properly be granted restraining a person who was not a party to the proceedings.

18 Two other points should be made with respect to Jackson. One is that two members of the majority relied in part upon a particular view of the nature of the Federal Court, namely that "**. . .** there are limits upon its functions which differentiate it from other Australian superior courts" (618), per Wilson and Dawson JJ. Their Honours went on to say that the presumption that a superior court of record has acted within jurisdiction is

denied to the Federal Court. Secondly, the Jackson decision depends essentially upon the construction of s. 23 of the *Federal Court of Australia Act* 1976 (Cth); the very jurisdiction of the Court to make the challenged orders was in issue. In contrast, there can be no doubt about the present order being within Derrington J's jurisdiction and the question is whether his Honour exercised his discretion properly. In my opinion the answer to that question is yes. I would, however, vary the order to avoid dispute about its effect, by adding to para. 1, "provided that this order does not give the plaintiff a proprietary interest, by way of security or otherwise, in the said sum".

19 It is necessary to say something of the plaintiff's appeal, asserting that the injunction should have required payment of a larger sum. I note that the order of Derrington J. was made in June 1997; for reasons which are unknown, the appeal reached this Court rather late and submissions in writing were not completed until 21 August 1998. The defendants have sought to place before us evidence, to which some reference has already been made, with respect to their present financial position. Changes in their circumstances, in the period of over a year which has elapsed since the order was made, would be relevant to the question whether or not it is proper to make some further order against the defendants. It appears to me inconvenient to litigate that subject, involving issues of fact, in the Court of Appeal. I would therefore dismiss the plaintiff's appeal but, in the circumstances, without costs.

20 That is, the orders I propose are as follows -

1. Appeal No. 5805 of 1997:

   Order No. 1 varied by adding "provided that this order does not give the plaintiff a proprietary interest, by way of security or otherwise, in the said sum"; otherwise appeal dismissed with costs.

2. Appeal No. 5788 of 1997:

   Appeal dismissed with no order as to costs.

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SUPREME COURT OF QUEENSLAND

Brisbane

Before Pincus J.A.
Thomas J.A.
Mackenzie J.

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(Defendants) Respondents

**REASONS FOR JUDGMENT - THOMAS J.A.**

**Judgment delivered 18 December 1998**

1 There are two appeals, namely -

1. the appeal of the defendants (Bigjig and Mr Gebauer and Ms Fletcher) against Derrington J's order requiring them to pay $200,000.00 into a trust account; and

2. the appeal of the plaintiff (Millennium) complaining that his Honour ought to have required $500,000.00 to be paid into the trust account.

2 I agree with the reasons of Pincus J.A. for the dismissal of the defendants' appeal, and in particular with his Honour's analysis of *Jackson v. Sterling Industries Limited*[1]. I have no doubt that the court had jurisdiction to require the defendants to retain an account or a fund pending the outcome of an action where an interest or entitlement to such proceeds is asserted by an adverse party. If the court has jurisdiction to preserve a fund or asset, it is difficult to think that it lacks the power to have it kept in an interest bearing trust account pending trial. Equity acts in personam, and in such cases a respondent may be ordered to set aside a certain sum so that it may be held to await the court's determination. The resemblance to an order for security is obvious, but it is not as such an order for security. The jurisdiction is differently based.

3 Despite certain references by the learned chamber judge to the provision of security by the defendants, the order should in substance more appropriately be regarded as one for the preservation of an asset. It was not contested that the defendants owned and controlled an account in excess of $.5M which represented the profits of the enterprise which the plaintiff alleged had been conducted in breach of duties owed to it by its officers or employees. The evidence would permit the inference to be drawn that during 1996 before leaving Millennium, Ms Fletcher saw an opportunity emerging for a very lucrative deal of the kind that Millennium was in the business of attempting to obtain. She subsequently sold her shares (along with Mr Gebauer's shares) to Mr Lee. She then took advantage of contacts that had been made with the prospective customer before her departure from Millennium and proceeded to effect a profitable result in favour of Bigjig, Mr Gebauer and herself.

4 In my view the order actually made was appropriate, and was justified by the evidence.

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1 (1987) 162 CLR 612.

So far as the plaintiff's appeal is concerned, a wide range of possibilities existed concerning the quantum of any entitlement that the plaintiff might prove. The inventiveness and the driving force in the transaction appear to have been Ms Fletcher's. She was of course free to leave Millennium at any time, and without her input that company may well have failed to secure the necessary deal. Furthermore, had Mr Gebauer and Ms Fletcher remained with Millennium and conducted the venture for its benefit, they would have been entitled to a substantial proportion of the profits. There is also evidence that although the venture realised the pre-tax profit of $518,000.00, the benefits obtained by the defendants amounted to approximately $155,000.00 each. It is impossible to tell at this stage of proceedings whether the plaintiff's entitlement should be assessed as equitable damages, taking into account the risk factors mentioned above, or by means of accounting by former officers for any benefit received in circumstances where a conflict of interest existed between duty to the company and personal interest.[2] Whichever way the matter is viewed, there is a wide range of possibility attending issues of quantum.

5 In these circumstances his Honour's order requiring the preservation of $200,000.00 holds a reasonable balance between the parties until trial and affords reasonable protection of an asset to which claims are presently made by both plaintiff and defendants.

6 I agree with the orders proposed by Pincus J.A.

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2 *Chan v. Zachariah* (1984) 154 CLR 178,199.

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AND:

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(Defendants) Respondents

**REASONS FOR JUDGMENT - MACKENZIE J.**

**Judgment delivered 18 December 1998**

1 I agree with the reasons given by Pincus J.A. and by Thomas J.A. for dismissing the appeals. I agree with the orders proposed by Pincus J.A.