SUPREME COURT OF QUEENSLAND

CITATION:	*Hafele Aust P/L & Anor v Maggbury P/L & Anor* [2000] QCA 397
PARTIES:	**MAGGBURY PTY LTD** ACN 011 007 793 (first plaintiff/first respondent) **GISMA PTY LTD** ACN 072 964 311 (second plaintiff/second respondent) **v** **HAFELE AUSTRALIA PTY LTD** ACN 006 021 432 (first defendant) **HAFELE GMBH & CO** (second defendant/appellant)
FILE NOS:	Appeal No 1495 of 1999 Appeal No 512 of 2000 SC No 8775 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 October 2000
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2000
JUDGE:	McPherson and Thomas JJA, Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed by setting aside order made on 6 January 2000, together with order for costs made on that application** **2. Appeal otherwise dismissed** **3. Appellants to pay respondents' costs to be assessed of and incidental to the appeal** **4. Respondents not at liberty to enforce such costs orders until determination of the application filed on 29 July 1999 or until further order** **5. First and second respondents' amended application filed on 18 August 2000 adjourned to a date to be fixed, with costs reserved**
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION

OF DOCUMENTS – PRODUCTION AND INSPECTION – GROUNDS FOR RESISTING PRODUCTION – LEGAL PROFESSIONAL PRIVILEGE – WAIVER OF PRIVILEGE – inventor of ironing board assembly alleged that appellants applied for own benefit confidential information re ironing boards in breach of deed of arrangements – certain documents produced and disclosed pursuant to court order – documents also exhibited to affidavit in support of an application and placed on Appeal Record – no effective steps taken to prevent documents becoming part of public record and available for public inspection – whether privilege lost

PARTNERSHIP – ACTIONS BY AND AGAINST PARTNERS – ACTIONS AND PROCEEDINGS AGAINST FIRMS AND INDIVIDUAL PARTNERS – IN NAME OF FIRM OR INDIVIDUAL PARTNERS – second defendant constituted limited partnership registered under German law – whether relief sought against limited partnership not individual partners

PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT – WHAT CONSTITUTES – DISOBEDIENCE OF ORDER OF COURT – INJUNCTIONS – contempt proceedings purport to enforce process and orders – use of proceedings for forensic manoeuvring purposes to be discouraged

Rules of the Supreme Court (Qld), O 54 r 7
Uniform Civil Procedure Rules, r 85, r 930

Adelaide Steamship Co Ltd v Spalvins (1998) 152 ALR 418, referred to
Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (1986) 161 CLR 98, contrasted
Australian Securities Commission v Marlborough Goldmines Ltd (1993) 177 CLR 485, referred to
Bayliss v Cassidy & Ors, CA No 1225 of 1998, 11 March 1998, contrasted
Berrill v Australian National Airlines Commission (1984) 85 ALR 211, referred to
Bridal Fashions Pty Ltd v Comptroller-General of Customs (1996) 17 WAR 499, referred to
Clifford v Middleton [1974] VR 737, referred to
Commissioner of Water Resources v Federated Engine Drivers, Firemen's Association of Australasia Branch & Ors [1988] 2 Qd R 385, referred to
Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477, considered

Goldberg v Ng (1995) 185 CLR 83, referred to
In Re New Gold Coast Exploration Company [1901] 1 Ch 860, referred to
Plating Co v Farquharson (1881) 17 Ch D 49, referred to
Re Warden Burton SM; ex parte Roberts (1997) 18 WAR 379, referred to
Scott v Scott [1913] AC 417, referred to
Sevic v Roarty, Appeal No 40037 of 1998, 14 August 1998, CA NSW, referred to
The Magistrates' Court at Prahran v Murphy [1997] 2 VR 186, referred to
Trade Practices Commission v Abbco Ice Works Pty Ltd & Ors (1994) 54 FCR 96, referred to
Trade Practices Commission v Arnotts Ltd (1990) ATPR 41-010, referred to
Witham v Holloway (1995) 183 CLR 525, referred to

COUNSEL: J S Douglas QC with G C McGowan for the appellants
S J Lee for the respondents

SOLICITORS: Shand Taylor Lawyers as town agents for Logie-Smith Lanyon (Melbourne) for the appellants
O'Shea Corser & Wadley for the respondents

[1] **McPHERSON JA**: I agree with the reasons of Muir J. The appeal should be allowed by setting aside the order made on 6 January 2000 for production or inspection of the documents together with the order for costs made on that application. Otherwise the appeal should be dismissed. The appellants are ordered to pay the respondents' costs to be assessed of and incidental to the appeal, but the respondent is not to be at liberty to enforce such orders for costs until determination of the application filed on 29 July 1999 or further order. The first and second respondents' amended application filed on 18 August 2000 is adjourned to a date to be fixed, with costs reserved .

[2] **THOMAS JA:** I agree with the reasons of and orders proposed by Muir J.

[3] **MUIR J:** The defendants in this action appeal against an interlocutory order made by a chamber judge on 6 January 2000, requiring Hafele Australia Pty Ltd (the first defendant), Horst Häfele, the heirs of the deceased Wolfgang Häfele, Claus-Peter Thierer, Ingrid Schuster, Ursula Krupp and Sibylle Thierer to deliver or produce for the inspection of the appellants documents, the subject of a claim for privilege, listed in a list of documents made pursuant to a disclosure order.

The circumstances surrounding the order under appeal.

[4] The first respondent, Maggbury Pty Ltd, was the inventor of a folding ironing board assembly. It assigned its rights with respect to the ironing board to the second respondent, Gisma Pty Ltd. In a Statement of Claim delivered in this action, the respondents alleged, in broad terms, that Hafele Australia Pty Ltd, in breach of a

deed of agreement with Maggbury Pty Ltd , had applied for its own benefit and the benefit of Häfele GmbH & Co certain information of a confidential nature in respect of the ironing board. It was alleged against Häfele GmbH & Co that it too had executed such a deed of agreement and was in breach of its terms. There were other allegations against the appellants in respect of the ironing board, but it is not necessary to discuss them.

[5] After a trial of the action, it was ordered on 22 January 1999 that Maggbury Pty Ltd recover from the appellants the sum of $25,000 and that the appellants be restrained, in broad terms, from manufacturing or distributing ironing boards as described in the order. An appeal from that order resulted in an order of the Court of Appeal on 12 May 2000, setting aside the orders at first instance and substituting an award of $5,000 damages. That decision is the subject of a pending application for special leave to appeal to the High Court.

[6] On 29 July 1999, thus before the dissolution of the injunction, the respondents filed an application in the proceedings seeking the following orders and direction –

1. that Hafele Australia Pty Ltd be "adjudged in contempt of court for breach of" the injunction "by manufacturing or distributing" the ironing boards;

2. that Häfele GmbH & Co be "adjudged in contempt of court for breach of …. (the injunction) … by manufacturing or distributing any other wall mounted ironing board designed or manufactured using whole or in part information derived directly or indirectly from the documents or prototype supplied by the (respondents) to the (appellants) as set out in the aforesaid orders …";

3. that the respondents have leave to interrogate Häfele GmbH & Co;

4. that Häfele GmbH & Co give disclosure on oath in respect of the matters in question on the application.

[7] That part of the application which sought disclosure was heard on 18 August 1999. The appellants argued that that the application was, in substance, a claim for a penalty and that disclosure should not be ordered. The argument was unsuccessful and disclosure was ordered, not against Häfele GmbH & Co, but against the company and individuals referred to in par [3]. There was no appeal .

[8] Häfele GmbH & Co is a limited partnership registered under the German Commercial Code. Such partnerships are comprised of one or more limited partners whose liability is limited to the amount of capital contributed to the partnership, and an ordinary partner or partners with unlimited liability. The Commercial Code prohibits limited partners from having authority to represent the partnership and from taking part in its management. Those roles are reserved to the ordinary partner or partners. The limited partnership can acquire rights and assume obligations under its own name, acquire and hold property and sue and be sued in its name.

[9] The sole ordinary partner in the limited partnership is Häfele + Thierel Limited Liability Management Company. The limited partners are the natural persons referred to in par [3] above.

[10] In compliance with the order of 18 August 1999, a list of documents and a supplementary list, each verified by affidavit, were delivered. The affidavit in each case was sworn by Horst Häfele and was expressed to be made on behalf of the ordinary and limited partners in the partnership. The affidavits contained a claim for privilege on behalf of the ordinary and limited partners in respect of specified documents. An application by the respondents for an order requiring production of the documents the subject of the privilege claim was heard on 6 January 2000. Hafele Australia Pty Ltd and Häfele GmbH & Co were the respondents to the application.

[11] Also heard on 6 January 2000 was an application by Häfele GmbH & Co for leave to withdraw the admissions made in the defence of allegations in par 1(d) of the Statement of Claim that –

> "(Häfele GmbH & Co) is and was:
>
> (i) a commercial partnership registered under German law which is capable, under the partnership name, of acquiring rights, undertaking obligations, suing and being sued;
>
> (ii) a foreign corporation within the meaning of s 4(1) of the *Trade Practices Act* 1974 (Cth);
>
> (iii) alternatively a person within the meaning of s 6(h) of the *Trade Practices Act* 1974 (Cth);
>
> (iv) the sole shareholder of Häfele GmbH, which is in turn the majority shareholder of (Hafele Australia Pty Ltd);
>
> the controller and prime mover of (Hafele Australia Pty Ltd)."

[12] The allegation in par 1(d)(v) of the statement of claim had in fact been denied in the various defences filed and delivered on behalf of the appellants in the action, but nothing turns on that for the purposes of this application.

[13] Presumably, Häfele GmbH & Co attempted to withdraw the admissions because of a perception that to do so would strengthen the claim for privilege. The learned primary judge declined to determine the application to withdraw the admissions after concluding that the question of the limited partnership's legal personality was not determinative of the respondents' application for the production of documents. His decision in that regard was also influenced by his view that the admission of the allegation in par 1(d)(ii) did not constitute an admission that the limited partnership was a "corporation" in the normal and accepted meaning of that term.

[14] The judge then held that the partnership had no separate legal personality of its own; that for the purposes of the *Uniform Civil Procedure Rules*, it should be treated as if it were a partnership under Queensland law; and that, by operation of the Rules, each member of the limited partnership should be treated as a respondent to the contempt proceedings. It followed from this, in the judge's view, that each of the ordinary and limited partners was obliged to make disclosure. His Honour concluded that none of the limited partners had adduced evidence sufficient to sustain a claim for privilege against self-incrimination, and that this was probably the case also with the ordinary partner. He rejected an argument that the *ratio*

decidendi in *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1] supported a claim for privilege by the ordinary partner.

[15] The documents the subject of the claim for privilege were produced by the appellants' solicitors to the respondents' solicitors on 11 January 2000. Copies of some or all of them were exhibited to an affidavit sworn on 18 January 2000 on behalf of the respondents in order to support an application on 1 February 2000 for a speedy trial. The documents have also been used by the respondents to particularize allegations of breach of the injunction.

[16] In this appeal, the appellants did not seek any relief in respect of the judge's failure to determine their application for leave to withdraw the admissions. Their arguments may be summarised as follows –

1. The primary judge should have applied *Caltex Refining Co Pty Ltd* as direct authority for the proposition that the ordinary partner could claim privilege against self-incrimination or against exposure to a risk of penalty. The court was not prevented from imposing a penalty by the limited relief sought by the respondents in their contempt application, and such proceedings should be regarded as criminal proceedings.[2] Consequently, the proceedings should be seen as proceedings for a penalty.
2. The primary judge erred in finding that the limited partners had not demonstrated sufficient grounds to warrant a claim by them for privilege against self-incrimination or exposure to the risk of a penalty.
3. The primary judge erred in exercising a discretion in favour of ordering production of the documents the subject of the claim for privilege. The respondents are seeking only "an adjudgment of contempt for the purposes of bringing the judgment to the attention of the appeal court on the hearing of the appeal from the order made on the trial" and the proceedings were thus vexatious. At about the time of the hearing on 6 January 2000, the respondents subpoenaed from the appellants' solicitors the documents the subject of the privilege claim. No order was made on the subpoenas, but the conduct of the respondents in having them issued was improper and is relevant to the exercise of the Court's discretion.
4. The primary judge erred in finding that the ordinary partner was obliged to produce documents belonging to the limited partnership, regardless of privilege claimable by the limited partners. If the limited partners had a valid claim for privilege, but the ordinary partner did not, the ordinary partner would have a fiduciary duty not to disclose documents against the interests of the limited partners. *Trade Practices Commission v Arnotts Ltd* [3] was relied on as authority for that proposition.

Has the privilege sought to be protected been lost?

[17] It is desirable to state at the outset that the upholding of the grounds of appeal would have little bearing on the respective rights and obligations of the parties. As I noted earlier, the documents the subject of the claim for privilege were produced for inspection by the appellants' legal advisers on 11 January 2000. It is probable that

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1 (1993) 178 CLR 477.

2 *The Magistrates' Court at Prahran v Murphy* [1997] 2 VLR 186, 216, 202-203 (CA).

3 (1990) ATPR 41-010 at 51,195.

this production, being pursuant to an order which the appellants opposed, may not have been sufficient, of itself, to destroy any privilege with respect to the documents produced.[4] The subject documents, however, were exhibited to an affidavit sworn on behalf the respondents and relied on by them in support of an application for speedy trial. They thus became evidence in the proceedings. There is no suggestion that any objection was made to the respondents' conduct in this regard. Copies of the documents (or many of them) were made part of the appeal record, presumably at the behest of the appellants and, if not at their behest, without objection on their part. The documents thus became part of a public record of proceedings and generally available for public inspection. They were available for perusal by the respondents and their legal advisers without restriction as to the use to which they could be put by the applicants in the furtherance of their contempt application. Also, as mentioned earlier, the respondents have used the documents in order to provide particulars of alleged breaches of the injunction.

[18] The general principles relevant to the question of imputed waiver of privilege were expressed in the following passage from the judgment of Deane, Dawson and Gaudron JJ in *Goldberg v Ng* [5] -

> "The circumstances in which a waiver of legal professional privilege will be imputed by operation of law cannot be precisely defined in advance. The most that can be done is to identify a number of general propositions. Necessarily, the basis of such an imputed waiver will be some act or omission of the persons entitled to the benefit of the privilege. Ordinarily, that act or omission will involve or relate to a limited actual or purported disclosure of the contents of the privileged material. When some such act or omission of the person entitled to the benefit of the privilege gives rise to a question of imputed waiver, the governing consideration is whether 'fairness requires that his privilege shall cease whether he intended that result or not'."

[19] Privilege will normally be waived by a litigant who intentionally discloses protected material to another,[6] and where the subject documents have gone into evidence.[7] The voluntary production of documents would normally be sufficient to constitute waiver of any privilege claim attaching to those documents, at least by the party producing them.[8]

[20] Although the documents were produced initially as a result of a court order, the appellants, although pursuing this appeal, took no effective steps (after the dismissal of a stay application brought by them) to ensure that the documents and their contents did not pass into the public record. Prior to that, they were put in evidence. Many of the documents, unnecessarily, were made part of the appeal record. In the circumstances discussed above, it seems plain enough that there has been a waiver of whatever privilege existed in respect of the subject documents.

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4 *Adelaide Steamship Co Ltd v Spalvins* (1998) 152 ALR 418 at 427; *Sevic v Roarty*, Appeal No 40037 of 1998, 14 August 1998, CA NSW; but cf *Bayliss v Cassidy & Ors*, Appeal No 1225 of 1998, 11 March 1998.

5 (1995) 185 CLR 83 at 95-96.

6 *Goldberg v Ng*, per Toohey J at 106.

7 *Sevic v Roarty*, Appeal No 40037 of 1998, 14 August 1998, CA NSW.

8 *Berrill v Australian National Airlines Commission* (1984) 85 ALR 211.

[21] The Court was requested to make orders which would have the effect of restoring the privilege claimed by the appellants and partners in the limited partnership. Assuming in favour of the appellants that such a course is open, I would not be disposed to accede to the request. If the appellants were concerned to maintain the efficacy of their claims, it would be open to them to attempt to prevent the subject documents becoming part of a public record. They are already on the court file and were placed in a sealed envelope by order of the judge hearing the application for speedy trial. Consequently, if it was necessary for there to be recourse to any of the documents on the hearing of the appeal, the documents in the sealed envelope would have been available. It was not necessary, as it turned out, for regard to be had to any of the documents in order to dispose of the appeal. The sole purpose of the order sought by the appellants appears to be to deny the use of the subject documents to the respondents in prosecuting the contempt proceedings. Any order, to be effective, would need to provide for the destruction of copies held by the respondents and their legal advisers and the removal of the documents from the public record. The documents were properly obtained, and the respondents are entitled to use them in the litigation. They have used them in ways already discussed. The circumstances of this case do not warrant any relaxation of the fundamental principle that legal proceedings be conducted publicly and in open court.[9] It is an adjunct to that principle that the materials before the Court for the purposes of its determination be available for public inspection.

The ordinary partner's right to claim privilege

[22] As will be explained shortly, I am of the view that disclosure should not have been ordered against the ordinary and limited partners. There was no appeal from that decision, however, and a question argued on this appeal was whether the ordinary partner had the right to claim privilege. Having regard to the above conclusions, it is unnecessary to decide the point, but I see no reason to doubt the correctness of the primary judge's finding that the ordinary partner had no right to claim privilege. In *Environment Protection Authority v Caltex Refining Pty Limited*, [10] it was held by Mason CJ, Brennan, Toohey and McHugh JJ that the privilege against self-incrimination did not apply to corporations. The minority, Deane, Dawson and Gaudron JJ, in a joint judgment, were of the opinion that the privilege was applicable to corporations.

[23] The case concerned a prosecution under s 29(2)(a) of the *Clean Waters Act* 1970 (NSW) which empowered an authorised officer to require "the occupier of any premises from which pollutants are being or are usually discharged … to produce … (materials) … relating to the discharge". The majority held that the provision could be used to obtain evidence against a corporation, notwithstanding the commencement of proceedings against it. It was held by a different majority, this time comprised of Brennan, Deane, Dawson and Gaudron JJ, that the accused corporation was not obliged to produce documents listed in a notice delivered by the prosecutor under the *Rules of Court* in order to obtain evidence and information for use against the accused corporation in the prosecution.

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9 *Scott v Scott* [1913] AC 417 at 477-8.

10 (1992-1993) 178 CLR 477.

[24] Deane, Dawson and Gaudron JJ concluded that the corporation was not obliged to produce documents on the grounds that it was entitled to the privilege against self-incrimination, a view rejected by a majority. Brennan J, although holding that such a claim was not available to corporations, upheld the privilege claim on the basis that corporations were entitled to claim privilege against self-exposure to a penalty. The other members of the Court did not consider the availability of such a claim, basing their respective conclusions on the privilege against self-incrimination.

[25] The reasons and decision in *Environment Protection Authority v Caltex Refining Co* have been considered in detail at appellate level in the Federal Court[11] and in the Supreme Court of Western Australia.[12] In *Trade Practices Commission v Abbco Ice Works Pty Ltd*, the Full Court of the Federal Court, by a majority four to one, concluded that the privilege against self exposure to a penalty did not apply to corporations. The decision in *Abbco* was applied by the Full Court of the Supreme Court of Western Australia in *Bridal Fashions Pty Ltd v Comptroller-General of Customs*[13]and in *Re Warden Burton SM; ex parte Roberts*.[14] The decision in *Caltex Refining* and relevant principles were analysed in those cases and little point would be served by further analysis here. It is obviously desirable that this Court apply a common law principle in conformity with prior decisions of intermediate Australian appellate courts, unless "convinced that [the decisions] are plainly wrong".[15] I am not so convinced.

[26] For the purposes of this discussion, I have assumed in favour of the appellants, without deciding that the respondents' claim against them is one which involves exposure to a penalty. I should mention also that on the view of the matter taken by me any disclosure order should have been made against Häfele GmbH & Co, which should have been treated as a corporation for the purposes of any claim for privilege.

The appropriateness of the order of 6 January 2000

[27] In the action, as I have explained, the respondent/plaintiffs sued Hafele Australia Pty Ltd and Häfele GmbH & Co. The parties litigated on the basis that the limited partnership, rather than the partners in the limited partnership, constituted the second defendant. Häfele GmbH & Co was named as the second defendant. The appellant made the admissions to which reference has earlier been made and an appearance was entered in the partnership name, further recognising that the individual partners were not being sued in the firm's name.

[28] Order 54 r 7 of the *Rules of the Supreme Court*, which applied at the time of the entry of appearance, provided –

> "When persons are sued as partners in the name of their firm, they shall appear individually in their own name; but all subsequent proceedings shall, nevertheless continue in the name of the firm."[16]

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11 *Trade Practices Commission v Abbco Ice Works Pty Ltd & Ors* (1994) 54 FCR 96.
12 *Re Warden Burton SM; ex parte Roberts* (1997) 18 WAR 379.
13 (1996) 17 WAR 499.
14 (1997) 18 WAR 379.
15 See *Australian Securities Commission v Marlborough Goldmines Ltd* (1993) 177 CLR 485 at 492.
16 The comparable provision the *Uniform Civil Procedure Rules* is r 85.

[29] The respondents to the contempt proceedings, made by the application in the action, are Hafele Australia Pty Ltd and the limited partnership. In the light of the matters I have mentioned, it is plain that relief was being sought against the limited partnership and not the partners. The nature of the application itself leads to the same conclusion. Proceedings for contempt are criminal in nature and contempt charges must be proved beyond reasonable doubt.[17] In such proceedings, "the utmost strictness in procedure and proof is demanded".[18]

[30] The breach of the injunction alleged against the limited partnership was "manufacturing or distributing" ironing boards as particularised. The evidence establishes that the limited partners have no authority to represent the partnership and are prohibited from taking part in its management. The material before the primary judge did not suggest that any of the limited partners, other than Horst Häfele, played any role in the conduct of the partnership business, let alone in and about the matters alleged to constitute a breach of the injunction. One of the limited partners, Horst Häfele, swore an affidavit verifying one of the lists of documents on behalf of Häfele + Thierel Limited Liability Management Co and the limited partners. He is the managing director of the ordinary partner. The limited partners include the heirs of a deceased person. It is not suggested that they had any role in the conduct of the partnership's affairs.

[31] A stranger to an action who aids and abets the breach of an injunction may be guilty of contempt punishable by committal.[19] However, an application seeking relief against named respondents for contempt would not be construed, readily, as encompassing claims for relief against unnamed persons for aiding and abetting the respondents' allegedly unlawful conduct. Here, the ordinary and limited partners were not mentioned in the application and nor was there any allegation, such as that of aiding and abetting, which might be thought referable to conduct on their part. Clearly then, no relief was being sought against the partners themselves.

[32] The respondents did not regard their application as being brought against the partners, and they did not seek the order for disclosure against the partners made by the primary judge. That order was unwarranted, but there was no appeal against it. It seems that the applicants took the view that, on a practical level, the interests of the ordinary and limited partners could be protected by a claim for privilege.

[33] The order made on 6 January 2000 involved the exercise of a discretion. Despite the failure to appeal from the order requiring disclosure by the partners, it seems to me that the exercise of discretion miscarried. The primary judge failed to give regard to matters relevant to the exercise of the discretion, such as the role of the limited partners in the partnership business, and more importantly, the fact that neither they nor the limited partners were parties to the litigation, and that no relief was being sought against them. Although the order has been overtaken by events, I consider it desirable that it be set aside. However, before concluding, I wish to make some general observations of the nature of these proceedings.

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17 *Witham v Holloway* (1995) 183 CLR 525 at 534.

18 *Commissioner of Water Resources v Federated Engine Drivers, Firemen's Association of Australasia Branch & Ors* [1988] 2 Qd R 385 at 392, quoting *Clifford v Middleton* [1974] VR 737at 739.

19 9 *Halsbury's Laws of England* 4th ed par 85

The unusual nature of the respondents' contempt proceedings

[34] Another unusual feature of this case is the relief sought in the contempt application. It seeks that the named appellants "be adjudged in contempt of court". An injunction against a corporation may be enforced by seizure of the defaulting company's property or by fine. In the case of an individual a contempt is punishable by imprisonment or fine or both.[20] It is noted in *Halsbury* that –

> "The court does not encourage motions to commit where committal is not really sought, and all that is asked for is an apology and the payment of costs. In such cases the party moving ought not be allowed his costs and the motion may be refused with costs."[21]

[35] In *In re New Gold Coast Exploration Company,*[22] Cozens-Hardy J expressed strong disapproval of the bringing of applications for committal for contempt where it was not intended to pursue such an order. He quoted with approval the following passage from the judgment of James LJ in *Plating Co v Farquharson* [23] -

> "I certainly in such cases would not only not give the party moving his costs, but I should be inclined to make him pay costs. I think these motions are a contempt of Court in themselves, because they tend to waste the public time."[24]

[36] The above observations of James LJ remain valid. The *Uniform Civil Procedure Rules* and their predecessors make provision for contempt proceedings in order to provide for the enforcement of the process and orders of the Court and the punishment of acts which impede the due administration of justice.[25] In the case of civil proceedings, the main purpose of the sanctions provided by the Rules in the event of a failure to comply with court orders is coercive rather than punitive.[26]

[37] Applications, such as the one under consideration, serve neither of these objectives. In my view, resort to contempt proceedings by litigants for the purposes of forensic manoeuvring should be discouraged.

[38] The foregoing considerations were not within the appellants' grounds of appeal and, although raised in the course of argument, were not the subject of considered submissions. I thought it desirable, however, to express these views, lest it be thought that failure to question the course being pursued by the respondents lent it tacit support.

[39] **Application for payment of moneys out of court**

[40] On 18 August, the respondents filed an amended application seeking an order that sums of $3,274.50 and $5,025.05, being the amounts of two orders for costs made against Häfele GmbH & Co, be paid to the respondents out of the sum of $25,000

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20 Rule 930, *Uniform Civil Procedure Rules.*

21 24 *Halsbury's Laws of England* 4th ed reprint par 1110.

22 [1901] 1 Ch 860.

23 (1881) 17 Ch D 49, 56.

24 At 863.

25 cf *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 107.

26 *Mudginberri* at 107.

ordered to be paid into court in this action on 24 March 1999. The sum was calculated by reference to the damages awarded on trial. As has been seen, the initial judgment for $25,000 was replaced by an award of $5,000.

[41] The appellants oppose the making of the orders sought by the respondents. They point out that there have been a number of costs orders in their favour which, when assessed, may well exceed in amount the costs the subject of this application. In view of the pending application for special leave, and the fact that the contempt proceedings await resolution, I consider it desirable that this application be deferred. There is also the consideration that, depending on the outcome of the special leave application, the respondents may have a *de facto* security for costs, the basis for which can no longer be fully supported having regard to the setting aside of the judgment on trial.

Conclusion

1. I have not sought to deal with all of the appellants' arguments as it is unnecessary to do so in order to dispose of this appeal. In view of my conclusion that disclosure (if any) should have been made by Häfele GmbH & Co, that it was unable to claim privilege and that, in any event, privilege has been lost, it becomes unnecessary to decide whether the primary judge erred in finding that the limited partners had not adduced sufficient evidence to make out their claim for privilege. Nor is it necessary to decide whether the ordinary partner had a fiduciary duty to the limited partners which prevented disclosure by the ordinary partner of documents which might incriminate the limited partners.

2. I mention in passing that neither of these arguments appears to me to be sustainable. As to the former, the privilege claims were based on the sworn opinion of Mr Häfele, unsupported by evidence. The documents the subject of the claim were not brought to Court. If the judge had been invited to consider them (which he was not) he could not have done so as most were in German and untranslated.

3. As for the second point, no evidence was adduced as to the existence, and scope of any relevant fiduciary duty. Apart from that, it is difficult to comprehend how there could be a duty on the partner with sole responsibility for managing the partnership business to avoid producing documents relating to the conduct of that business which were required to be produced by compulsion of law.

4. The discretion of the primary judge in making the order under appeal miscarried and the order should be set aside. Otherwise, the appeal should be dismissed.

5. The privilege claim of Häfele GmbH & Co in respect of the subject documents has been lost and it is not appropriate to make an order which would have the practical effect of restoring the privilege, even if it were possible so to do.

6. As the respondents have been successful on the appeal for all practical purposes, I would order that the appellants pay the respondents' costs of and incidental to the appeal, to be assessed. I would further order that the respondents not be at liberty to enforce such costs orders until the determination of the application filed on 29 July 1999 or unless ordered to the contrary. As the matters raised on the 6 January 2000 hearing have not been determined on the merits, I would not make any order for the costs of and incidental to that hearing.