

SUPREME COURT OF QUEENSLAND

CITATION: *Formal Wear Express Franchising P/L v Roach* [2004] QCA 339

PARTIES: **FORMAL WEAR EXPRESS FRANCHISING PTY LTD**
ACN 096 072 418
(applicant/respondent)
v
JOHN WILLIAM ROACH
(respondent/applicant)

FILE NO/S: CA No 300 of 2004
DC No 3830 of 2003

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 16 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 16 September 2004

JUDGES: McPherson and Williams JJA and White J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Grant leave to appeal**
2. Allow the appeal
3. Substitute for the sentences imposed at first instance an order that the applicant be imprisoned for three months on each of the three counts of contempt, such sentences to be served concurrently

CATCHWORDS: PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT – WHAT CONSTITUTES – BREACH OF UNDERTAKING TO COURT – where orders were made pursuant to undertaking given by applicant prohibiting them from carrying on mobile suit hire business – where applicant breached undertaking and was fined \$3,000 – where applicant again breached undertaking and was ordered to be imprisoned for six months – where no remorse shown – where futile to impose fine – whether term of imprisonment ordered was manifestly excessive

Bakir v Doueih & Ors [2001] QSC 414; SC No 6124 of

2000, 6 November 2001, referred to
*Evenco Pty Ltd v Australian Building Constructions
Employees and Builders Labourers Federation (Qld Branch)*
[2001] Qd R 118, cited

COUNSEL: A J Rafter SC for the applicant
J C Faulkner for the respondent

SOLICITORS: Legal Aid (Queensland) for the applicant
Ffrench Commercial Lawyers for the respondent

WILLIAMS JA: This is an application for leave under s 118(3) of the District Court Act to appeal against a sentence of six months' imprisonment imposed on the applicant after he was found to be in contempt of Court.

The applicant is no longer pursuing the challenge to the finding that he was in contempt.

Proceedings were commenced in the District Court between the present respondent as plaintiff, Roach Pty Ltd as first defendant, and the applicant and his wife Patricia May Roach as second defendants.

Upon an interlocutory application being made in that proceeding, an order was made by Judge Brabazon QC on 1 December 2003 which incorporated the following undertaking by all of the defendants:

"The defendants and each of them whether by their servants or agents or otherwise until the determination of these proceedings or further order will not conduct on their own account or be concerned or interested in any business for the mobile hire of formal menswear within the south west Brisbane area as identified in a Franchise Agreement between the parties dated 6 August 2002 or

within fifty (50) kilometres thereof as referred to in a Restraint Agreement prepared pursuant to the said Franchise Agreement."

By application filed on 26 February 2004, the present respondent sought an order that each of the defendants in the action be dealt with for contempt in that on or about 20 February 2004 they breached the undertaking by entering into a transaction with a person named Cameron.

On 9 March 2004, Judge Forno QC found the contempt proved and on 12 March ordered that the present applicant be fined \$3000 to be paid on or before 30 August 2004. I also mention that Mrs Roach was then admonished and discharged and the company also fined the sum of \$3000.

The application with which the Court is presently concerned was initially filed on 21 May 2004 and sought orders that each of the defendants in the action be dealt with for further contempts of Court. The application related to transactions with a Ms Schurmanns between 24 and 30 March 2004 and a Mr Busmar between 20 March and April 2004.

Before the hearing that application was amended to include particulars of a third transaction, namely one with a person named Graham between 16 March and June 2004.

The application came on for hearing before Judge Brabazon on 17 June 2004 at which time the applicant appeared on his own behalf and on behalf of his wife. Partly because there was

some new material in the amended application, and partly because Mrs Roach was then in hospital, Judge Brabazon adjourned the hearing until 19 July.

The substantive hearing took place before Judge Samios on 19 July 2004. There was no appearance by or on behalf of any of the defendants to the original action on that occasion. Judge Samios found Mr and Mrs Roach to be in contempt, being the three particulars of contempt alleged in the amended application and supporting affidavit material, and adjourned the question of sentence to 6 August 2004.

On 6th August 2004, the present applicant appeared on his own behalf and on behalf of his wife. The applicant indicated to the Court that his wife was unable to attend because she was ill, she was waiting on bowel surgery.

In the course of making submissions on sentence the applicant informed Judge Samios that a fine would be "a waste of time" because he would not be "able to meet the fine, as I've got trouble doing the last one". Statements by the applicant to Judge Samios also indicated that the "business has folded".

I take that to mean that the defendant company is no longer trading.

In his sentencing remarks Judge Samios noted that despite the orders made by Judge Forno on 12 March 2004 the applicant had continued to breach the undertaking. In consequence he

imposed a sentence of six months' imprisonment on each of the acts of contempt and ordered that the sentences be served concurrently.

With respect to Mrs Roach, a sentence of imprisonment of two months wholly suspended for 12 months was imposed. There is no application for leave to appeal against that sentence.

Finally by way of background it should be noted that on 31 August 2004, Judge Brabazon extended the time for payment of the fine imposed on 12 March 2004 so that it had to be paid by 30 August 2005.

The question for this Court is whether or not the sentence of six months' imprisonment was manifestly excessive in all the circumstances. Counsel for the applicant submitted that the period already served in custody, namely 41 days, was appropriate. He contended that the sentence should be suspended forthwith with a significant operational period.

Although the contempt was committed in civil proceedings there is a significant public interest element involved. The contempt procedure is designed to punish disobedience of orders of the Court and it is in the public interest, as well as in the interests of the parties to the civil proceeding, that the Court's order be obeyed: *Bakir v. Doueihi & Ors* [2001] QSC 414.

The seriousness of the contempt will be the determining feature when considering the nature of the penalty to be imposed: *Evenco Pty Ltd v. Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] Qd.R. 118 at 128 and 137.

Here the most significant feature of the case is the lack of remorse on the part of the applicant and his continued refusal in the face of being fined for contempt to abide by the undertaking given to the Court and forming part of its order.

Counsel for each party referred to a number of decisions involving the imposition of a penalty for contempt of Court. Fines often in very significant amounts have frequently been imposed and, in other instances, wholly suspended periods of imprisonment have been imposed on individuals. There are also instances where actual imprisonment was imposed.

Here it would be futile to impose a fine. Because of the contemptuous behaviour of the applicant in continuing to breach the undertaking so soon after being fined for contempt, it was appropriate in my view to impose a custodial sentence. That is particularly so where there was no acknowledgment of wrongdoing at the sentence hearing or subsequently.

So far as is revealed by the material, this was the first occasion on which the applicant, who was aged in his 40s, had been in prison. In the circumstances, one can also have regard to the fact that the business in question is no longer operating and the applicant's wife has a serious medical

condition. The applicant also has twin daughters in Year 12 and an 11 year old son.

Whilst Courts are reluctant to impose short periods of imprisonment, that is the only punishment in my view open on the evidence here. However I am of the view that in all the circumstances imprisonment for six months is manifestly excessive.

I would grant leave to appeal, allow the appeal and substitute for the sentences imposed at first instance an order that the applicant be imprisoned for three months on each of the three counts of contempt, such sentences to be served concurrently.

McPHERSON JA: I agree.

WHITE J: I agree also.
