

SUPREME COURT OF QUEENSLAND

CITATION: *Returned & Services League of Australia (Queensland Branch) v Comprite Pty Ltd* [2006] QCA 377

PARTIES: **RETURNED & SERVICES LEAGUE OF AUSTRALIA (QUEENSLAND BRANCH)**
(plaintiff/respondent)
v
COMPRITE PTY LTD
(ACN 010 486 736)
(defendant/appellant)

FILE NO/S: Appeal No 450 of 2006
SC No 8678 of 2004

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 29 September 2006

DELIVERED AT: Brisbane

HEARING DATE: 7 August 2006

JUDGES: Jerrard JA and Dutney and Mullins JJ
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: CONTRACTS – CONSTRUCTION AND INTERPRETATION – OTHER MATTERS – where appellant managed respondent’s art unions pursuant to a contract – where information obtained from art unions stored in appellant’s database – whether respondent was precluded from using art union information after contract terminated

EQUITY – GENERAL PRINCIPLES – RULES AND MAXIMS OF EQUITY – confidential information – where appellant’s database contained information from managing respondent’s art unions – where art union information was only part of the information in the database – whether art union information in appellant’s database confidential as against the respondent

Charitable and Non-Profit Gaming Act 1999 (Qld)

COUNSEL: W Sofronoff QC, with M R Bland, for the appellant
R G Bain QC, with G C Newton, for the respondent

SOLICITORS: Russell & Company for the appellant
 BCI Law for the respondent

- [1] **JERRARD JA:** In this appeal I have read the reasons for judgment and the orders proposed by Dutney J, and respectfully agree with those.
- [2] **DUTNEY J:** The respondent (“the RSL”) conducts a series of Art Unions to raise funds for the provision of retirement and nursing homes for returned service personnel and their dependants. The right to conduct art unions is conditional on the party conducting the art union having the appropriate licence. The types of organisations which can obtain a license are limited but include the RSL.
- [3] Until recently, the means by which the RSL conducted the art unions was to engage the appellant (“Comprite”) to manage and promote them pursuant to an agreement dated 1 April 1999 (“the Comprite agreement”). Comprite is a company associated with Mrs Olsen.
- [4] The relationship between the RSL and Comprite goes back to 1983. Prior to that the RSL had conducted a number of its art unions at a loss. In 1983, the RSL entered into two agreements with Formdeen Pty Ltd (“Formdeen”). Formdeen was another company associated with Mrs Olsen.
- [5] By the first agreement with Formdeen, the RSL sold various items of plant and equipment together with two lists totalling about 180,000 names of persons who had at some stage purchased tickets in the RSL’s art unions. The sale price was \$154,000.
- [6] The second agreement was a management agreement under which Formdeen would manage and promote the art unions for up to 24 years subject to periodic rights on the part of the RSL to terminate the agreement earlier.
- [7] The recitals to the management agreement acknowledged that the RSL owned and conducted art unions and that it wished to hand over management of the art unions to Formdeen.
- [8] Under the management agreement, Formdeen was to pay the RSL \$2,000 per week subject to three yearly increases together with a further annual sum equal to the greater of \$104,000 (subject to the same three yearly increases as the weekly fee) or one half of the net profit earned by Formdeen from conducting the art unions in that year.¹
- [9] Under clause 6 of the management agreement Formdeen was entitled to all profits from the art unions after payment of the amounts required to be paid to the RSL and was responsible for all the expenses incurred.
- [10] The following additional clauses of the Formdeen management agreement also appear to be relevant to the arguments advanced before this Court:
 “9. It is hereby specifically agreed that a person nominated by the [RSL] shall be entitled to inspect and audit all books and records maintained by [Formdeen] relating to the art union during the term

¹ See clauses 2 to 5 (AB Vol 3, pages 533, 534).

hereby created. [Formdeen] hereby specifically agrees to allow that person nominated by the [RSL] to inspect and audit its books and records to do so on any working day during the ordinary business hours the art union is conducted.

17. It is agreed and declared that the [RSL] and [Formdeen] are not partners or agents of each other and that neither has the authority to bind the other by contract declaration admission or other statement without the consent of the other first had and obtained and each is entitled to make this situation known to any affected party and neither is entitled to pledge the credit or guarantee of the other.

21. On the termination of this agreement for any cause:

(a) [Formdeen] shall cease to be entitled to occupy the premises at 188 Barry Parade Fortitude Valley aforesaid leased by the [RSL] from Perimeter Investments Pty Ltd;

(b) [Formdeen] shall return to the [RSL] all documents relating to the conduct of the art union business which are in its possession power custody or control at that time.

27. It is expressly agreed that ownership of the art union business shall be retained by the [RSL] and it shall at its cost and expense continue to renew the registration of the business name 'RSL War Veterans Homes Art Union' with the Commissioner for Corporate Affairs throughout the term hereby created and shall continue to do all things necessary to preserve its said ownership and the right to conduct art unions."

- [11] Under the sale agreement, the purchase price for the chattels and lists was to be paid at a rate of \$18,400 for each of the first seven art unions managed by Formdeen and \$8,400 per art union for the next three art unions. In any event the full price was to be paid by 1 May 1985.²
- [12] In 1986, Formdeen sold its "Database" to Comprite for \$350,000.³ It may be that this database had its origin in the lists sold by the RSL to Formdeen under the sale agreement of 1983. It is equally likely that the lists sold by the RSL had already evolved as a result of each art union subsequently conducted giving rise to new purchasers' names and addresses and those names and addresses being added to the Comprite database. Other information must also have been added to the database. By 1997 the database had grown to approximately 1.2 million persons. Of the original 180,000 persons on the lists sold to Formdeen only some tens of thousands were still included. It is probably safe to assume that this transition and growth were already underway by 1986.
- [13] From 1986 until 1 July 1997, Comprite continued to manage and promote the art unions under the terms of the Formdeen management agreement.

² See clause 2 (AB Vol 3, page 513).

³ AB Vol 3 pages 542 to 544.

- [14] By the Comprite agreement which, although dated 1 April 1999 apparently took effect from 1 July 1997, the arrangements between the RSL and Comprite were altered.
- [15] The fundamental change in the relationship was that under the Comprite agreement the RSL assumed the commercial risk of conducting the art unions and received the profits whereas Comprite was paid a management fee for the services provided. I will come to the terms of the Comprite agreement shortly.
- [16] By 2005, the relationship between the RSL and Comprite had soured. The Comprite agreement was for a term of 10 years but was subject to termination by either party at any time after 30 June 2000 on the giving of 18 months written notice. The RSL gave such a notice on 29 June 2004. The agreement therefore came to an end on 29 December 2005.
- [17] The dispute between the parties at trial was concerned with whether Comprite was obliged to provide the RSL with a list of the names and addresses of persons who had bought tickets in the art unions conducted under the management of Comprite (“the ticket registers”). This information is stored in the database maintained by Comprite. It is not all the information in that database.
- [18] The RSL based its entitlement to the information on three bases. It relied on the terms of the *Charitable and Non-Profit Gaming Act 1999 (Qld)*, an implied term of the Comprite agreement and on an equitable right to the information.
- [19] The primary judge ordered that the ticket registers be supplied. A counterclaim by Comprite seeking an injunction to restrain the RSL from taking commercial advantage of the information in the ticket registers was dismissed. It is from the dismissal of the counterclaim that Comprite appeals. Comprite now accepts that the RSL is required by the terms of the statute to retain the ticket registers in its possession but argues that the information is confidential to it and cannot be used by the RSL for any purpose other than compliance with its statutory obligations.
- [20] The primary judge was satisfied that the names and addresses of ticket purchasers were confidential as between Comprite and the RSL on the one hand and third parties on the other; but was not satisfied that the confidentiality existed as between Comprite and the RSL *inter se*.⁴
- [21] Comprite based its assertion of an exclusive right to use the ticket registers on three facts. First, that the original lists were acquired from the RSL for value and developed by Formdeen and subsequently by Comprite. Second, the recitals to the Comprite agreement acknowledged Comprite’s ownership of the database. Third, obtaining the names of new purchasers, and adding them to the database, involved manipulation and skilled use of the huge and valuable database owned by Comprite.
- [22] The primary judge accepted the first two facts but doubted the relevance of the third.
- [23] On the hearing of the appeal a great deal of emphasis was placed by Comprite’s senior counsel on the purchase of the original lists by Formdeen from the RSL.

⁴ *Returned & Services League of Australia (Queensland Branch) v Comprite Pty Ltd* [2005] QSC 361 at [90] to [93], [120] to [121].

- [24] The origin of Comprite's database does not seem to me to take the matter very far. The orders made by the primary judge were not concerned with the database but only with the names and addresses of actual purchasers of tickets in the RSL's art unions. It seems to me that the two are not equivalent. Although the names and addresses of the purchasers are in the database, the value of the database is much greater and its value, at least in part, is in Comprite's ability to manipulate the information in the database to obtain lists of names based on particular profiles for particular purposes.
- [25] At trial, the primary judge concluded that the ticket registers were both accounting and gaming records of the Art Unions.⁵ This conclusion is not now challenged by Comprite. As records of the Art Unions, clause 21(b) of the Formdeen agreement required their delivery up to the RSL at the conclusion of that agreement. For my own part, this appears to be a clear recognition that there was a difference between the original lists sold to Formdeen under the contemporaneous agreement and records of the art unions Formdeen then conducted. Clause 27 of the Formdeen agreement acknowledged that the business of the art unions was to be retained by the RSL. If the business was retained by the RSL I cannot see any logic in excluding from that business its business records – the ticket registers.
- [26] When the Comprite agreement replaced the Formdeen agreement the RSL was, in my view entitled to the ticket registers for the earlier art unions and Comprite owned its database with whatever information it contained. While the information contained in each overlaps, they are separate items of property.
- [27] It follows from this that in my view, the acknowledgement in the recitals to the Comprite agreement that Comprite was the owner of the database is of little assistance in this case.
- [28] It is then necessary to see whether anything in the Comprite agreement changes the position as far as ownership of the ticket registers is concerned.
- [29] The recitals to the Comprite agreement were as follows:
- A The [RSL] has the right to conduct art unions known as RSL War Veterans' Homes and Welfare Art Union ("the art union")
 - B [Comprite] or [Comprite's] managing director has managed the art union for the [RSL] since 30 June, 1986, by utilising its database and providing other services as hereinafter mentioned.
 - C The [RSL] wishes [Comprite] to continue to conduct the management and marketing of the art union.
 - D [Comprite] is prepared to continue to manage and promote the art union and provide computer and other services and utilize its buyer database on the terms hereinafter appearing."
- [30] During the course of argument the Court was taken to these clauses of the Comprite agreement:

⁵ *Returned & Services League of Australia (Queensland Branch) v Comprite Pty Ltd* [2005] QSC 361 at [59].

“5. A person nominated by [the RSL] shall be entitled to inspect and audit all books and records maintained by [Comprite] relating to the art union during the term hereby created. [Comprite] hereby specifically agrees to allow that person so nominated by [the RSL] to inspect and audit its books and records to do so on any working day during the ordinary business hours the art union is conducted after reasonable notice in that regard.

...

10. It is agreed and declared that [the RSL] and [Comprite] are not partners or agents of each other and that neither has the authority to bind the other by contract declaration admission or other statement without the consent of the other first had and obtained and each is entitled to make this situation known to any affected party.

...

19. Each party agrees with the other that it will at all relevant times keep the contents of this Agreement and any information owned by the other party whether or not designated by that party as being confidential information (but which may reasonably be assumed to be confidential) confidential, and not disseminate same further without the consent of the party owning it. Confidential information owned by a party shall be treated by the other party in the strictest confidence. Except as is required by law a party shall not copy photocopy transcribe reproduce transmit or communicate by any other means or document any confidential information or any part thereof provided that the obligations in this clause shall not apply where the confidential information is already known to or lawfully in the possession of the recipient party through sources other than the party owning the information, or where disclosure is required by law, or where the confidential information becomes generally and publicly available except by breach of this clause.”

- [31] The argument advanced on behalf of Comprite appeared to rely heavily on the recitals to the Comprite agreement and on clause 19 protecting confidential information. Clause 19 seems to me to beg the question as to who was entitled to exploit the information in the ticket registers. It applied only if the information was owned by Comprite, which is the very question presently the subject of the litigation. Likewise, the recital acknowledging Comprite’s ownership of the database does not take the matter very far because, as I have already discussed, the database is not what the RSL wishes to exploit.
- [32] It was submitted that clause 5 of the Comprite agreement was an indication that Comprite owned the records of each art union. Otherwise, it was submitted, it would be unnecessary to have a clause permitting those records to be audited. Again, I do not think clause 5 advances the argument. It appeared in the Formdeen management agreement in materially identical terms. Again, for reasons I have already outlined, I do not think the term in the Formdeen management agreement assisted Comprite’s argument. *A fortiori*, I do not think it is of assistance in relation to the Comprite agreement.

- [33] In the result I agree with the primary judge when he concluded that the agreements do not in their terms confer on Comprite a right of confidentiality with respect to the ticket registers.⁶
- [34] In examining the position outside the agreements, the primary judge placed some emphasis on the fact that much of the entering of the ticket registers into the Comprite database was done by RSL employees, albeit under the direction of Comprite.
- [35] The primary judge addressed the issue as follows:
“[120] I have already set out the nature of the information, the terms of the relationship between [the RSL] and [Comprite] and the circumstances in which the communication has been or will be communicated to the plaintiff. There is nothing in any of these circumstances which indicates that it would be unconscionable for the [RSL] to use the ticket registers in the future conduct of its art unions. I so conclude from the following:
1. The relationship between the parties is governed by a contract pursuant to which [Comprite] has managed the conduct of the [RSL’s] art unions so that the [RSL] can make profits to fund its charitable works. The contract does not in its terms confer on [Comprite] a right of confidentiality with respect to the ticket registers.
 2. The information consists of the identities of those who have bought tickets in the [RSL’s] art unions. There is nothing in the nature of the information which would indicate that it should belong to [Comprite], the manager of the art unions, save for the fact that for the proper performance of the agreement [Comprite] assimilated the information into its databases. The information which is stored in the database was received by, recorded and converted into electronic form by the [RSL’s] employees as part of the conduct of the [RSL’s] art unions.
 3. The [RSL] has a statutory obligation to keep the information at its premises and [Comprite] is under a contractual obligation to assist the [RSL] to comply with the Act. There is nothing in the communication of information in these circumstances which suggests some surreptitiousness, some impropriety, which would attract the attention of equity.
 4. By the terms of the confidentiality agreements which [Comprite] had the [RSL’s] employees sign the [RSL’s] interest in maintaining confidentiality in the information is acknowledged.”

[121] These considerations lead me to conclude that [Comprite] cannot assert, as against the [RSL], that the ticket registers are its confidential information or that it is information imparted in confidence which ought not to be divulged or used by the [RSL] in the conduct of its art unions.

⁶ *Returned & Services League of Australia (Queensland Branch) v Comprite Pty Ltd* [2005] QSC 361 at [107], [120].

[122] One reaches the same conclusion if one considers the ‘elements’ of the cause of action for breach of confidentiality. One of the elements which must exist before the breach is made out is that the information be received by the recipient in such circumstances as to import an obligation of confidence. See *Corrs Pavey Whiting & Byrne v Collector of Customs (VIC)* (1987) 14 FCR 434 at 443; *Coco v A N Clark (Engineers) Ltd* (1969) RPC 41 at 47-48. Information was received by the [RSL’s] employees in the course of their employment in connection with the conduct of the [RSL’s] art union. The Act and the agreement oblige [Comprite] to give the information to the [RSL] because it is both an accounting record and a gaming record which the [RSL] must keep. The information itself consists of the identities of those persons who participate in the [RSL’s] art unions. These circumstances are not such as, in my opinion, to import an obligation of confidence on the [RSL]. The fact that [Comprite] has added the information to other information held by it which it can amalgamate and manipulate to its own value does not mean that the information was received by the [RSL] in circumstances importing an obligation not to use it in the conduct of its own future art unions.”

- [36] The confidentiality agreements to which the primary judge referred in paragraph 120(4) acknowledged that the RSL was the owner of confidential information and in relation to that information could enforce the confidentiality provisions of clause 19 of the Comprite agreement.⁷ Some doubt attends the validity of the primary judge’s reliance on the confidentiality agreements. Those agreements were entirely general. Arguably, it is just as improper to assume that they refer to the ticket registers as it is to assume that the general words of clause 19 of the Comprite agreement refer to the ticket registers. Nonetheless, in my view, the confidentiality agreements add little to the primary judge’s reasoning. His ultimate conclusion is not, in fact, dependent on any particular construction of the confidentiality agreements and is, with respect, correct.
- [37] The RSL is in the business of conducting art unions. The fact that it has contracted out the management, promotion and sale of tickets in those art unions does not mean it is not itself conducting the business. The RSL is taking advantage of its license in the conduct of the art unions and is receiving the profits of those art unions. The names and addresses of the persons who have bought tickets in any particular art union are records of that art union. The fact that a ticket has been sold by a third party on behalf of the RSL does not mean that the third party can keep the identity of the ticket purchaser from the RSL. That much is now admitted. In the absence of a specific contractual provision, the fact that the ticket has been sold by a third party does not mean that the RSL cannot use the purchaser’s name or address for its own advantage in other art unions. There is no such contractual provision. The ticket registers are no more than the names and addresses of the ticket purchasers. In my view, as between Comprite and the RSL, no basis has been established for restricting the RSL’s use of information the RSL is entitled to hold.
- [38] I would dismiss the appeal with costs.
- [39] **MULLINS J:** I agree with Dutney J.

⁷ An example of an agreement is exhibit 36 to Mrs Olson’s affidavit at AB737.