

DISTRICT COURT OF QUEENSLAND

CITATION: *Mangosteen Orchard Pty Ltd v Zieth & Anor* [2021] QDC 20

PARTIES: **MANGOSTEEN ORCHARD PTY LTD (ACN 160280811)**
(applicant)
v
PETER JAMES ZIETH AND JULIE ANN ZIETH
(respondents)

FILE NO: 73/2021

DIVISION: Brisbane

PROCEEDING: Application

ORIGINATING COURT: District Court, Brisbane

DELIVERED ON: 29 January 2021

DELIVERED AT: Brisbane

HEARING DATE: 15 January, 19 January and 28 January 2021

JUDGE: Sheridan DCJ

ORDER: **UPON THE APPLICANT GIVING THE USUAL UNDERTAKING AS TO DAMAGES, THE ORDER OF THE COURT IS THAT:**

1. Between the hours of 7:00am and 6:00pm commencing on Saturday, 30 January 2021 and continuing between the hours of 7:00am and 6:00pm each day thereafter, up until 6:00pm, Monday, 1 February 2021, the respondents grant such employees or agents of the applicant (other than Hoa Binh Xuan Ngo), as are reasonably necessary to enable the applicant to remove such chattels as it is permitted to remove by this order, such access to Lots 1 and 190 (excluding the farmhouse occupied by the respondents as their place of residence) on Registered Plan 804147 in the State of Queensland (the Farm) as may be reasonably necessary to enable the applicant to remove the chattels listed below from the Farm:

- (a) the roller conveyor (yellow frame) depicted in Photograph 3 exhibited to the Affidavit of David Kempton sworn 22 January 2021 (Kempton Affidavit);**
- (b) the roller washer (blue frame) depicted in Photograph 4 exhibited to the Kempton**

Affidavit;

- (c) the hopper conveyor (blue) depicted in Photograph 5 exhibited to the Kempton Affidavit;**
 - (d) the weight grader (red top) depicted in Photograph 7 exhibited to the Kempton Affidavit;**
 - (e) the conveyor (yellow strip) which is depicted within the circle which appears in the version of Photograph 8 which is Exhibit “DK24” to the Kempton Affidavit;**
 - (f) the washer conveyor (stainless) depicted in Photograph 9 exhibited to the Kempton Affidavit;**
 - (g) the brush cleaning machine (blue red) depicted Photograph 9A exhibited to the Kempton Affidavit;**
 - (h) the wash tank depicted in Photograph 10 exhibited to the Kempton Affidavit;**
 - (i) the circular grader depicted in Photograph 15 exhibited to the Kempton Affidavit;**
 - (j) the conveyor on legs depicted in Photograph 16 exhibited to the Kempton Affidavit;**
 - (k) the white bird nets depicted in Photographs 18 and 18A to 18D exhibited to the Kempton Affidavit;**
 - (l) the 393 stackable fruit crates depicted in Photograph 19A exhibited to the Kempton Affidavit; and**
 - (m) such of the polystyrene boxes, depicted in Photographs 21 to 23 exhibited to the Kempton Affidavit and which are 18-litre boxes of the “UltraStak” brand but so as not to exceed 1000 in total.**
- 2. In accessing the property as contemplated in Order 1, one only of the employees or agents of the applicant to whom access is granted may carry with them a mobile phone for the sole purpose of contacting Mr Ngo if any issue arises as to the identification of any of the items listed in Order 1 and the employee or agent in possession of the mobile phone may take such photographs of the item for the purpose of sending such photograph to Mr Ngo.**
 - 3. In taking the steps contemplated in Order 1, the parties are not relieved from compliance with such laws and regulations concerning the COVID-19 pandemic as are in force.**
 - 4. Until further order, the applicant must not damage any of the items removed from the Farm, subject to**

fair wear and tear.

5. The respondents must preserve and must not remove from the Farm, any of the chattels listed in Order 1 above until after 6:00pm, Monday, 1 February 2021.
6. The applicant must file any submissions as to costs, of no more than 4 pages in length, excluding any attachments, by 4:00pm, Tuesday, 2 February 2021.
7. The respondent must file any submissions in response, of no more than 4 pages in length, excluding any attachments, by 4:00pm, Monday, 8 February 2021.
8. The applicant must file any submissions in reply, of no more than 2 pages in length, by 4:00pm, Wednesday, 10 February 2021.
9. The proceeding be listed for review before her Honour Judge Sheridan at 9:30am on Friday, 19 February 2021.

CATCHWORDS: EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – where ownership of chattels in dispute – where applicants seek orders to access property and to collect chattels – where matter of urgency – where issue of ownership of chattels left to final hearing – whether the applicant showed a prima facie case – whether the balance of convenience favours the granting of an injunction

LEGISLATION: *Disposal of Uncollected Goods Act 1967 (Qld)*

CASES: *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, cited
Beecham Group Limited v Bristol Laboratories Pty Ltd (1968) 118 CLR 618, applied
Jakudo Pty Ltd v South Australian Telecasters Limited (No 2) (1997) 69 SASR 440, applied

COUNSEL: E Robinson for the applicant

The respondents were self-represented

SOLICITORS: Crosby Brosnan & Creen Lawyers for the applicant

Introduction

- [1] On 15 January 2021, I heard an interlocutory application for an order for delivery up of certain chattels listed in the annexure to the originating application, namely:

1. Mangosteen packing line machines including fruit packing line, feeding line, washer, inspection conveyor, weight grader
 2. Rambutan packing line machines including fruit packing line, feeding line, washer, inspection conveyor
 3. Cherry picker machine – AG Track – White
 4. 11 pallets White bird nets of different sizes – “Net Pro” brand
 5. 2 electronic fruit scales
 6. 4 Etiquetador Hand Labellers (battery operated sticker guns)
 7. 500 Plastic Yellow and Red Fruit Stackable Plastic Crates – NAP Brand Baskets
 8. 30 Fabric Mangosteen bags (picking bags)
 9. 60 Custom made aluminium picking sticks and poles
 10. 10,000 White Plastic Rambutan Linger bags (on rolls, some in boxes)
 11. 1,000 White 18 litre Polystyrene Boxes
 12. 10,000 clear flat plastic covers for polystyrene boxes
 13. 60 rolls “Binh Minh” Brand Rectangular Stickers
 14. ½ pallet clear 3 inch wide 75m long sticky tape rolls (packing tape)
 15. 250 cotton bath towels (assorted colours)
- [2] Initially, the applicant sought to have the order made by way of final relief. In the course of the hearing, I indicated that I was not persuaded that such relief could be granted without a trial and the matter has proceeded on that basis.
- [3] The orders made on that occasion included an order permitting the applicants access to the property to collect two particular items, namely a cherry picker machine-AG Track – white (Item 3) and 60 rolls “Binh Minh” brand rectangular sticker (or such are the stickers as located on the farm) (Item 13). The orders permitted access to the property to carry out an inspection for the purposes of identifying the remaining items listed in the annexure.
- [4] On 19 January 2021, after a dispute arose between the parties, some of the terms of the orders were varied, in particular the order allowing access to the property to carry out the inspection was made subject to an independent solicitor attending with the parties. The independent solicitor was permitted to take photographs of the chattels listed in the annexure or such chattels as were considered to fall within the description of the chattels listed.
- [5] Pursuant to the term of the order made on 15 January 2021, following the inspection, the applicant was to provide to the respondents evidence of ownership or present entitlement to possession of any of the chattels listed in the annexure.
- [6] Both parties recognised the urgency of resolving the dispute between them, given the upcoming fruit harvesting season which was due to commence the following week. Orders were made which required the further evidence to be provided as soon as possible and which permitted the applicant access to the property up until Friday, 22 January 2021 in order to remove such chattels as the respondents, acting reasonably, considered were the property of the applicants or to which it had a present entitlement to possession and the respondents were required to preserve and not remove from the property any of the chattels listed until that time.
- [7] The applicant sought an extension of time for the provision of the further material and in relation to the order requiring the respondents to preserve and not remove from the property any chattels listed in the annexure. The parties were unable to

agree terms of any order affecting that desire and the court made a further order on Friday, 22 January 2021.

- [8] The issue to now be resolved by this court is whether the applicants should be permitted to remove any further chattels from the property on the basis of the further evidence provided to the respondents.

Background

- [9] The applicant operates a fruit harvesting and wholesaling business. The respondents are the owners of the Yum Yum Farm (the **Farm**) which is located outside of Innisfail.
- [10] In 2015, the parties entered into an oral arrangement in respect of the harvesting of fruit on the Farm. There is now disagreement between the parties as to the precise nature of the arrangement, including whether Mr and Mrs Zieth leased or licensed the Farm to the applicant or whether the applicant merely was the purchaser of the fruit crop on the Farm.
- [11] It is not in dispute that the respondents moved off the Farm and the applicant moved on to the Farm in 2016 and performed the first harvest of fruit on the Farm in 2017. In so doing, the applicant moved various harvesting equipment and chattels on to the Farm.
- [12] In March 2020, Mr and Mrs Zieth returned to the Farm. Following their return to the Farm, the relationship between the applicant and Mr and Mrs Zieth deteriorated.
- [13] Prior to the making of the application to the Court, correspondence was sent by the solicitors acting for the applicant to Mr and Mrs Zieth. It is clear from that correspondence that at all times the applicant was making a request to collect the packing line machines and the cherry picker, amongst other items, from the Farm.
- [14] In correspondence sent by Julie Zieth on behalf of both respondents to the solicitor for the applicant dated 24 December 2020, access to the property was again denied and it was stated, "Property abandoned by your client at the end of the last season has been either appropriated by us in payment of outstanding debts and damages or disposed of at the Innisfail dump, your client is free to search there!"
- [15] A further email was sent by Julie Zieth on 25 December 2020 attaching a spreadsheet of the respondents containing a "preliminary assessment of damages, fees, faults and charges resulting from unhonoured commitments to fruit sales and negligence by Binh and his company employees and officers using our equipment and facilities." It was said that the amount claimed was a preliminary estimate only.
- [16] A cherry picker was named in the spreadsheet; there was no reference to any packing line machines, or any components of those machines.
- [17] Following the filing and service of the originating application, in correspondence from Julie Zieth to the solicitor for the applicant dated 14 January 2021, it was stated that the applicant may collect its belongings upon full payment of the invoice for storage.

- [18] The invoice dated 14 January 2021 was for an amount of \$143,000 including an amount of \$13,000 for GST, and was said to be for “Storage Fees for Abandoned Equipment – June 2020 – December 2020 - 26 weeks @ \$5000 pw + GST.”
- [19] Previous monthly invoices for storage fees had been issued by the Zieths to the applicant. The monthly invoices were said to be for “Storage Fees for Processing Equipment” and were issued for an amount of \$2200 including GST. A statement issued on 3 November 2020 incorporating the invoices issued between August and November 2020 said the total amount due was \$12,752.30.

Legal principles

- [20] By its applications, the applicant sought an order for the delivery up of the chattels on a final basis, or alternatively, an order for a mandatory injunction requiring the delivery up of the chattels.
- [21] The effect of any injunction would be that the applicant would be permitted to take possession of the chattels at this stage but the issue as to ultimate ownership would be left for resolution at a final hearing. The applicant proffered the usual undertaking as to damages in the event it was found that the respondents were entitled to retain the chattels, or some of them.
- [22] The relevant issues to the grant of an interlocutory injunction were stated by Gleeson CJ and Crennan J in *Australian Broadcasting Corporation v O’Neill*,¹ approving statements by Doyle CJ in *Jakudo Pty Ltd v South Australian Telecasters Limited (No 2)*² as:

“...a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff’s entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction.”³

Gleeson CJ and Crennan J described these as:

“... the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed.”

- [23] Gleeson CJ and Crennan J agreed with the explanation of the organising principles as stated in the reasons of Gummow and Hayne JJ. Gummow and Hayne JJ referred to the two main enquires as stated by the court in *Beecham Group Limited v Bristol Laboratories Pty Ltd*⁴ which the court must address:

“The first is whether the plaintiff has made out a *prima facie* case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to a relief ... the second enquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction

¹ (2006) 227 CLR 57, [19] (*O’Neill*).

² (1997) 69 SASR 440, 442-443.

³ *O’Neill*, [19].

⁴ (1968) 118 CLR 618 at 622-623 (*Beecham*).

were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.”⁵

Has the applicant shown a *prima facie* case?

- [24] First, in considering the question as to whether the applicant has made out a *prima facie*, it is necessary to consider the evidence which has been placed before the court as to the applicant’s entitlement to the chattels.
- [25] The applicant has provided compelling evidence to the court in relation to certain component parts of the packing line machines, being items 1 and 2 in the List of Chattels annexed to the originating application. In the affidavits of both Judith Spagnolo sworn 22 January 2021 and Edward Stinson sworn 25 January 2021, both Ms Spagnolo and Mr Stinson identified photographs of certain items (being the items which appear in photographs 4, 5, 9, 10, 15 and 16 and photographs 3, 7, 8, 9A and 17 respectively) and explained their recollection of those items and the manner in which those items had been manufactured and subsequently sold. An injunction in relation to the items in photograph 17 is not pressed by the applicant.
- [26] Evidence was also provided by Mr Ngo, as a director of the applicant, and Mr Rushtam, a past employee of the applicant, in relation to the bird nets (as appears in photographs 18 and 18A-D), the plastic fruit crates (as appears in photograph 19A) and the polystyrene boxes (as appears in photographs 21 to 23).
- [27] It was accepted that items on the list of chattels in the annexure, identified in paragraph 1 above as items 5, 6, 8, 9, 10, 12, 14 and 15, did not appear to be located on the Farm and for the purposes of any interlocutory injunction no order was sought in respect of those items.
- [28] The evidence as to the applicant’s ownership of the remaining chattels is consistent with the original position of Mr and Mrs Zieth.
- [29] In response to the letter from the solicitors for the applicant demanding the return of the items, Mr and Mrs Zieth had asserted the property had been abandoned and appropriated by them or disposed of at the Innisfail dump. On the first return date, in the written submissions filed by the Zieths, in referring to the abandoned items on the Farm, the Zieths said the items were “dirty, broken or in-operational” and in respect of other items said that they were abandoned for “reasons unknown”. The Zieths said that the applicant had refused to pay the storage charges for these items.
- [30] Further, the Zieths relied upon the provisions of the *Disposal of Uncollected Goods Act 1967* (Qld), maintaining that they acted as the bailee of the goods, and that they were entitled to retain the goods until payment of the storage fees.
- [31] Those submissions are all quite inconsistent with the Zieths ever having ownership of the items.
- [32] Subsequent to the last hearing, leave having been given to the Zieths to file further evidence, a contrary position has been taken by the Zieths. Mrs Zieth filed an affidavit sworn 28 January 2021 going through the various chattels and identifying them as ones which she recognises as having been there when they bought the Farm

⁵ *Beecham*, [65].

and states that she conducted the harvest in early 2015 using that equipment. This is the first time that anything of this nature had been asserted.

- [33] The affidavit, unfortunately for Mrs Zieth, looks contrived and purely made as a consequence of my comments in respect to the affidavit evidence filed by the applicant. At the hearing in the morning of 28 January 2021, I had remarked that the affidavit of Ms Spagnolo as to the component parts of the packing line machines was compelling evidence. The affidavit looks like a blatant attempt to adduce contrary evidence purely for the sake of meeting my comments.
- [34] This conclusion is reinforced by the statements made in the earlier affidavit of Mrs Zieth sworn 27 January 2021 where she says that they conducted the harvest in 2015, using equipment which was at the Farm when they bought it. That affidavit does not assert that any of the equipment the subject of the application was that equipment. In contrast, she does assert that the polystyrene boxes were purchased by her for the harvest in 2015.
- [35] In any event, the annexures to the affidavit which are said to refer to certain items of equipment bought with the Farm are generic and could apply to any items at any farm at any time and certainly the depreciation schedule does not contain a schedule, as was indicated in oral submissions, identifying any equipment by serial numbers.
- [36] The Outline of Argument by the Zieths dated 27 January 2021 also does not instil confidence that the Zieths are entitled to ownership or possession of the chattels either. Paragraph 3 of the outline relevantly says, “We claim proprietary and/or possessory title to all chattels on this farm.” Paragraph 16 then concludes that the evidence filed by the applicant “does not prove proprietary title.” There was, at that time, nowhere a clear statement by either Mr and Mrs Zieth, as one would have expected, that they owned any of the chattels listed in the annexure to the originating application.
- [37] The position for the applicant is strengthened given the admission by the Zieths that they have not conducted a harvest since 2015 and the assertion by Mrs Zieth that “the boxes are contaminated by vermin droppings and nests. They would not pass food safety certification.” If that is the true position, it is almost impossible to understand why the Zieths are resisting the making of an order permitting the applicant to remove the boxes unless it is that something else is motivating their resistance to the application.

Balance of Convenience

- [38] Second, as to the balance of convenience, Mr Ngo has sworn that the applicant stood to lose profit of at least \$1 million if the applicant is not granted access to its harvesting equipment and cannot proceed to harvest. There is presently no evidence before the court as to the ability of the Zieths to meet a damages award in that amount.
- [39] This evidence is unchallenged, though Mrs Zieth now asserts that the items are needed by them or “we will not be able to harvest.” This is new and quite contrary

to the position previously taken in the issue of the invoices, and in the correspondence with the solicitors for the applicant. It is impossible to have any confidence that this assertion is truthful.

- [40] On balance, I am not convinced that there is any real risk to the Zieths by the granting of an injunction entitling the applicant to remove the items identified. I am not satisfied as to the Zieths' intentions in relation to the upcoming harvest, and certainly not convinced that the removal of the items identified will prevent the fruit being harvested.
- [41] If ultimately, the Zieths could establish that certain of the items in question belonged to them and as a consequence of their removal damages were suffered, then the applicant has offered an undertaking as to the damages and that undertaking has not been challenged.
- [42] Accordingly, I intend to make an order requiring the delivery up of the items identified in photographs 4, 5, 9, 10, 15 and 16 and photographs 3, 7, 8, 9A and photographs 18, 18A-D, 19A and 21 to 23, as attached to the affidavit of David Kempton sworn 22 January 2021, being certain of the component parts of items 1 and 2 of the list more fully detailed in paragraph 1 above and item 4 (but only the 5 pallets currently located on the Farm), item 7 (but only the 393 crates located on the Farm) and item 11. Items 3 and 13 of the list have already been delivered up.
- [43] It is appropriate to hear further submissions as to the appropriate terms of the final orders.