IN THE SUPREME COURT OF QUEENSLAND Writ No. 196 of 1995

[Jarbad (No 3) P/L (in liquidation) v. A. Long & Ors]

BETWEEN:

JARBAD (No 3) PTY LTD (in liquidation) Plaintiff

AND:

ANTHONY LONG First Defendant

AND:

SUSAN DOWN Second Defendant

AND:

DESIGN FURNITURE SYSTEMS PTY LTD Third Defendant

REASONS FOR JUDGMENT - THOMAS J

Delivered: 3 January 1997

CATCHWORDS:

Injunctions - Contempt of court - Whether injunction against "dealing with property .. save in the ordinary course of business" is sufficiently clear to be enforceable - Director using company account to repay director's loan - No evidence of inability of company to pay debts - Whether contempt shown.

Counsel:	Mr Cooper for the Plaintiff Mr Matthews for the First, Second & Third Defendants
Solicitors:	Blake Dawson Waldron for the Plaintiff Egans for the First, Second & Third Defendants
Hearing Date:	3 January 1997

HIS HONOUR: This is a motion for contempt against Mr Long, and Ms Down. Other contempt proceedings are pending against those parties by the present plaintiff but they have been referred to civil sittings for determination.

The present motion relates to a discrete transaction which is said to constitute a separate contempt and which it was submitted could conveniently be dealt with before the Chamber Judge.

Mr Long was at material times a director of Design Furniture System Pty Ltd. ("Design"). Ms Down was a director of that company but apparently resigned on 29 June 1995.

It is common ground that that company traded between 1 July 1995 and 11 August 1995 and that it ceased trading on that latter date.

On 16 October 1995, Mr Justice Moynihan granted an injunction which restrained the defendants Mr Long, Ms Down and Design - "from disposing of or encumbering the assets of the business variously described as 'Knots Design Furniture', or 'Design Furniture', from removing the same from the jurisdiction of this Honourable Court or in any way dealing with the same in the jurisdiction of this Honourable Court save in the ordinary course of business of the said business."

The evidence shows that that "business" referred to in the order was that of "Design" which operated under various business names or styles.

The essence of the complaint is that Mr Long and Ms Down are responsible for the removal of an asset of Design, namely, a sum of $50,485.06.

The particulars provided by the plaintiff in the notice of motion allege that sum to be a credit in Design's account at the Kenmore branch of the National Australia Bank Limited, and it is alleged that the defendants

disposed of that sum other than in the ordinary course of business.

Perhaps some clarification is needed in relation to the asset. On the date of the order, 16 October 1995, Design succeeded in obtaining judgment against the National Australia Bank, for $51,384.11 and costs. It is, therefore, uncertain whether the asset of the company when Mr Justice Moynihan's order was made was the judgment debt against the National Australia Bank or the moneys in the Kenmore branch account.

In the event, on 23 October 1995, the bank provided a bank cheque to Mr Long's solicitors, in payment of the judgment debt. That cheque was deposited on the following day in a Westpac account at Coorparoo. Thus far, there is no complaint about any dealing by any of the defendants, because this was merely a realisation of the judgment debt and the asset was simply re-converted into another credit bank account.

The precise details of how the account was depleted, and for what creditor or to what object the moneys were paid, is not disclosed either by any evidence produced by the applicant, or the defendants.

Mr Long, however, deposes that a week later, 31 October 1995, he received certain advice from an accountant, Mr Barrett, including that he could disburse Design's moneys in the normal course of business, including the payment of trade creditors, accountancy fees, legal fees and directors' loans. The fact that he acted on advice is not relevant on the question of whether a contempt has been committed although it might well be relevant on a question of penalty. A more relevant question is whether the advice was correct, and ultimately the question is whether a contempt has been committed by an inappropriate action by the respondents.

The wording of the injunction creates some difficulty although I do not regard this as insuperable. Counsel for

the respondents submits that the words are imprecise, and that they fail to comply with the requirement recognised in Australian Consolidated Press Limited v. Morgan (1964) 112 CLR, 483, 515, that the order be clear and unambiguous so that it directs what is to be done, and so that any breach must be clear beyond question.

It has also been said in Meat and Allied Trades Federation v. Australasian Meat Industry Union (1990) 1 Qd.R. 441, 448, that the order should be so expressed that the person to whom it is directed should know at once what he must or must not do in order to comply with its terms.

Now, when one is subject to an order that restrains disposition of a business asset "save in the ordinary course of business", it is at least arguable that the limits of legitimate compliance are not entirely clear.

Mr Cooper for the applicant, relies upon the well-known statement of Rich J in Downes Distributing Company Pty Ltd v. Associated Blue Star Stores Pty Ltd. in Liquidation (1948) 76 Commonwealth Law Reports 473, 477, as giving a clear definition to the words, and in particular, relies upon the following statement - "It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."

He also referred to statements in Taylor v. White (1963-1964) 110 Commonwealth Law Reports 129, 136 and 154.

It certainly is not a concise concept and there is obviously room for argument at the periphery of such a concept. However, it is a common order and such orders permit the continuation of business, when the alternative might be a simple shut-down. It would certainly be inconvenient if injunctions of this kind were worthless, in the sense that they could not be enforced.

It seems to me that there will be cases where quite plainly certain activity does breach such an injunction. I should think, however, that in any doubtful case, proof of a breach of such an injunction would be extremely difficult because of the imprecision and breadth of the restraint. The question then is whether the present case shows a clear breach of the injunction in its present form.

Mr Long did not state to which type of payment mentioned by Mr Barrett the moneys were applied but he states that "funds received from National Australia Bank by the third defendant were disbursed in the manner as advised by Mr Barrett". This means that they may well have been applied in payment of a director's loan or loans.

While there is no onus upon the defendant, the knowledge of the disposition is solely within the knowledge and control of Mr Long. That is not to say that the applicant could not have made inquiries and investigations in order to find the nature of the withdrawal and the payee.

For the purpose of argument, I shall assume the strongest case that could be alleged against Mr Long, namely, the assumption that he repaid a director's loan to himself or to himself and another. Now, if he did so, in circumstances where Design was unable to pay its debts as they fell due, that plainly would be a breach of the injunction. It would certainly not be a payment in the ordinary course of business. However, if Design were a solvent company, I fail to see any impropriety in a director causing such a company to repay a loan to a director, even after it had ceased trading.

The answer, of course, depends upon all the circumstances and in the present matter the applicant has not set out to prove that Design was at any material time insolvent or unable to pay its debts as they fell due.

It, therefore, seems to me that the applicant has in the present matter failed to prove beyond reasonable doubt

that the withdrawal of these moneys was a dealing with an asset other than in the ordinary course of business of the relevant business.

Mr Cooper submitted that assets are frozen when the company does not continue trading or carry on a business. I am, however, unable to accept that as a general proposition. It seems to me that a company may well have ceased trading, and yet it may be entirely proper for the management of a company to discharge existing debts provided that it has adequate assets to enable this to be done.

For the reasons that I have mentioned, I do not think that the application can succeed against Mr Long. On a fortiori grounds, it cannot succeed against Ms Down. I may say that even had I regarded the withdrawal by Mr Long as infringing the injunction, I do not think that the evidence implicates Ms Down in that withdrawal. I note Mr Cooper's argument in reliance upon The Attorney-General in Tuvalu v. Philatelic Distribution Corporation Limited (1990) 1 W.L.R. 926, 936 to the effect that a director has a positive duty to prevent an injunction from being breached. It is unnecessary to decide whether that is a principle that would render a passive director guilty of a contempt in the present circumstances, but I would indicate a provisional view that some personal involvement, or some level of knowledge or at least wilful blindness would be necessary before liability in contempt would be established. None of these is here shown. However, as I have indicated, it is not necessary to discuss the Philatelic Distribution Corporation case further in this instance.

The motion will be dismissed with costs.