

# SUPREME COURT OF QUEENSLAND

CITATION: *Cheque Exchange (Australia) Pty Ltd & Anor v Llewellyn & Ors* [2000] QSC 138

PARTIES: **CHEQUE EXCHANGE (AUSTRALIA) PTY LTD**  
(ACN 084 480 311)  
(first plaintiff/first respondent)  
and  
**PAUL ALEXANDER SYDNEY HARE**  
(second plaintiff/second respondent)  
v  
**PETER ELFYD LLEWELLYN**  
(first defendant/first applicant)  
and  
**AUSTRALIAN MONEY EXCHANGE PTY LTD**  
(ACN 086 789 531)  
(second defendant/second applicant)  
and  
**RODERICK WICKHAM JAMES**  
(third defendant/third applicant)

FILE NO: S8189 of 1999 (Brisbane Registry)

DIVISION: Trial Division

DELIVERED ON: 12 May 2000

DELIVERED AT: Brisbane

HEARING DATE: 18 April 2000

JUDGE: Mullins J

ORDERS: **1. The respondents disclose to the applicants the following classes of documents in the possession or under the control of the respondents or either of them by delivering to the applicants copies of each document in the class or producing for the inspection of the applicants each document in the class:**  
**(a) all documents (including correspondence, advices, invoices, diary notes, memoranda, franchise agreements, disclosure documents and leases):**  
**(i) relating to the retainer by the respondents or either of them of Messrs Lawton Gillon in the period prior to 20 April 1999 concerning the respondents' establishment in Australia of a cheque changing and pay day advance business, including but not limited to, the preparation of franchise documentation, registration of business names and general advice relating to the business; and**

- (ii) relating to the retainer by the respondents or either of them of solicitors in the period prior to 13 March 1999 in respect of the negotiation for and granting of the franchise of the Parramatta Cheque Exchange store;
- (b) all documents relating to the operation of the Parramatta Cheque Exchange store, including the computer system, as it was shown to the first and third applicants on or about 13 March 1999.

2. The respondents make, file and serve on the applicants an affidavit stating:

- (a) that the advice from the first applicant referred to in paragraph 38 of the second respondent's affidavit sworn on 31 August 1999 does not exist or has never existed; or
- (b) the circumstances in which the said advice ceased to exist or pass out of the respondents' possession or control.

**CATCHWORDS:** PROCEDURE – DISCLOSURE – Application for further disclosure of particular classes of documents relevant to the pleadings – whether the duty of disclosure has been complied with – r223(4) *UCPR*.

*UCPR*, rr5, 211(1), 223(2), 223(4)

*Robson v REB Engineering Pty Ltd* [1997] 2QdR 102

**COUNSEL:** Mr D M Logan for the applicants  
Mr D G Clothier for the respondents

**SOLICITORS:** Minter Ellison for the applicants  
redchip lawyers for the respondents

- [1] **MULLINS J:** This is an application by the applicant defendants for an order requiring the respondent plaintiffs to provide further disclosure of all of the documents in their possession or control directly relevant to an allegation in issue in the pleadings or to a matter in issue in the proceedings. It became necessary to consider this part of the application filed on 10 April 2000, when on 28 April 2000 I refused to dismiss the proceedings for want of prosecution.
- [2] The order relating to disclosure which the applicants ultimately sought (Exhibit 4) was specific. It was that the plaintiffs disclose to the defendants the following classes of documents in the possession or under the control of the plaintiffs or either of them by delivering to the defendants copies of each document in the class or producing for the inspection of the defendants each document in the class:
- (a) all documents (including correspondence, advices, invoices, diary notes, memoranda, franchise agreements, disclosure documents and leases) relating to the retainer by the plaintiffs or either of them of Messrs Lawton Gillon and any other solicitor in the period prior to 20 April 1999

concerning the plaintiffs' establishment in Australia of a cheque changing and pay day advance business, including, but not limited to, the preparation of franchise documentation, registration of business names and general advice;

- (b) all documents relating to any work by the plaintiffs or either of them in the period prior to 20 April 1999, concerning the plaintiffs' establishment in Australia of a cheque changing and pay day advance business;
  - (c) all documents in relation to the operation by the plaintiffs or either of them in Australia of a cheque changing and pay day advance business and the nature of that business, including computer software, forms and manuals used for recording customer information and transactions, manuals containing procedures for the operation and marketing of and training of staff for stores offering cheque changing and pay day advance services and, in particular, for checking the identity and credit worthiness of customers for these services and obtaining security in relation to the provision of these services;
  - (d) all documents relating to the intentions of Buckwise Inc to act, and actions in 1998 and 1999, with respect to the establishment in Australia of a cheque changing and pay day advance business.
- [3] The first applicant is a solicitor. It is alleged in paragraph 3 of the amended statement of claim, that in or about July and August 1998 the second respondent retained the first applicant as his solicitor to advise in relation to the financial services proposed to be offered to the public in Australia through retail stores intended to be established by the second respondent and one Mr S Cobbold. The financial services were to include "pay day advance", being the discounting of retail customer's cheques, and "cheque changing", being the provision of cash to retail customers in exchange for cheques drawn by others payable to and endorsed by the customer. The respondents plead that the second respondent also retained the first applicant to act as the franchisor's solicitor in relation to the franchising operation which the second respondent and Mr Cobbold intended to establish on the east coast of Australia to conduct the financial services business under the name "Cheque Exchange".
- [4] The first respondent was incorporated on 24 September 1998 to be the franchisor for granting to franchisees to conduct the "Cheque Exchange" business.
- [5] The applicants allege that the first applicant was in July 1998 an investor in Buckwise Inc ("Buckwise") and, in response to paragraph 3 of the amended statement of claim, allege that the second respondent asked the first applicant whether he was interested in becoming financially involved in the operations of Buckwise in Australia and that the second respondent mentioned cheque changing and pay day advance activities in a general way. In summary, the applicants deny the content of the conversations alleged by the respondents in paragraph 3 of the amended statement of claim.
- [6] Paragraph 4 (i) and (j) of the defence pleads:

"(i) at all material times Hare and the first plaintiff had retained Messrs. Lawton Gillon, solicitors, to act for them generally in relation to the proposed cheque changing and pay day advance business, including the preparation of franchise documentation:

**Particulars**

Further particulars of the retainer cannot be provided until after the completion of interlocutory steps.

(j) further, or alternatively, at all material times Hare and the first plaintiff had retained other solicitors to act for them in relation to the establishment of the said business, including setting up and franchising of the Parramatta Cheque Exchange store:

**Particulars**

Further particulars of the retainer cannot be provided until after the completion of interlocutory steps."

- [7] In response the applicants plead in paragraph 4(f) of the reply and answer that:  
**"4(f)** say that Messrs Lawton Gillon had been retained by the Plaintiffs to act for the Plaintiffs in respect of the proposed cheque changing and pay day advance business for the western part of Australia. Messrs Lawton Gillon had also been retained to advise as to whether the proposed cheque changing and pay day advance businesses were likely to contravene legislation in the western part of Australia."
- [8] In paragraph 5 of the amended statement of claim, it is alleged that in or about March 1999, either the first or the second respondents retained the first applicant to advise whether the Franchising Code of Conduct would affect the operation of the proposed Cheque Exchange stores. That is denied by the applicants.
- [9] Relying on the retainers alleged to have been made in July and August 1998 and March 1999, the respondents plead in paragraph 6 of the amended statement of claim that the first applicant owed fiduciary duties to the second respondent or there were implied terms of the retainer that the first applicant would not voluntarily disclose to any person any of the information disclosed to him for the purposes of the retainer, would use such information only for the purposes of the retainer, would not use such information to make a personal profit, and would not put himself into a position where his duties to the second respondent conflicted with the first applicant's own interest or duties. These allegations are denied by the applicants.
- [10] In paragraph 7 of the amended statement of claim, it is alleged that between July 1998 and March 1999 that the first applicant represented to the respondents that the first applicant might organise a group of investors including himself to invest in the proposed Cheque Exchange business by becoming franchisees in Queensland and that the first applicant agreed with the respondents not to disclose any information provided to him by the respondents in relation to that proposal, except to intending

franchisees who first agreed to keep the information confidential. The applicants admit that there was the intimation from the first applicant that he knew of other persons who might be possible co-investors and might be prepared to become franchisees in Queensland, but deny that there was any agreement not to disclose any information provided to the first applicant by the respondents in relation to the proposed Cheque Exchange business.

- [11] In paragraph 8 of the amended statement of claim, it is alleged that in or about March 1999 the respondents retained the first applicant as their solicitor to advise them in relation to the respondents' proposed franchising operations on the east coast of Australia, or that they were in the process of negotiating upon such a retainer. That is denied by the applicants. It is not in issue that on or about 12 March 1999 Messrs Lawton Gillon solicitors of Perth acting on behalf of the first respondent gave instructions to the first applicant to register certain business names in Queensland which was attended to by the first applicant through his firm, Messrs Llewellyns.
- [12] In paragraph 9 of the amended statement of claim, the respondents rely on the retainer alleged in paragraph 8 of the amended statement of claim together with the earlier retainers alleged to plead the same fiduciary duties or implied terms of the retainer as set out in paragraph 6 of the amended statement of claim.
- [13] In paragraph 10 of the amended statement of claim, it is alleged that between July 1998 and March 1999 the respondents disclosed to the first applicant information relating to the operation of the cheque exchange and pay day advance facilities and that information was disclosed for the purposes of the retainers and was information relating to the first applicant's proposal to become a franchisee. It is also alleged that the disclosures of information were made in circumstances in which the first applicant knew that the information should not be further disclosed or used without the respondents' consent.
- [14] The applicants admit that certain information relating to the operation of cheque changing and pay day advance facilities, as particularised in the defence, was provided by the second respondent to the first applicant, but deny that the information was disclosed pursuant to any retainer. The applicants admit that the information was disclosed to the first applicant as a prospective investor-franchisee, but that information, other than information about the intentions of Buckwise and/or the respondents with respect to the proposed business and opening of Cheque Exchange stores and written material handed by the second respondent to the first applicant at the Cheque Exchange store at Parramatta on 13 March 1999 or provided soon after, was not confidential information, in that it was readily available in the public domain and was not communicated in circumstances importing any duty of confidence.
- [15] In paragraph 11 of the amended statement of claim, it is alleged that in or about March 1999 the respondents disclosed to the third applicant information relating to the operation of cheque changing and pay day advance facilities at the meeting at the Parramatta store at which the third applicant was present with the first applicant and the second respondent. It is also alleged that the first applicant disclose to the third applicant information relating to the operation of the cheque changing and pay day advance facilities which the respondents had previously disclosed to the first

- applicant. It is alleged that the disclosures of information to the third applicant were made in circumstances in which the third applicant knew that the information should not be further disclosed or used without the respondents' consent and that the third applicant owed the respondents duties of confidence. It is alleged by the applicants that the respondents did not disclose to the third applicant any information relating to the operation of cheque changing and pay day advance facilities which was not information generally available in the public domain.
- [16] From 19 March 1999, the second applicant was a duly incorporated company. It is alleged by the respondents that the first and third applicants caused the second applicant to be incorporated for the purposes of conducting or franchising the business of providing financial services including cheque changing and pay day advance facilities and that both the first and third applicants became directors of the second applicant. The applicants admit that the second applicant was incorporated for the purposes of conducting and franchising the business of providing financial services including cheque changing, but not pay day advance facilities as defined in the amended statement of claim.
- [17] In paragraph 14 of the amended statement of claim it is alleged that from in or about June 1999 the second applicant has carried on its competing business in Queensland under the name "Australian Money Exchange" ("AMX"). The applicants admit that the second applicant has carried on a business of providing financial services including cheque changing facilities, but not pay day advance facilities (other than a short period in or about June 1999 after which it discontinued offering those facilities).
- [18] In paragraph 14(b) of the amended statement of claim, it is alleged that the second respondent has used and continues to use the information relating to the operation of the cheque changing and pay day advance facilities disclosed by the respondents to the first and third applicants. In particular, it is alleged that the second applicant's business uses the system described by the franchisee of the first respondent in the presence of the second respondent at the Parramatta store to the first and third applicants in March 1999. It is alleged that the franchisee showed the following aspects of the operation of the Cheque Exchange computer system:
- (a) placing the photograph of the customer/borrower on the computer;
  - (b) storing all relevant information pertaining to the borrower;
  - (c) the processing of forms containing the customer's information;
  - (d) down loading information to the bank so that the borrower's account could be debited when required.
- [19] The applicants admit that the AMX business involves (*inter alia*) cheque changing and short term loan facilities, including the use of computers to store information pertaining to borrowers and direct debiting of customers' bank accounts, but alleges that the AMX business does not use a system which involves the placing of a photograph of a customer/borrower on the computer; and that all aspects of the applicant's computer software and associated documents have been independently developed by or on behalf of the second applicant.

- [20] In order to determine this application, it has been necessary to recite at length the issues raised by the pleadings. This is the only way to ascertain what are the allegations in issue in the pleadings. Under rule 211(1) of the *UCPR* the duty of disclosure is in respect of each document "directly relevant to an allegation in issue in the pleadings".
- [21] The respondents have made disclosure in this action. In order to obtain an order for further disclosure against the respondents, the applicants need to show that r223(4) of the *UCPR* is applicable. That permits an order for further disclosure to be made only if:
- (a) there are special circumstances and the interest of justice require it; or
  - (b) it appears there is an objective likelihood –
    - (i) the duty to disclosure has not been complied it; or
    - (ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party.
- Mr Logan of Counsel who appeared on behalf of the applicants made two submissions which went to the ambit of disclosure. He relied on the decision in *Robson v REB Engineering Pty Ltd* [1997] 2QdR 102 at 105, where Demack J states that "directly relevant" means something which tends to prove or disprove the allegation in issue.
- [22] The other submission made by Mr Logan as to the ambit of disclosure was based on the new philosophy of the *UCPR* expressed in rule 5. He therefore submitted that an order for further disclosure may be justified if it would be likely to "facilitate the just and expeditious resolution of the real issues" or "avoid undue delay or expense".
- [23] The philosophy in rule 5 of the *UCPR* may be relevant to the exercise of the discretion under rule 223(4) of the *UCPR*.

### **Category (a)**

- [24] I shall firstly deal with the documents of which further disclosure is sought described in par (a) of the applicants' draft order and refer to those documents as category (a).
- [25] It is apparent from the analysis of the pleadings that the extent of the retainer of Lawton Gillon by the respondents is directly relevant to the issues. It would assist the applicants in disproving the allegations of retainer against the first applicant, if the applicants can show that Lawton Gillon's retainer was more extensive than the western part of Australia.
- [26] It appeared from the respondents' list of documents delivered on 4 November 1999 that the respondents accepted the obligation to disclose Lawton Gillon's file. Document 38 is described as "Bundle copy of Lawton Gillon's file re Cheque Exchange Australia Pty Ltd". On inspection, however, what was disclosed was a letter from Lawton Gillon to the respondents' solicitors dated 1 July 1999 which attached copies of correspondence between Lawton Gillon and Llewellyns (dated

from 12 March 1999 to 1 April 1999) and enclosures, all relating solely to the registration of business names undertaken by Llewellyns.

- [27] The respondents have therefore failed to make complete disclosure in relation to the extent of Lawton Gillon's retainer.
- [28] The applicants cannot point to any document which relevantly suggests the retainer of any other solicitors by the respondents in the relevant period.
- [29] The Parramatta Cheque Exchange store was set up by March 1999. It is obviously situated in eastern Australia. A bundle of hand written records for the Parramatta store is disclosed, but the respondents do not appear to have disclosed any solicitors' file relating to the grant of that franchise. It assists the applicants to disprove the retainers alleged against the first applicant to show that solicitors other than the first applicant were retained to act on behalf of the first respondent in the grant of the franchise of the Parramatta store.
- [30] Further disclosure should therefore be made by the respondents in the following terms:
- "all documents (including correspondence, advices, invoices, diary notes, memoranda, franchise agreements, disclosure documents and leases):
- (i) relating to the retainer by the respondents or either of them of Messrs Lawton Gillon in the period prior to 20 April 1999 concerning the respondents' establishment in Australia of a cheque changing and pay day advance business, including, but not limited to, the preparation of franchise documentation, registration of business names and general advice relating to the business; and
  - (ii) relating to the retainer by the respondents or either of them of solicitors in the period prior to 13 March 1999 in respect of the negotiation for and granting of the franchise of the Parramatta Cheque Exchange store;"

### **Category (b)**

- [31] Paragraph (b) of the applicants' draft order is too wide. It is obviously fishing. It cannot be said that all documents which could conceivably fall within that broad class are relevant to the issues in the pleadings. The applicants do not point to the existence of any document revealed by the pleadings, correspondence or disclosure which falls within the category, which is relevant to the issues in the pleadings and which has not been disclosed.

### **Category (c)**

- [32] Paragraph (c) of the draft order seeks all documents in relation to the operation by the respondents of the Cheque Exchange business. The amended statement of claim identifies the specific information which it is alleged against the applicants was used by them in breach of fiduciary duty and, in the case of the first applicant, in breach of the alleged retainers. The respondents seek injunctive relief, an

account of profits earned by the applicants in the conduct of the AMX business and damages, including exemplary and aggravated damages. Except for two matters identified in the defence, the applicants plead that the information imparted to the applicants, at the time it was imparted, was readily available in the public domain.

- [33] What will be relevant to consider at the hearing of this action is the nature of the information imparted by the respondents to the applicants and whether use was made of that information by the applicants.
- [34] Paragraph (c) is again too broadly framed and suggests that it is part of a fishing expedition.
- [35] What is relevant is the disclosure of the information relating to the operation of the Parramatta store that was inspected by the first and third applicants on or about 13 March 1999. That was recognised in numbered paragraph 2 of the respondents' solicitors' letter dated 17 April 2000 to the applicants' solicitors.
- [36] It is therefore appropriate that the respondents make further disclosure in the following terms:  
 "all documents relating to the operation of the Parramatta Cheque Exchange store, including the computer system, as it was shown to the first and third applicants on or about 13 March 1999."

#### **Category (d)**

- [37] This application is concerned with disclosure by the respondents. The issue of the second respondent alleged to have advised the first applicant that Buckwise was considering opening franchised cheque changing and pay day advance stores in Australia is raised in the applicants' defence and denied by the respondents. The fact that no documents have been disclosed on this issue by the respondents is not necessarily surprising.
- [38] The respondents cannot point to any material which shows the likelihood of the existence of documents in this category in the possession or control of the respondents. The applicants are not entitled to further disclosure of the documents described in paragraph (d) of the draft order.

#### **Advice on "Pink Slip" Loan**

- [39] In paragraph 38 of Mr Hare's affidavit sworn on 31 August 1999, Mr Hare states that in July and August 1998 he asked the first applicant to investigate whether there were any impediments to the operation of the "pink slip" loan concept in Australia. Mr Hare stated:  
 "In this regard I asked Llewellyn to advise me on the implications of a default on a loan, liens on a motor vehicle, and the sale of a motor vehicles (*sic*) under a lien. He provided me with a detailed advice on that concept. I do not have a copy of the advice in Australia as this has been kept in my home in the United States of America, where I lived at that time."

- [40] That advice has not been disclosed by the respondents. In the respondents' solicitors' letter dated 17 April 2000 to the applicants' solicitors, the statement is made that the respondents have been unable to locate that document.
- [41] The applicants seek an order under r223(2) of the *UCPR* that the respondents file and serve an affidavit dealing with the matters covered by r223(2) of the *UCPR* in relation to the advice referred to in paragraph 38 of Mr Hare's affidavit sworn on 31 August 1999. Mr Clothier of Counsel who appeared on behalf of the respondents did not oppose such an order.

### Order

- [42] I therefore order that:
1. The respondents disclose to the applicants the following classes of documents in the possession or under the control of the respondents or either of them by delivering to the applicants copies of each document in the class or producing for the inspection of the applicants each document in the class:
    - (a) all documents (including correspondence, advices, invoices, diary notes, memoranda, franchise agreements, disclosure documents and leases):
      - (i) relating to the retainer by the respondents or either of them of Messrs Lawton Gillon in the period prior to 20 April 1999 concerning the respondents' establishment in Australia of a cheque changing and pay day advance business, including, but not limited to, the preparation of franchise documentation, registration of business names and general advice relating to the business; and
      - (ii) relating to the retainer by the respondents or either of them of solicitors in the period prior to 13 March 1999 in respect of the negotiation for and granting of the franchise of the Parramatta Cheque Exchange store;
    - (b) all documents relating to the operation of the Parramatta Cheque Exchange store, including the computer system, as it was shown to the first and third applicants on or about 13 March 1999.
  2. The respondents make, file and serve on the applicants an affidavit stating:
    - (a) that the advice from the first applicant referred to in paragraph 38 of the second respondent's affidavit sworn on 31 August 1999 does not exist or has never existed; or
    - (b) the circumstances in which the said advice ceased to exist or past out of the respondents' possession or control.
- [43] I will hear submissions on an appropriate time to be allowed for disclosure under the first order. I will also hear submissions on the costs of the application seeking an order that the proceedings be dismissed and the application for further disclosure.

