



Transcript of Proceedings

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Date 4/11/08

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MOYNIHAN J

No S6708 of 2001

CSR LIMITED (ACN 000 001 276)

Plaintiff

and

CASARON PTY LTD (ACN 077 155 4290)

First Defendant

and

PETER JOHN DANCE

Second Defendant

and

ELIZABETH ANN DANCE

Third Defendant

BRISBANE

..DATE 16/10/2002

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WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for orders that:

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1. Pursuant to rule 371, the third defendant, within 21 days of the order, disclose to the plaintiff each and every document which is in her possession or control and which is directly relevant to the allegations in paragraphs 2(a), 2(bb) and 2(d)(i) of her defence and counterclaim.

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2. Pursuant to rule 223, the third defendant, within 21 days of the order, disclose to the plaintiff each and every document which is in her possession or control and which is within the following class of document:

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(a) Any guarantees or indemnities which the third defendant has ever given to any person ("creditor") in respect of debts owed or likely to be owed by any other person ("debtor") to the creditor;

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(b) Any mortgages or other securities which the third defendant has ever given to any person ("creditor") in respect of or as security for debts owed or likely to be owed by any other person ("debtor") to the creditor;

(c) Documents evidencing or relating to the refusal by the third defendant to provide any guarantee for, or any mortgage or other security in respect of or to secure the debts of any other person;

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(d) Documents evidencing or relating to the conduct by the third defendant of any role or duties as director or secretary of any company;

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(e) Documents relating to the third defendant's educational or vocational training;

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(f) Documents evidencing or relating to the third defendant's involvement in any business or the management thereof;

(g) Any advice the third defendant has obtained about the nature or effects of any guarantees or other securities that she has given or refused to give or been asked to give in relation to the debts of any person;

(h) Her employment and income over the period of ten years before 18 December 1988.

3. Pursuant to rule 223, to the extent that any document within any of the classes described in paragraph 2:

(a) Do not exist; or

(b) Have been, but are no longer in the possession or control of the second defendant -

The third defendant, within 21 days of the order, file and serve an affidavit stating -

(c) That the specified document or class of documents does not exist or has never existed; or

(d) The circumstances in which the specified document or class of documents ceased to exist or passed out of her possession or control.

The action is one in which the plaintiff sues the first defendant for a debt guaranteed by the second and third defendants. By Uniform Civil Procedure Rule 211(1) a party to a proceedings has a duty to disclose each document in the possession or under the control of that party and directly relevant to an allegation in issue in the pleadings.

The allegation in issue relevant to the proceedings in the circumstances of this case arises in the following fashion. The third defendant raises the plea that it would be unconscionable to enforce the guarantee against her in circumstances where she did not understand its purport and effect, gained no benefit from the contract guaranteed and the guarantee was procured by her husband whom the plaintiff ought to have known she would have trusted and have confidence in.

It is pertinent to note at this stage that rule 211(1) imposes an obligation in respect of disclosure of documents in the possession or under the control of the party but does not deal with documents which had been under the possession and control of the party. This is taken up by rule 223(2) which permits the Court to order a party to file and serve an affidavit stating that a specified document or class does not exist or never existed or, it having ceased to exist or passed out of the possession or control of the disclosing party, the circumstances in which that occurred. That is the provision which it is sought to enliven by paragraph 3 of the application.

It is pertinent to note that on 15 October, as a conclusion to an exchange of correspondence, the solicitors for the third defendant wrote to the plaintiff's solicitors on an open basis. They advised that the third defendant was prepared to consent to an order in the terms set out in the letter which included that the costs of and incidental to the application be costs in the cause.

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This application falls to be disposed of on the basis that the offer was made and rejected. In other words, I do not construe the letter as an admission on the part of the third defendant that she was obliged to give the more limited disclosure than that presently sought which is set out in the letter.

It is convenient to return to the issue canvassed by paragraph 3 of the application and Rule 223(2). This relates to documents which did not exist or were no longer in the possession or control of a party and the application of the provision of the rules which deals with that.

The third respondent has filed an affidavit by leave today dealing with the question of documents which may have been in her possession or control. She deposed to documents damaged or destroyed as a consequence of flood and that she is not able to specify with any degree of particularity the documents or class of relevant documents which might have been in her possession or control. In my view, the affidavit sufficiently deals with the issue of documents which may have been but no longer are in the third defendant's possession or control.

The question which remains is whether there are proper grounds for concluding that there has been insufficient disclosure. In my view, the application in any event casts too wide a net. I am not persuaded for that the respondent ought to be compelled to swear as to whether the broad categories of documents - mortgage documents, any documents relating to

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educational or vocational training, any documents evidencing or relating to her involvement in any business, documents relating to employment or income - are disclosable. If they were it would, in my view, be oppressive with the relevant issue confined in the way that I have identified to require that to be done.

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I do not accept that the respondent ought to be required to disclose documents in relation to activities after the date at which the guarantee was given.

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The issue then is whether the material discloses reasonable grounds for concluding that documents which ought to have been disclosed have not been.

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The evidence establishes that the plaintiff is the registered owner of residential real estate which is the subject of a mortgage. There is no issue here about her knowledge as to the nature of a mortgage. The issue here is in relation to a guarantee and, as I say, I am not persuaded that her knowledge of mortgage in terms of having had one or more is directly relevant in the appropriate sense.

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There is also evidence that she was a co-director and/or co-shareholder of private companies controlled by, essentially I think, the first defendant.

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The respondent has now sworn to the lack of knowledge and participation in the affairs of those entities. Nothing has

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emerged which would indicate that, given her being a shareholder or a director of those companies, she has failed to disclose relevant documents.

So far as any legal advice is concerned, assuming that to be the case, I should have thought that it be privileged. In any event, I have some difficulty in seeing its direct relevance to the issue having regard to the terms in which it arises.

The considerations being those that I have endeavoured to identify, I am not persuaded that it has been established the respondent has failed to discharge her obligations as to disclosure. The considerations being those I have canvassed. I dismiss the application.

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HIS HONOUR: I turn to the question of costs. I note that on 23 July 2002 the plaintiff's solicitors wrote to the third defendants under rule 444 seeking delivery of a list of documents. That led to a response of 30 July containing a list of documents. There was then another letter from the plaintiff's solicitors, again in reliance on rule 444, stating that the list was inadequate. It was said it did not disclose documents relevant to the issue which I have identified earlier and requiring the disclosure of documents in three general categories identified by the letter or, alternatively, confirmation "that no such documents" existed or were not in the respondent's possession or control.

The response to that is the letter of 15 October 2002 which
was written after the application had been filed. It is true
that the necessity of resorting to an order pursuant to
Uniform Civil Procedure Rule 223 (2) to file and serve an
affidavit dealing with the existence of specified documents
might have been avoided had the earlier letter been responded
to and it is, as I have indicated, avoided by the filing of
the affidavit by leave today accounting in my view
satisfactorily for the documents.

The respondent has otherwise, on the view I have taken on the
matter, successfully resisted the making of an order for
further disclosure and, in my view, is entitled to the costs
of having done so. I had contemplated whether some
apportionment might satisfy the consideration but, in the end,
I think that that would involve a degree of refinement which
is not necessary here.

The application was brought by the applicant, it has failed in
relation to the further disclosure areas, and there has been
an answer which might have been provided earlier but was not
in respect of the existence of the documents but, as I say, it
seems to me the appropriate order in the end is to order that
the applicant pay the respondent's costs of the application to
be assessed.

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