



Transcript of Proceedings

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Date: 24 September, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MACKENZIE J

No 7523 of 2002

AQWELL PTY LTD
ACN 007 726 981

Applicant

and

BJC DRILLING SERVICES PTY LTD
ACN 086 032 742

Respondent

BRISBANE

..DATE 22/09/2003

JUDGMENT

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 by receivers for directions whether certain funds itemised in an affidavit filed on their behalf - which I will call the receiver's affidavit, although it was by another partner of the firm - are funds required to be deposited in a bank account set up pursuant to an order under which they were appointed. They further ask whether moneys due for reimbursement to the respondent under the terms of the order may be offset against any amount that should have been paid in, but has not.

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The original order was made against the background of disputes in a joint venture, as defined in the order, relating to drilling. The intent of the orders made at that time was that all moneys deriving from the use of the drills in question for the purposes of the joint venture be paid into the account set up under the order and the respondent reimbursed on proof of entitlement under the joint venture agreement.

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The receivers are concerned that moneys itemised have not been paid in as required on the basis of information given to them by companies for which work was said to have been done and by whom payment is said to have been made to the respondent.

The receiver calculates that on the assumption that all outstanding claims for reimbursement are made out there is a sum of about \$260,000 required to be paid into the account. That amounts to a balance figure.

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Mr Weber, a director of the respondent, claims that the respondent is actually owed about \$260,000 under the terms of the order. He says that he only became aware of the application on the 19th of September and because the person most involved with the proceedings is geographically difficult to contact because of the nature of the business a full analysis of the position could not be made in time for a proper response to be made at the last hearing. However, on the basis of some discussion with him they - to use their words - dispute many of the factual allegations in the receiver's affidavit.

An affidavit from a solicitor who has become involved urgently in the conduct of the proceedings for the respondent due to the work related absence overseas of colleagues directly involved with the case deposes that the respondent has instructed that it disputes allegations made in the affidavit, including in particular paragraphs 4, 6, 11, 16 and 17. Seven to 10 days will be needed to respond to the allegations.

There are issues about whether the matter will be able to be disposed of in the applications jurisdiction or whether it should go to the civil list with the issues defined by pleadings or otherwise. I need not resolve that issue prematurely, although the need for pleadings may be minimised by what I intend to order.

What I will do is to try to have defined as soon as possible the extent to which the respondent wishes to controvert what

is in the list of transactions itemised in the receiver's affidavit and areas of dispute in any other respects. The receiver's allegations are simple enough. It should equally be easy to disprove that moneys were not received as alleged.

The time I will allow to do so is within the time frame suggested by the respondent, but will allow for any issues arising from what is raised by the respondent to be agitated on the same day when an application by the respondent to have the original order set aside for fraud is heard, the 9th of October 2003.

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If the order is set aside what happens to the moneys currently in the receiver's possession becomes an issue. For that reason it is sensible to have both matters at least advanced if not solved at the same time. It is also necessary for the parties to adhere to the timetable I am setting. Slippage will not be acceptable in view of the tight schedule.

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The issue of whether the original order was obtained by fraud, which was apparently not discovered until after the alleged failures to pay moneys in had occurred, should not logically affect the question whether the respondent had an obligation at the time to pay them into the account. But it may have practical consequences which need not be pursued at this time.

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I should also note one other complication, although not one that impacts directly on the dispute between the receiver and the respondent. It is that Aqwell, the original applicant, is

at present under administration, but it is anticipated that it will probably no longer be by the 9th of October. The carriage of the primary action will then revert to the legal advisers then involved on Aqwell's behalf. It seems important that they be kept informed as to what develops to avoid any delay in having the issues disposed of.

I should also mention that it is deposed that Mr Weber is concerned that if an order is made allowing the receivers to offset amounts to which the respondent is entitled by way of reimbursement against amounts that should have been paid in it will cause a cashflow problem for it and possible insolvency. The merits of that argument may be put aside for later determination, if necessary, having regard to the regime I intend to impose.

The orders that I make are the following:

1. I order that no later than 4 pm on Monday, 29th of September 2003 the respondent serve on the applicants and also on Aqwell Pty Ltd - which I will call Aqwell - and file an affidavit setting out with full particularity what facts deposed to in the affidavits of Damian Justin Bender and/or Brendan Joseph Nixon, filed on the 12th of September 2003 and 18th of September 2003 respectively, are disputed and the factual basis with full particulars for disputing them.
2. I order that no later than 4 p.m. on Thursday, the 2nd of October 2003 the applicants serve on the respondents and

Aqwell, and file, any affidavit in response to issues raised in the affidavit required to be served and filed under order 1 and, subject to order 4, any other affidavits intended to be relied on by the applicants.

3. I order that no later than 4 p.m. on Monday, the 6th of October 2003 the respondent serve on the applicant and Aqwell, and file, any further affidavits intended to be relied on by the respondent. 11

4. I order that the affidavits, if any, responding to further affidavits served and filed by the respondent under order 3 be served and filed by the applicants at the earliest possible time after service upon the applicants, but in any event no later than 12 midday on Wednesday, the 8th of October 2003. 31

5. I order that the administrator of Aqwell, if the administration is still subsisting at the time of service upon him of any affidavit referred to in preceding orders, deliver a copy of such affidavit to the former solicitors of Aqwell forthwith. 41

6. I order that until 4 p.m. on Thursday, the 9th of October 2003, or further order or agreement, the respondent not dissipate, dispose of, remove from the jurisdiction or otherwise deal with or part with any of its assets save for the payment of ordinary business expenses and reasonable legal expenses, if doing any of those acts 51

preceding the word "save" will reduce the value of such assets below the sum of \$260,000, or such lesser sum as may be agreed upon in writing by the applicants and the respondent, having regard to the contents of the affidavit required to be provided pursuant to order 1 or otherwise.

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7. The application is adjourned to the 9th of October 2003.

8. Costs as between the applicant and the respondent are reserved.

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9. With regard to Aqwell's costs the costs of the administrator of Aqwell of and incidental to the present application are recoverable by him from Aqwell as costs of the administration: costs as between Aqwell and the applicant and the respondent are reserved.

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So that is where it is at. Thank you.

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