



Transcript of Proceedings

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State Reporting Bureau
Date: 25 October, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No BS8439 of 2004

WPS MOTORSPORT PTY LTD
(ACN 107 091 736)

Applicant

and

WHITPARK PTY LTD
(ACN 007 242 515)

Respondent

BRISBANE

..DATE 15/10/2004

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.

HER HONOUR: This is an application to set aside a statutory demand. The demand was served in the amount of \$55,537.19. Part of the amount claimed has been paid since the demand was served, leaving a balance of \$47,837.19.

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A share sale deed between the respondent creditor, as vendor, and the applicant company, as purchaser, and A S and C R Noske, as covenantors, was executed on 25 February 2004.

Pursuant to its terms, the applicant was bound to pay the respondent \$290,000, less allowable offsets, on 3 May 2004.

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There was dispute as to offsets claimed, leaving the amount of \$55,537.19 claimed in the statutory demand.

The applicant seeks to have the statutory demand set aside on the ground there is a genuine dispute as to the existence or amount of the debt and the existence of an offsetting claim, within section 459H of the Corporations Act. Under section 459H(5):

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"Offsetting claim means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates)."

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The company contends that \$250,000 damages it claims as a consequence of alleged defamatory publications made by A S Noske (one of the covenantors) constitute an off-setting claim within the meaning of section 459H.

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The share sale deed related to the sale of the respondent creditor (Whitpark)'s shares in the company Tony Noske Racing

Pty Ltd. By clause 8.1, Whitpark warranted that, as at the date of the deed, it had advanced to Tony Noske Racing Pty Ltd loans between \$800,000 and \$1 million ("the vendor's loan account"), which were repayable on demand.

By clause 8.2, in consideration of the purchaser (WPS Motorsport) agreeing to pay the vendor (Whitpark) \$290,000, less allowable offsets, on 3 May 2004, Whitpark assigned the benefit of the vendor's loan account to WPS Motorsport. The covenantors, the Noskes, were guarantors of the vendor Whitpark's obligations (clause 9.1).

By clause 13.10, each party was bound to treat the existence and terms of the deed confidentially, and no announcement or communication relating to the negotiations of the parties or the existence, subject matter or terms of the deed was to be made or authorised by a party without the written approval of the other parties.

The vendor (Whitpark) warranted that the trade creditors of Tony Noske Racing Pty Ltd did not exceed \$40,000 and that it had no other liabilities (clause 15.3 to schedule 5). By clause 6.2, the vendor (Whitpark) indemnified the purchaser (WPS Motorsport) against any claim of or against the purchaser to the extent that it arose from or was connected with any breach of any of the warranties or any other term of the deed.

The applicant (WPS Motorsport) alleges that on 16 August 2004
A S Noske sent an e-mail to the CEO of AVESCO, the controlling
body of the sport, containing the following statements:

"We are still unable to get payment from Gore/WPS,
despite legally settling all the issues they say were in
dispute"

and:

"I am also told today that David Thexton has a similar
problem."

It alleges that the statements were defamatory and that they
were published of and concerning it (WPS Motorsport) as well
as of and concerning Craig Gore. It claims \$250,000 as
damages, including exemplary and aggravated damages, for
defamation.

The applicant, WPS Motorsport, contends that the e-mail was a
breach of Noske's confidentiality obligation in clause 13.10,
and that by clause 6.2, Whitpark indemnified it against
breaches of the deed whether they were breaches by WPS
Motorsport or the Noskes. It contends that under clause 8.2,
it is entitled to set off against the \$290,000 the damages
payable for the defamation as a "claim of the purchaser",
arising from or connected with a breach of a term of the deed.

I do not accept these arguments. The e-mail did not disclose
the deed, any negotiations leading to it or its subject matter
or terms. The \$250,000 damages claimed are claimed for
defamation and not for breach of the confidentiality
obligation. Moreover, the offset claimed in clause 8.2 must

have been one in existence when the \$290,000 was payable -
that is on 3 May 2004 - but the e-mail was not sent until 16
August 2004.

An offsetting claim under section 459H is necessarily one
which the company (WPS Motorsport) has against the creditor
(Whitpark). The defamation claim per se is against Noske, not
against Whitpark. WPS Motorsport has submitted that it has an
offsetting claim against Whitpark, in the nature of a claim
for indemnity against a breach of the share sale deed by
Noske. However, for the reasons I have explained, the sending
of the e-mail on 16 August 2004 was incapable of giving rise
to an offset within clause 8.2 of the share sale deed.
Further, the contents of the e-mail was such that, even if
defamatory of the company, WPS Motorsport's claim for damages
is not one arising from or connected with any breach of any of
the warranties or any other term of the deed within clause
6.2.

Finally, there is no more than an assertion that the damages
recoverable for the defamation would be \$250,000, or otherwise
equal or exceed the \$47,837.19, which is the otherwise
undisputed balance of the amount claimed in the statutory
demand. Such a mere assertion is insufficient to give rise to
a genuine dispute about the existence of the debt under
section 459H(5). See *John Holland Construction and
Engineering Pty Ltd v. Kilpatrick Green Pty Ltd* (1994)
14 ACSR 250 at 253 per Young J.

I dismiss the application to set aside the statutory demand.
I order the applicant to pay the respondent's costs of and
incidental to the application to be assessed on the standard
basis.

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