SUPREME COURT OF QUEENSLAND

CITATION:	*Club LaBourse Travel Pty Ltd v CLB International Pty Ltd & Ors* [2005] QSC 380
PARTIES:	**CLUB LABOURSE TRAVEL PTY LTD** (plaintiff) v **CLB INTERNATIONAL PTY LTD** (first defendant) and **YVONNE WHYSALL STALLING** (second defendant) and **OAK VILLA INVESTMENTS LTD** (third defendant)
FILE NO/S:	BS1118 of 2005 BS1119 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	6 December 2005, 14 December 2005
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	8 November 2005
JUDGE:	Wilson J
ORDER:	**(a) that the application filed by the plaintiff on 5 October 2005 be dismissed;** **(b) that the application filed by the first and second defendants on 31 October 2005 be dismissed;** **(c) that the costs of both applications be reserved;** **(d) that the defendants deliver any further amended defence by 27 January 2006;** **(e) that disclosure take place by exchange of all parties' lists of documents on or before 14 February 2006**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – where the second defendant was a director and paid employee of the plaintiff company – where an agreement was reached that the business should be split and a new company incorporated – where there are now

fundamental disagreements between the plaintiff and the second defendant as to the terms of that agreement - where the plaintiff has made a claim for transfer, delivery up or repayment of moneys, property, profits or funds allegedly misappropriated – where both parties have given undertakings to the Court - where there is a critical dispute of fact between the plaintiff and the second defendant which depends on credibility – whether summary judgment should be granted

PROCEDURE – COSTS – SECURITY FOR COSTS – where the defendants contend that the plaintiff has withdrawn moneys from various bank accounts which are in breach of undertakings given to the Court - where the defendants have made a cross-application for security for costs and for the release of funds pursuant to undertakings previously given to the Court

Uniform Civil Procedure Rules 1999 (Qld), r 292

Deputy Commission of Taxation v Salcedo [2005] QCA 227, followed
Leaway v Newcastle City Council (No 2) [2005] NSWSC 826, cited

COUNSEL: NJ Thompson for the applicant plaintiff
RIM Lilley for the respondent defendants

SOLICITORS: Stacks Gray for the applicant plaintiff
Worcester & Co for the respondent defendants

[1] **WILSON J**: This is an application for summary judgment on a claim for transfer, delivery up or repayment of moneys, property, profits or funds allegedly misappropriated. There is a cross-application for security for costs and for the release of certain funds held in a trust account pursuant to undertakings previously given to the Court.

[2] Tourism Advisory Group SA ("TAG"), a Swiss based company, licenses others to sell its products, which consist of the registration, resale and rental of timeshare weeks and a vacation club programme offering members discounted holiday accommodation. Mr Brian Wates is a 20% shareholder of TAG and its associated company Onda Inc. TAG had a licensee in Oceania, whose license was terminated in 2000. At about that time TAG undertook to ASIC not to sell timeshare in Australia, although it would continue to operate here promoting its travel club.

[3] Subsequently the second defendant, a qualified accountant, became TAG's exclusive licensee for Oceania. She was to manage the clients who had registered to resell and rent time share weeks and to manage the needs of Club members. Shortly afterwards (in October 2000) the plaintiff company was incorporated, its sole shareholder being Onda Investments Inc and its directors being Mr Wates and the second defendant. The plaintiff became the licensee from TAG and the second defendant became its paid employee. The club memberships were sold by telemarketing.

[4] In accordance with the TAG business strategy, the second defendant also became a subagent to a travel agency handling travel agency arrangements in conjunction with the rental accommodation of club members. She acted as such a subagent in her capacity as a representative of the plaintiff.

[5] According to Mr Wates she was paid $6,000-00 per month ($5,000-00 of which was paid in Australia and $1,000-00 in Switzerland) as well as a bonus equal to 26% of the royalty paid by the plaintiff to TAG SA (calculated on gross sales receipts excluding ongoing renewal fees). He says that there was no agreement for her to receive a share of the profits, although she received a one off bonus in 2004 of $15,000-00. He says that she wanted her share of the royalty increased from 26% to 50%.

[6] There were some adverse references to Mr Wates on the internet, which the second defendant considered detrimental to the business. In about May 2004 she and Mr Wates reached agreement that the business should be split into two and that a new company should be incorporated. Mr Wates was not to be a shareholder or director of the new company.

[7] The defendants have pleaded that the agreement was in these terms -

(i) A new company would be formed or acquired by the second defendant;

(ii) The new company would operate the business of providing Club Labourse memberships to the public;

(iii) The second defendant would be the sole director and secretary of the new company;

(iv) The second defendant would be paid $6,000.00 per month for managing the business of the second defendant;

(v) The net profit of the new company would be payable as to 50% to Mr Wates and 50% to the second defendant ("the Agreement").

[8] There are now fundamental disagreements between the plaintiff and the second defendant as to -

(i) which part of the business was to be conducted by the new company: Mr Wates says the new company was to conduct the travel agency; the second defendant says the new company was to deal with club memberships; and

(ii) whether the second defendant was to have a beneficial interest in the shareholding of the new company: Mr Wates says that there was no discussion about shareholding and that it was not intended that the second defendant have any beneficial interest: the second defendant says they agreed that no shares would be issued in Mr Wates' name and that he not be a director, but that the beneficial interest in the profits be shared 50/50 between him and her.

[9] The first defendant was incorporated on 28 May 2004 with the second defendant as its sole shareholder and sole director. On 1 July 2004 Mr Wates ceased to be a director of the plaintiff.

[10] The first defendant's profitability by the end of 2004 was low. The second defendant blamed high telemarketing costs incurred in Hong Kong. In February 2005 Mr Wates received information which caused him concern that the second defendant was negotiating to sell the club membership business, and that she had set up sham documentation indicating that marketing activities were occurring in Hong Kong and that she had arranged remittance of invoices from Hong Kong to Australia so that funds could be sent to Hong Kong to her personal account. The plaintiff applied ex parte for an *Anton Piller* order claiming that as its employee and/or director the second defendant had breached her fiduciary duties in that she had -

(i) diverted profits and moneys of the plaintiff of the order of $300,000-00;

(ii) attempted to appropriate the goodwill and business of the plaintiff through the first defendant;

(iii) appropriated the business records of the plaintiff;

(iv) attempted to sell the plaintiff's business;

(v) remitted the profits of the plaintiff's business to Hong Kong under a sham marketing transaction.

A search order was granted and in due course executed.

[11] The plaintiff filed a claim shortly thereafter, and on 21 February 2005 Oak Villa Investments Pty Ltd (a company controlled by the second defendant and into whose bank account in Hong Kong moneys were allegedly diverted) was joined as third defendant.

[12] The plaintiff sought also to restrain the defendants from disposing of assets held by them or companies under their control including moneys received from the sale of club memberships and commissions received from travel or accommodation arrangements for club members, and from parting with possession of or destroying records relating to club memberships and travel and accommodation arrangements for club members. On 4 March 2005 the following undertakings were given to the Court -

Undertakings of the plaintiff, Club LaBourse Oceana Pty Ltd and Mr Wates:

1. The usual undertaking as to damages.

2. Undertaking that until trial or further order:

   (a) the business of the travel club and travel agency shall be operated by the Plaintiff and/or Club LaBourse Oceana Pty. Ltd.;

   (b) the Plaintiff shall not sell, encumber or otherwise dispose of any interest in the travel club business;

   (c) all moneys generated on account of the travel club and travel agency business shall be paid to one of accounts numbered 0644753411, 0644512310, 445110269280, 445110269934 or the LaBourse Travel Pty. Ltd., Trust Account (“the accounts”) held at the Commonwealth Bank Nerang;

(d) the only withdrawals from the accounts shall be payments in discharge of bona fide debts and expenses of the travel club or travel agency business and any such other withdrawals as are authorised in writing by either the Second Defendant or her Solicitors;

(e) that they shall provide to the Second Defendant's Solicitors, upon request, copies of bank statements for the accounts.

Undertakings of the first, second and third defendants:

1. To cause all money being held in the name of Oak Villa Investments Ltd., in Hong Kong Shanghai Banking Corporation including account number 173378100838 and the money held to the credit of the First Defendant in account number 10254652 at the Commonwealth Bank at Nerang ("the Nerang CLB account") to be deposited into the trust account of Worcester & Co. Solicitors on account of the first Defendant and the Plaintiff.

2. To provide to the Plaintiff's solicitors, upon request, copies of bank statements on the Nerang CLB account.

Undertaking of defendants' solicitors:

To provide to the plaintiff's Solicitors, upon request, copies of bank statements on the Nerang CLB account.

[13] By its application filed on 5 October 2005 the plaintiff seeks an order -

"That the following monies or funds of the Plaintiff held by the Defendants be transferred or repaid to the Plaintiff.

a	Advances to the Second Defendant from the Plaintiff's bank accounts	$6,504.68
b.	Advances to the Second Defendant from the First Defendant's accounts monies which are the property of the Plaintiff:	$12,000.00
c.	Salary overpaid (nett)	$1,840.00
d.	Unauthorised travel expenses	$3,358.27
e.	Legal expenses of Defendants (Worcester & Co)	$5,071.00
f.	Legal expenses (Popular Corporate Services Co ltd)	$8,558.66
g.	Toyota Camry owned by the Plaintiff in the Second Defendant's possession value	$14,000.00
h.	Laptop computer owned by the Plaintiff in the Second Defendant's possession	$1,500.00
i.	Holiday pay to be credited	-($7,890.00)

j. Amounts transferred overseas and held in: $308,912.94

- Oak Villa Investments Limited – HSBC Hong Kong Account No. 173-378100-838 $295,118.24

- Yvonne Stalling – Lloyds TSB (Isle of Man) BS 309373 Account No. 10522766 £5,993.05 – converted to AUD $13,794.70

NETT AMOUNT REPAYABLE BY THE DEFENDANTS TO THE PLAINTIFF **$353,855.55**"

By the time the application came on for hearing affidavits had been exchanged, and the accountant retained by the plaintiff (Ms Styles) had provided an amended "summary of funds misappropriated by the Defendants" as follows -

Advances to Y. Stalling from CLB	$6,504.68
Advances to Y. Stalling from CLBI	$12,000.00
Unauthorised travel expenses	$3,358.27
Legal expenses (Worcester & Co)	$5,071.00
Legal expenses (Popular Corp. Services Co. Ltd.)	$8,558.66
Toyota Camry	$14,000.00
Laptop Computer	$200.00
Overseas transfers	$330,391.58
Less salary underpaid	($1,160.00)
Less unused annual leave	($5,770.00)
Less transfer in dispute (01.10.03)	($44,028.00)
TOTAL AMOUNT MISAPPROPRIATED	$329.126.19

[14] The second defendant has dealt with each of the items claimed by the plaintiff in an affidavit filed on 21 October 2005. She reached this conclusion in para 18 -

> "All monies which were to be paid into the trust account of Messrs Worcester & Co have now been collected from various places including the overseas accounts and I am informed by Mr Stinchcombe of my Solicitors and believe that the total paid into that account was $251,129.66. In view of the above accounting CLBI and/or I am entitled to $168,989.00 of the amounts now in the trust account of Messrs Worcester & Co and the plaintiff of Mr Wates is

> entitled to $74,269.24 and the balance of $7,870.78 should be divided equally."

[15] I shall endeavour to deal with each item claimed.

(a) *$6,504-68 Advances to the second defendant from the plaintiff's bank accounts*. Receipt of these moneys is admitted.

(b) *$12,000-00 Advances to the second defendant from the first defendant's accounts of moneys the property of the plaintiff*. Receipt of these moneys is admitted.

(c) *$1,840-00 Salary overpaid (nett)*. The second defendant says she has been underpaid $1,160-00 (which seems now to be accepted by the plaintiff) and that in addition she is entitled to one month's pay in lieu of notice ($6,000-00). The latter is disputed.

(d) *$3,358-27 Unauthorised travel expenses*. The second defendant says these expenses were incurred for legitimate business purposes.

(e) *$5,071-00 Legal expenses of Defendants (Worcester & Co)*. The second defendant says these expenses were incurred for legitimate business purposes.

(f) *$8,558-66 Legal expenses (Popular Corporate Services Co Ltd)*. The second defendant says these expenses were incurred for legitimate business purposes.

(g) *$14,000-00 Value of Toyota Camry owned by the plaintiff in the second defendant's possession*. The plaintiff's purchase of this vehicle was partly funded by the trade-in of the second defendant's own vehicle. There is a dispute as to the true value of the trade-in and whether the plaintiff has been reimbursed for this. The second defendant contends that the vehicle has a net worth to the plaintiff of $6,000-00, which she seeks to bring into account as shown below.

(h) *$1,500-00 laptop computer owned by the plaintiff in the second defendant's business*. The second defendant contends that the depreciated value of the laptop is $200-00, which seems to be accepted by the plaintiff.

(i) *($7,890-00) Holiday pay*. The second defendant says she has unused leave entitlements amounting to $28,633-53.

(j) *$308,912-94 Amounts transferred overseas and held in accounts of the third defendant ($295,118-24) and the second defendant ($13,794-70).*

The second defendant was the sole director of the first defendant, and believed she had the sole right to manage its affairs, subject only to her being trustee for Mr Wates of 50% of the profit (as pleaded) or the income (as deposed to in para 12 of her affidavit). She says in para 12 of that affidavit -

> "(a) the amounts transferred to Oak Villa were transferred from CLBI (a company of which I was the sole share holder and director);

(b) I did not hold my share in CLBI in trust for the plaintiff or Mr Wates;

(c) The arrangement, by which CLBI was incorporated and took over the business of the plaintiff, is deposed to by me in my affidavit sworn 2 March 2005;

(d) The income of CLBI belongs half to me and half to Mr Wates;

(e) I had obligations as a director of CLBI to ensure it was solvent and to protect it by ensuring the claims of disenchanted purchasers of club membership, of which there were many, could be paid;

(f) Another purpose of building up a reserve fund which is the amount paid to Oak Villa was to secure CLBI, as there was no share capital invested by Brian Wates or me;

(g) This protection I saw as necessary because Mr Wates's previous habit in CLB of sifting all funds from the Australian bank accounts of CLB into his Geneva account, and causing cash flow problems. I, as the sole director of CLBI, made a judgement call that the reserve fund had to be set up without Mr Wates's knowledge."

Further, she says that it was only after 14 September 2004 that she sent moneys overseas to the reserve fund. She says that the amounts allegedly sent overseas include moneys paid for telemarketing ($62,757-22), her salary ($6,000-00) and proceeds of the sale of her former matrimonial home ($44,028-00). She says that excluding these erroneous amounts and bank charges, the sum of $336,391-58 is reduced to $223,578-36 "of which I am entitled to half and Mr Wates is entitled to half".

[16] The second defendant's summary is as follows -

"(a)	Advances to Y Stalling from CLB		$6,504.68
(b)	Advances to Y Stalling from CLBI		$12,000.00
(c)	Salary underpaid		($7,160.00)
(d)	Unauthorised travel expenses		nil
(e)	Legal expenses		nil
(f)	Legal expenses (totally erroneous)		nil
(g)	Toyota Camry	($6,000.00)	$12,000.00
(h)	Laptop computer		$200.00
(i)	Overseas transfers	($111,789.18)	$223,578.36
(j)	Holiday Pay		($28,633.53)

(k)	Desks Computer Renovations etc	($15,406.93)
	(paid for by CLIB now used by plaintiff)	
(l)	Respective entitlements CLBI or Me	$168,989.64
	The plaintiff or Mr Wates	$74,269.24"

[17] Rule 292 of the *Uniform Civil Procedure Rules* provides -

> "**292 Summary judgment for plaintiff**
>
> (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
>
> (2) If the court is satisfied that —
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[18] In *Deputy Commission of Taxation v Salcedo* [2005] QCA 227 the Court of Appeal reviewed relevant authorities on the interpretation of rules 292 and 293, and concluded that applicable test is to be found in the wording of the rules themselves (and not in interpretations of earlier differently worded rules). At para 17 Williams JA said -

> "That review of the authorities clearly establishes to my mind that there has been a significant change brought about by the implementation of r 292 and r 293 of the *UCPR*. The test for summary judgment is different, and the court must apply the words found in the rule. To use other language to define the test (as was contended for in this case by counsel for the appellant relying on the reasoning of Chesterman J in *Gray v Morris* [2004] 2 QdR 118) only diverts the decision-maker from the relevant considerations. But, and this underlies all that is contained in the *UCPR*, ultimately the rules are there to facilitate the fair and just resolution of the matters in dispute. Summary judgment will not be obtained as a matter of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial; if that is established then the matter must go to trial. In my view, the observations on summary judgment made by the judges of the High Court in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99 are not incompatible with that application of r 292 and r 293; what is important is that in following the broad principle laid down by their Honours the test as defined by the rules is applied."

[19] In the present case there is a critical dispute of fact as to the terms of the agreement reached between the second defendant and Mr Wates in May 2004. Further there are disputes of fact about most of the items making up the plaintiff's claim. The resolution of the first dispute depends on a credibility conflict between the second defendant and Mr Wates. The resolution of the other disputes turns at least in part on the outcome of the first dispute. In these circumstances it cannot be said that the defendants have no real prospect of defending the whole or at least part of the plaintiff's claim.

[20] If the second defendant's version were accepted at trial, either the plaintiff or Mr Wates would be entitled to approximately $75,000-00 of the moneys presently in her solicitors' trust account. It cannot be said that the defendants have no real prospect of defending the plaintiff's claim to the $75,000-00, and accordingly there needs to be a trial even of this part of the claim.

[21] The defendants contend that the plaintiff has withdrawn moneys from various bank accounts for purposes which are in breach of the undertakings given to the Court on 4 March 2005. While not asking that the plaintiff be dealt with for contempt of court, counsel for the defendants submitted that this was relevant to the exercise of the Court's discretion to refuse summary judgment. He referred to *Leaway v Newcastle City Council (No 2)* [2005] NSWSC 826 where Campbell J discussed the circumstances in which a Court may refuse to hear a party in contempt. However, because I am not satisfied of the matters in paragraphs (a) and (b) of r 292(2), the discretion to give judgment does not arise.

[22] The first and second defendants seek an order -

> "That the plaintiff provide security for costs of the proceedings by securing to the satisfaction of the Registrar the sum of $60,000.00 or otherwise by leaving invested in Australia and subject to the undertakings given on 4 March 2005 all money presently deposited in the trust account of Messrs Worcester & Co solicitors in the sum of $251,129.66 pursuant to that undertaking;"

[23] The plaintiff has only one shareholder - Onda Investments Inc which is a Swiss company. It currently has two directors - Mr Wates (who resides in the United Kingdom) and Kevin George Selby, both of whom were appointed on 4 February 2005. According to a balance sheet as at 7 November 2005 it had current assets of $72,688-39 and current liabilities of $12,654-69. It had fixed assets of $335,000-00 and long term liabilities of $253,000-00. The fixed assets consist of a unit at Main Beach on the Gold Coast purchased only a few days before for $335,000-00. According to an affidavit by Mr Wates there is a mortgage debt secured against it of $268,000-00. (There is no explanation for the discrepancy between $268,000-00 and $253,000-00 shown on this account in the balance sheet.)

[24] Since the undertakings were given to the Court on 4 March 2005 an amount just short of $360,000-00 has been paid out of the bank accounts referred to in para 2(c) of the plaintiff's undertakings. Of that amount approximately $113,000-00 has been sent offshore. Mr Wates has sought to justify approximately $253,500-00 of the payments as legitimate business expenses (albeit some of them incurred to related companies) within the terms of the undertakings. I was not asked to make a finding of contempt, and I am unable on this application to determine whether the

undertakings have been breached. Needless to say, unless and until it is released from the undertakings it gave the Court on 4 March 2005, the plaintiff will remain bound thereby.

[25] I note that the defendants complained also that the plaintiff had failed to provide them with copies of bank statements in accordance with para 2(e) of its undertaking. However, by the time the matter came on for hearing, those statements had been provided.

[26] The second defendant has deposed to having incurred legal costs of $46,000-00 to 21 October 2005 (of which $8,000-00 had been paid). There is no estimate of her future legal expenses.

[27] The defendants have complied with their undertaking to cause all moneys held in the third defendant's name in Hong Kong Shanghai Banking Corporation and moneys held to the credit of the first defendant in a bank account at Nerang to be paid into their solicitors' trust account. In the absence of a direction from both the plaintiff and the first defendant, those solicitors ought not disburse any of those funds without an order of the Court.

[28] On this material I do not think it would be proper to make an order for security for costs in the terms sought.

[29] In their cross-application, the first and second defendants seek the following further order -

> "That until further order the following amounts be paid from the funds held in the trust account of Worcester and Company Solicitors pursuant to the order of 4 March 2005:
>
> (a) the sum of $60,000.00 for legal fees incurred or to be incurred by the defendants;
>
> (b) the sum of $600.00 per week be paid to the Second Defendant to be used to defray her reasonable living expenses."

At the hearing counsel for the defendants asked for an order that $100,000-00 be released from the trust account to the second defendant.

[30] As counsel for the defendants submitted, the allegations against the second defendant are extremely serious and involve dishonesty. The defendants have complied with their undertaking and caused the moneys to be repatriated into their solicitors' trust account. Since the *Anton Piller* order (made on 10 February 2005) and the undertakings given to the Court on 4 March 2005, the second defendant has been excluded from the business and so denied the income of $6,000-00 per month which she was previously receiving. She swears that she is now in receipt of social security benefits of $1693-00 per month; that between 19 August and 26 October 2005 she had a temporary job from which she supplemented her social security payments by $2156-00; that her living expenses are $4867-00 per month; and that she has no assets with which to finance her legal expenses.

[31] The defendants contend -

> "Mr Wates is being maintained out of the funds which the plaintiff is earning from conducting the first defendant's business pending resolution of this dispute. There is no reason why Mrs Stalling should not be in a similar position."

[32] On the material before me I cannot accept the assertions in the first sentence of this submission. Whether the business the plaintiff is conducting is "the first defendant's business" is one of the contentious issues at the very core of this litigation. Of course the other key question is that of the beneficial interest in the shareholding (and ultimately the profits) of the first defendant.

[33] Mr Wates has asserted that the moneys paid out of the accounts referred to in the plaintiff's undertakings have been paid for legitimate business expenses. I am not in a position to determine whether this is so. Assuming for present purposes that they have been legitimate payments, it remains the fact that some of them have been to related companies, and that Mr Wates has probably benefited indirectly through his shareholdings in those related companies.

[34] The application before the Court on 4 March 2005 was for orders restraining the first and second defendants from dealing with assets held by them or any companies under their control including moneys received from the sale of club memberships and commissions from travel or accommodation arrangements for club members. It can fairly be said that in giving the various undertakings the parties recognised that the balance of convenience favoured the plaintiff's conducting the businesses until trial but disbursing funds only for legitimate business purposes and the defendants' causing the disputed moneys to be repatriated and held on trust for the first defendant and the plaintiff until trial.

[35] Both in his written submissions and in his oral submissions counsel for the defendants emphasised the position of the second defendant and sought the release of some of the trust fund to her. However, the parties previously agreed that the fund should be held for the first defendant and the plaintiff, and I can see no basis for ordering that any amount be released to her.

[36] In summary, then, I consider that both the application and the cross-application should be dismissed. There should be directions for the further conduct of the proceeding. I will ask counsel to try to agree on the terms of a draft order.

Addendum - 14 December 2005

[37] Counsel having agreed on the order as to costs and on directions, the orders are:

(a) that the application filed by the plaintiff on 5 October 2005 be dismissed;

(b) that the application filed by the first and second defendants on 31 October 2005 be dismissed;

(c) that the costs of both applications be reserved;

(d) that the defendants deliver any further amended defence by 27 January 2006;

(e) that disclosure take place by exchange of all parties' lists of documents on or before 14 February 2006.