[2006] QSC 339

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No BD8590 of 2006

RICHARD CHARLES TURNBULL	Applicant
and	
THE 383 COMPANY PTY LTD (ACN 090 614 672) as trustee for THE GREEN FAMILY TRUST	Respondent

No BD8906 of 2006

WOODY ENTERPRISES and WOODY MARINE FABRICATIONS	Plaintiffs
and	
WOODY MARINE PTY LTD (ACN 119 233 091)	First Defendant
and	
DAVID CHARLES GREEN	Second Defendant
and	
DEIDRE ANN GREEN (in her own right and as Trustee for THE GREEN FAMILY TRUST)	Third Defendant

BRISBANE

..DATE 01/11/2006

ORDER

CATCHWORDS: Partnership of two companies - one purportedly expelled for protracted indisposition of its principal - without any agreement or payment, a new company set up by principals of the other takes over the whole partnership businesses - interlocutory injunctions to protect partnership assets granted against the new company.

Guarantee - order that a principal debtor exonerate a guarantor - various objections to exercise of discretion to grant quia timet relief considered and rejected.

HIS HONOUR: There are two applications before the Court, being closely relating matters. The first to be filed is an originating application filed on the 9th of October 2006 seeking that the respondent. The 383 Company Pty Ltd, exonerate the applicant, Richard Charles Turnbull, in respect of indebtedness to Westpac for which he is guarantor and the respondent is principal debtor.

The relief sought is quia timet relief of a kind which is well established in relation to guarantees. One reads in O'Donovan and Phillips, The Modern Contract of Guarantee (Third edition) at 564:

> "The rationale for equity's intervention is that guarantors should be able to remove the cloud hanging over their heads before it starts to rain. Quia timet is intended to protect guarantors from first having to pay the debt. Such relief is not restricted to the context of guarantees. It is available in equity whenever a person has a reasonable apprehension of imminent inconvenience or detriment because of the neglect, inadvertence or culpability of another. It requires the principal debtor to take appropriate steps to ensure that the debt will be discharged or the guarantor relieved of the liability the guarantor might incur in consequence of the debtor's default."

Reference has been made to the decision of Campbell J in Rossfreight Holdings Pty Ltd v. Unipep Australia Pty Ltd [2002] NSWSC 1074; BC200206762 where Campbell J made reference to the authorities of Watt v. Mortlock [1964] 1Ch84 and Woolmington v. Bronze Lamp Restaurant [1984] 2 NSWLR 242. At paragraph 18 his Honour said:

> "It's part of the justification for the equity of exoneration that, when the obligations between surety, creditor and principal debtor are worked out, one can say with confidence, at the time the court makes an

> order, that it is the principal debtor who will end up being liable to pay. Equity avoids multiplicity of actions, by ordering that the inevitable eventual outcome of two different actions by creditor against surety, and then by surety against principal debtor, be achieved straight away, without going through those two different actions, and without the surety suffering any financial disruption involved in first paying the creditor and then seeking reimbursement from the principal debtor. That is not the situation here. One simply cannot tell who it is who will be liable, following the account, to pay the amount required to discharge the mortgage."

In the result there, there was no order for exoneration, proceedings for an account which might resolve the uncertainty referred to being on foot already. I am not persuaded that there is any uncertainty of that kind here. The debt is an ordinary business overdraft in respect of which Mr Turnbull committed himself as guarantor.

That is not to say there are no complicating features. Also jointly and severally liable to Westpac as principal debtor is Turnbull Projects Pty Ltd, a company belonging to Mr Turnbull and I think his wife. No quia timet relief is sought against it, nor does it appear that it has done anything to discharge to any extent the indebtedness to Westpac, which currently exceeds $122,000.

There is a co-guarantor, Mr David Green, who is one of the defendants in the claim in which interlocutory injunctive relief is sought in the other application. There is perhaps no necessity that he should be involved. Needless to say, the bank has been pursuing its debt, serving notices on the principal debtors and guarantors, Mr Turnbull at all events,

indicating that he is in real jeopardy at the suit of the bank.

The failure of Mr Turnbull to join his own company, which must be as amenable to an order being made to exonerate as is Mr Green's company, is relied on as a factor telling against the Court exercising the discretion which it has in this application for quia timet relief. It is relied on as a factor which would induce the Court not to exercise the discretion favourably.

I am not persuaded that the Court ought to stay its hand on that basis, whether or not it is necessary to seek justification for Mr Turnbull's choosing from the total cast of those he might sue. There are, as will appear, circumstances which arguably justify the choice he made.

Mr Green's affidavit mentions, in terms, another of the objections raised to the granting of the relief sought, which is that the respondent claims to have a cause of action of its own against Mr Turnbull which would or might overtop $122,000 or whatever is the appropriate amount.

I observe at this point that I reject another argument made against the granting of relief, namely that the bank as the creditor has not been joined. The only reason for joining it suggested is that it could provide the Court with an accurate payout figure. There are various reasons for thinking that the respondent company and indeed, the Greens and all entities

associated with them have not the slightest difficulty in identifying that payout figure.

The claim asserted against Mr Turnbull is a Trade Practices Act or Fair Trading Act type claim based on misleading and deceptive conduct represented by Mr Turnbull's asserted failure to reveal before the Greens, through entities of theirs, became involved with him in a business, that he suffered seriously from depression. That he did so suffer, speaking generally, appears to be borne out by the material. He did not last long as an active participant in or contributor to the business alongside Mr Green, who was apparently the person key in establishing and maintaining it.

The experience of the business seems to have been dire while Mr Turnbull was there or supposedly there. The evidence suggests that now he's gone it's doing much better. I suppose there's a basis in Rossfreight for withholding relief on the basis that on a final accounting if some claim, as foreshadowed, is made against Mr Turnbull it might turn out that the respondent has just claims against him. I think that is far too speculative today and that the Court ought to grant the relief sought by way of exoneration.

What I shall say later regarding other aspects of the parties' relations in their context in regard to the application for an injunction will serve to explain my attitude. I confess beginning the hearing of this application with serious misgivings in the face of Mr Derrington's submissions to the

effect that it was no objection that there appeared to be discrimination happening among principal debtors. In the end I resiled from those misgivings.

I am not persuaded by Mr Liddy's reference to the maxim that equity is equality, that Mr Turnbull comes without clean hands and the like. Mr Derrington made a point of demonstrating to the Court that the timetable the parties agreed on for these matters on or before the 19th of October, when it was incorporated in a consent order, gave the Green interests sufficient opportunity, if they wanted to redress matters by bringing in Mr Turnbull's company or in any other way, they had the opportunity to do it. I note that Mr Liddy is instructed by solicitors who came into the matter only late last week, so it is not fair to hold them responsible for this situation.

I am not troubled by assertions that there has been delay here. The demands from Westpac are relatively recent.

The possibility is adverted to that Mr Turnbull may, if anything comes of the order which he will obtain for exoneration, gain a priority over other creditors. If that happens, then it may be that Westpac has to disgorge. I would think that, in common with other banks, it is not unaccustomed to such circumstances, but would nevertheless be happy to see its money in the short term. It may not be minded to release Mr Turnbull as guarantor.

What does trouble me in relation to the application is the apparent lack of any advance notice of the application being given and of the respondent having an opportunity to make arrangements without the necessity of a Court order; that goes not to principal relief, only to costs.

The other application before the Court seeks interlocutory injunctive relief which, although the application does not include any exception for transactions in the ordinary course of business, I am told is intended to permit such transactions while otherwise restraining the first defendant, a company called Woody Marine Pty Limited, from dealings, described in a thesaurus-like list, with "any of the business assets and all and any property which it acquired from the plaintiff and which the plaintiff formerly employed in the conduct of the partnership under the names 'Woody Enterprises' and 'Woody Marine Fabrications'."

There is also sought an injunction restraining that company from further increasing indebtedness to the third defendant, Mrs Green, sued in her own right and as trustee for the Green Property Trust under a charge which was given to her on the 2nd of June 2006. The third injunction sought requires the first defendant to keep and maintain proper accounts in respect of the business.

Mr Liddy spoke in rather belittling terms of the relief sought, indicating, as appears to me to be the case, that it is very limited relief and may well not prevent the first

defendant from acting as it would have done in any event. I would think that the Corporations legislation and the tax legislation would require the keeping of accounts and one would not ordinarily anticipate that a company which (it would appear on evidence before the Court) is trading very successfully might be making away with parts of its business.

Mr Derrington contends that the first defendant and the Green interests generally have "form" in this respect having, according to him, already improperly seized the plaintiff's business without paying anything for it.

There is something, I think, in what he says.

There is perhaps more clout in the second injunction on the basis of a concern that indebtedness to Mrs Green generated in transactions which would not be at arms length might be manipulated in such a way as to transfer assets and property of the kind the injunction is concerned with for less than full consideration.

The partnership business was conducted under a formal partnership deed between The 383 Company Pty Ltd which was formally named Woody Enterprises Pty Ltd and Turnbull Projects Pty Ltd, mentioned above. The deed is dated the 2nd of September 2005. The business was previously operated by The 383 Company Pty Ltd, as I shall call it, on premises owned by Mrs Green.

In retrospect, it appears to have been poor business judgment from the point of view of the partnership that the $350,000 paid by Turnbull Projects for its half interest in the partnership went to the vendor rather than being contributed to the partnership to give it some capital. There was also paid $52,000 for stock.

The vendor company changed its name and the partnership took over as either a single combined business name or two separate business names, the trading names indicated above.

Mrs Green, about the same time, entered into lease for five years with a five year option of the premises to the partner companies. They also required, for the continued operation of the business, the use of various plant and equipment which she owned and rented out.

Turnbull Projects acquired from Mrs Green a half-interest in that plant and equipment at valuation, the price paid being $144,000. If I understand correctly, there was no indebtedness to Westpac at the outset but overdraft arrangements were put in place and availed of with guarantees of the two male protagonists as noted already. I was told that Westpac called up the debt in August this year.

By the end of January Mr Turnbull's difficulties had become manifest and from that time it seems he was rarely if ever able to attend. He was designated in the deed of partnership as the "partner representative" for his company and became

obliged to devote 50 hours a week of his time to partnership affairs. One of the issues in the litigation is whether "partner representative" meant the two gentlemen identified in the definition, and them only, or extended to "such person as each partner nominates" as referred to in the definition, the partners having an ability to change their nomination.

It is said that Mrs Turnbull was nominated, was eventually excluded. The criticisms from Mr Green of Mr Turnbull are not limited to his non-appearance for work. He has said that Mr Turnbull's style alienated staff and customers, was very damaging to the business. For present purposes, it may be accepted that from the Greens' point of view, although receiving a large cash amount for letting the Turnbull interest in, they had exercised very poor judgment from the point of view of choosing the right man to work alongside Mr Green.

There is an issue whether a notice which was given, purportedly under the partnership agreement, excluding the Turnbull interest from the partnership on the basis of either 60 days or 90 days non-attendance, as set out in the relevant clause, was validly given or not. In a practical sense the Turnbulls were excluded. It has to be said they do not seemed to have shown any particular tenacity in trying to get back in.

There is a long course of correspondence conducted through solicitors in which resolution of matters was sought. The

notice of expulsion is included in a letter of 5th of April 2006 sent by Tony Pereira Lawyers. This followed earlier communications such as one of the 17th of March complaining of the Greens having been misled as to Mr Turnbull's history of mental illness and going on:

> "Our clients are not minded to continue to run the Woody Enterprises business as currently constituted in light of the misrepresentation made to them prior to entering into the agreements and continued lack of feasibility in operating the business."

The offer to buy out on the 17th of March 2006 was for a total sum of $100,000. There is a stark comparison there with what the Turnbulls paid to come in but, of course, they may have simply made a very bad bargain. One can understand their unhappiness at the situation. There may be room for argument here what assets the "business" includes, pertinent to valuation. Mr Liddy suggests that without the willing contribution of Mr Green, it would be worth little.

The only offer of any kind which the Turnbulls appear to have made was one which would see them get their money back. The $100,000 offer was withdrawn by the letter of expulsion. The correspondence goes on and on with counter-proposals for valuations of this and that, accountants being favoured to do the exercise on one side, business brokers on the other.

A document was prepared by Pitchers, who apparently did accounting work for the business, indicating its chronic lack of capital and likely insolvency. One has to wonder, reading

that, about the wisdom of the original transaction, at least from the Turnbulls' point of view.

The correspondence unsurprisingly includes complaints, made on their behalf, that representations of net maintainable earnings for the business being $370,000 per annum were misleading. From the Greens' point of view, little progress was made towards any kind of buy-out, and what has happened is an unofficial take-over of the business by a company, Woody Marine Pty Ltd, incorporated on the 11th of April 2006.

It appears to have taken over the role of lessee of the premises. It is using the equipment - according to the new valuation by auctioneers, worth only $60,000 as opposed to $288,000 months before - but without paying anything for it, in particular without paying anything to the Turnbull interests. It has taken over the telephone service.

Mr Liddy says he concedes there are triable issues here about the plaintiff's entitlement to relief based on breach of fiduciary obligations. Even on the assumption that the Greens are people in the position of trying to keep an established family business operating for the benefit not only of themselves but also of their employees who have been kept on through the things that have happened, however much the Greens were acting in deference to what they might have seen as practical necessity, it seems to me as things are presented today that something close to an overwhelming claim for relief is well established. Even when a partnership has been

dissolved, until the winding up is complete, fiduciary obligations continue and it is not acceptable (for the partners at all events) to retain advantages that have their origin in partnership assets. I refer to Zacharia v Chan 154 CLR 178.

The role of the partners here is unusual. The plaintiff in the claim is the partnership identified as having the combined name, the partners being the two companies identified above. At one point concern was expressed that the claim had been commenced without the support of both partners.

Queensland Southern Barramundi v Ough Properties Pty Ltd [2000] 2 Queensland Reports 172 establishes that a partner has authority in circumstances such as the present to commence a proceeding in the partnership name.

In principle it has to be open to someone to vindicate the partnership's interest and it may be inferred that The 383 Company Pty Ltd is unlikely to develop an intention to do that in the circumstances.

The undertaking as to damages, which would ordinarily be required if interlocutory relief is granted, would on the face of things have been offered in the name of the partnership. I would think it permissible and, indeed, a common occurrence for a member of a partnership to give an undertaking to a Court binding the partnership. That seems to me to be done for firms of solicitors on a very regular basis. In

circumstances like the present where one of the partners, represented by Mr Liddy today, indicates that it is not willing to give such an undertaking, then it is clearly wrong for the Court to regard a proffered undertaking which appears to apply to it as contemplated.

Therefore, the undertaking as to damages is that of Turnbull Projects Pty Ltd only. It is not possible in the circumstances to take much comfort from an undertaking from that quarter. None is offered by Mr Turnbull, who is understood to be still seriously indisposed, or Mrs Turnbull.

Mr Derrington relied on a statement of Campbell J in Varley v. Varley [2006] NSWSC 1025; BC200607792 at paragraph [56] as justification for some indulgence from the point of view of demonstrating that an undertaking is of value being granted in appropriate cases.

The Judge said at the end of that paragraph that,

> "The usual way a Court proceeds on an application for an interlocutory injunction is to take account of any risk that an undertaking as to damages might be inadequate as one factor entering into the balance of convenience".

Mr Liddy is right that those statements were made in the rather special context of proceedings under the New South Wales Property (Relationships) Act 1994. I think the proposition is of general application.

One of the other factors to be taken into account in considering the balance of convenience is the likely extent of liability of the person whose undertaking is offered. Here, and Mr Liddy has made submissions reinforcing my view, it is unlikely that the interlocutory injunctions sought will have any impact on the first defendant, which is the party sought to be restrained.

I would not think Mrs Green would be able to persuade a Court that she should be compensated if she lost some non-commercial advantage, effectively a gift, from some dealing that might otherwise have been entered into involving her.

In this respect, Mr Liddy reminded me that there is a fear that these parties will become embroiled in protracted litigation which probably none of them can afford.

If there are any damages occasioned by the injunction and it be determined retrospectively it should not have been granted, those may blow out by reason of the time taken to get the litigation to an end. I am not persuaded that that is a factor.

I understood Mr Derrington had a proposed draft order. I will consider that if he wants to hand one up but I have already noted that the application is deficient in not expressly permitting dealings in the ordinary course of business to be entered into by the first defendant.

...

HIS HONOUR: Mr Derrington, what I will do is reserve the applicant's costs and grant liberty to apply in that regard if the applicant can establish that there was some opportunity given to the respondent to do what you are asking, and they said they would not.

...

HIS HONOUR: Well, I think this matter has been finalised and given Mr Derrington's apparent understanding that the application was, indeed, unheralded, in light of what he has said and what Mr Liddy said, paragraph 4 of the order will require the respondent to pay half of the applicant's costs of and incidental to this application to be assessed on the standard basis.

...

HIS HONOUR: "Of Turnbull Projects Pty Ltd, a member of the plaintiff partnership." I am just putting those extra words in to identify it more clearly as the giver of the undertaking as to damages.
