SUPREME COURT OF QUEENSLAND

CITATION:	*Witham & Anor v Hough & Anor* [2009] QSC 101
PARTIES:	**CATHERINE MARY WITHAM (first plaintiff)** **AUSTRALIAN POLO MAGAZINE PTY LTD (ACN 081 109 248) (second plaintiff)** **V** **GREGORY DAVID HOUGH (first defendant)** **EXECUTIVE PUBLISHING NETWORK PTY LTD (ACN 058 057 597) (second defendant)**
FILE NO/S:	8521 of 2006
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	8 May 2009
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	24-27 November 2008
JUDGE:	Douglas J
ORDER:	**Judgment for the first defendant**
CATCHWORDS:	**TRADE AND COMMERCE - TRADE PRACTICES ACT 1974 (CTH) AND RELATED LEGISLATION - ENFORCEMENT AND REMEDIES - ACTIONS FOR DAMAGES - CAUSATION - ASSESSMENT OR AVAILABILITY OF DAMAGES - GENERALLY - Relaunch of “Australian Polo Magazine” - Whether first defendant knowingly concerned in publishing “International Polo Leisure & Lifestyle” magazine – Whether likely to mislead consumers into believing that magazine was “Australian Polo Magazine” or affiliated with it - Whether first defendant breached terms of agreement binding him to assist in the creation of a new company to publish magazine - Whether first defendant breached alleged duty of good faith or fiduciary duty owed to plaintiffs - Whether plaintiffs suffered loss of commercial opportunity to exploit their intellectual property - Whether damages proved – Whether nominal damages available.** *Trade Practices Act* 1974 s 52, s 82 *Uniform Civil Procedure Rules* 1999 r 428

CGU Workers Compensation (NSW) Ltd v Garcia (2007) 69 NSWLR 680 referred
Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228 [3]-[4], [25] referred
Gold Coast Waterways Authority v Salmead Pty Ltd [1997] 1 Qd R 346 referred
Highmist Pty Ltd v Tricare Australia Ltd [2005] QSC 115 at [43] referred
JLW (Vic) Pty Ltd v Tsiloglou [1994] 1 VR 237, 249 followed
Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd [2001] QCA 212 referred
Re Kendells (NSW) Pty Ltd (In Liq) [2005] QSC 064 [58]-[60] referred
Re Zurich Australian Insurance Ltd [1999] 2 Qd R 203, 213-219 [34]-[82] referred

COUNSEL: Catherine Mary Witham in person and representing the second plaintiff.
Gregory David Hough in person.

SOLICITORS: Catherine Mary Witham in person and representing the second plaintiff.
Gregory David Hough in person.

[1] **Douglas J**: This is an action arising out of an agreement made 21 March 2005 between the plaintiffs and the defendants. The second defendant, Executive Publishing Network Pty Ltd is in liquidation and leave has not been given to proceed against it. The action has continued, however against Mr Hough, the first defendant, who was a director and chief executive officer of the second defendant at relevant times. He is claimed to have been knowingly concerned in a contravention of s. 52 of the *Trade Practices Act* 1974 (Cth) alleged against the second defendant of publishing a magazine called *International Polo Leisure & Lifestyle* and in so doing engaging in conduct likely to mislead consumers into believing that magazine was a magazine called *Australian Polo Magazine* or was affiliated with that magazine, the rights to which are claimed by the plaintiffs.

[2] Mr Hough is also said to have breached terms of the agreement binding him to assist in the creation of a new proposed company originally intended to be used to publish *Australian Polo Magazine* and to have breached an alleged duty of good faith arising out of a fiduciary relationship between him and Ms Witham by publishing the *International Polo Leisure & Lifestyle* magazine.

[3] There is also a claim for breach of copyright but it was only alleged in para. 48 of the second amended statement of claim that the plaintiffs had suffered and continued to suffer loss and damage by reason of the second defendant's infringement of the plaintiffs' copyright. There is no case pleaded, therefore, against Mr Hough for breach of copyright.

Background

[4] Between 1995 and 2000 Ms Witham, through her company, Curlew Publishing Pty Ltd, published a magazine called *Australian Polo Magazine*. It was published quarterly and she also published calendars, posters and other documents some of

which were associated with events which she also organised and promoted. She ceased publication of the magazine about 2000 after a dispute about intellectual property rights between her and the Ralph Lauren organisation concerning the use of the word "polo" in a website called "www.polomag.com". She says that dispute cost Curlew Publishing about $20,000 but that it was not just that cost but the difficulties caused with advertisers because of the dispute that caused her to terminate its publication.

[5] Before then, however, the publication of *Australian Polo Magazine*, which had previously occurred with the approval of the New South Wales Polo Association and the Australian Polo Council, was running into difficulties. They resulted in the New South Wales Polo Association terminating their arrangement with Curlew Publishing in respect of the publication of the magazine, requiring Curlew Publishing to return all mailing lists, information and other documents which properly belonged to that association by 30 July 1999.

[6] In 2004, after the resolution in her favour in 2002 by the World Intellectual Property Organisation of her dispute with the Ralph Lauren organisation, Ms Witham began to plan to relaunch *Australian Polo Magazine* for April 2005, gained some temporary financial support from a Mr Campbell to that end and employed four staff members to assist in the relaunch. She could not fund that relaunch herself and, on 13 December 2004, met Mr Hough at a restaurant in Brisbane to discuss the involvement of his employer, the second defendant, in the relaunch of *Australian Polo Magazine* and its proposed related business ventures.

[7] She says, and he agrees, that she told him then about her difficulties with the New South Wales Polo Association and the Australian Polo Council but that she did not rely on them for support. It is my view, however, that she did not then or later tell Mr Hough that the New South Wales Polo Association had, by a letter of 12 July 1999, which is included in ex. 22, terminated its arrangement involving her magazine and required her to return all mailing lists, information and other documents which properly belonged to that Association by 30 July 1999. No such information is contained in notes she made of the meeting with Mr Hough some months later.

[8] She provided Mr Hough with a budget, sales brochures and a business plan and entered into what she described as an oral agreement evidenced by a letter of 14 January 2005 after a meeting at another restaurant. Between that date and entry into a more formal agreement on 21 March 2005 the second defendant employed staff who had previously been employed by the second plaintiff, Australian Polo Magazine Pty Limited, and began to pay them and her in anticipation of the relaunch of *Australian Polo Magazine*. She and others of her staff members were assigned work to do towards the relaunch and the second defendant took over payment of the expenses associated with the preparations for that event.

[9] On 21 March 2005 both plaintiffs and defendants entered into a more formal agreement titled "Shareholder, IP Rights, Royalty and Services Agreement" by which Ms Witham assigned to *Australian Polo Magazine* her interest in certain intellectual property and the domain names, "polomag.com" and "polomag.com.au".[1] The parties also agreed that a new company referred to as

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[1] See ex. 12.

"Pub Co" would be formed to carry on a publishing business under the name "Polo Magazine" including event organisation and management. The second plaintiff agreed to grant to Pub Co the right to the sole and exclusive use of the intellectual property received by it from the first plaintiff. Ms Witham was also to be employed by Pub Co either as an employee or a contractor at the rate of $104,000 per annum before tax and was also to be paid a royalty fee by Pub Co calculated at 7.5% of its annual revenue less her agreed remuneration. The second defendant was to have an option to purchase her shares in the second plaintiff for $3 million within two years of the date of execution of the agreement and the second defendant was also to have an option to purchase the first plaintiff's shares for a fair market price after the expiry of two years after the execution of the agreement.

[10] The pleading alleges that the agreement created a fiduciary relationship between the parties and asserts an implied term that they would act in good faith in their dealings with each other in circumstances where the first and second defendants were aware of the lack of financial resources of the first and second plaintiffs.

[11] As it happened Pub Co was never established but the second defendant did carry on with the work of preparing the re-launch of *Australian Polo Magazine*. Early in April 2005, however, Mr Hough had a number of conversations with Mr Paul Manka, the chairman of the board of the second defendant. He was a polo follower and had received unfavourable information about Miss Witham stemming from her previous dealings with the New South Wales Polo Association and the Australian Polo Council.

[12] Then, on 19 April 2005, the Australian Polo Council sent a letter to Mr Hough informing him that the Australian Polo Council and the New South Wales Polo Association were not prepared to support *Australian Polo Magazine.* The letter drew his attention to the termination of the previous arrangements dated 12 July 1999, saying that there had been a meeting with Ms Witham on 7 April 2005 at which that position was reinforced. The letter also said that if *Australian Polo Magazine* were to use Australian Polo Council or New South Wales Polo Association mailing lists for distribution to customers there would be legal consequences as the notice of termination in July of 1999 required all of those organisations' intellectual property to be returned. It also asserted that an allegation of a Ms Latham who had previously been employed by Ms Witham's earlier company, Curlew Publishing, and was then employed by the second defendant, that the mailing lists were the property of *Australian Polo Magazine*, was not correct. The letter went on to state that the previous arrangement with *Australian Polo Magazine* required the databases to be kept by an independent mailing house and also contended that if *Australian Polo Magazine* did come into possession of the databases it was bound to surrender that intellectual property because of the July 1999 notice of termination.

[13] The receipt of that letter prompted the second defendant to decide not to fund the establishment of Pub Co and to terminate Ms Witham's employment. Mr Hough did that as chief executive officer of the second defendant by letter of 19 April 2005 in which he said that the second defendant would not fund any operations of Pub Co including the engagement of Ms Witham as a consultant to that company because of the misleading and deceptive statements he said were made by Ms Witham in

relation to the intellectual property referred to in the agreements of 21 March 2005.[2] That agreement defined intellectual property to include "lists of customers or key contractors or contacts… concerning the publication of the magazine called 'Polo Magazine'." Although the letter contained a passage saying that the second defendant stood "ready willing and able to perform its part" of the agreement it was clear that the arrangement between the parties had been terminated by it.

[14] In response to that letter of termination of 19 April 2005 Ms Witham sent a letter dated 20 April 2005 seeking to enter into negotiations to resolve their dispute which was followed by a further exchange of emails and letters on 26 April 2005 in which Ms Witham argued that she and her company were entitled to the mailing lists contrary to the assertions of the Australian Polo Council. That was an issue that was not possible to resolve on the material led in evidence in this case. Mr Hough did not seek to lead evidence from anybody associated with the Australian Polo Council or the New South Wales Polo Association.

[15] Subsequently, in correspondence from her then solicitors of 1 June 2005, Ms Witham asserted that the second defendant had plundered her intellectual property by using it and exploiting it in its publication of the May edition of the new magazine titled *International Polo Leisure & Lifestyle*. She also took the stance in argument that Mr Hough had used the letter of 19 April 2005 from the Australian Polo Council to enable him to breach his obligations under the agreement of 21 March and asserted that he did so, in effect, by pre-arrangement with the Australian Polo Council.

[16] She argued that I should reach that conclusion partly because of the registration of the business name "Polo Leisure & Lifestyle" by a document lodged on 18 April 2009. By that date Mr Manka and Mr Hough had gone to Sydney and spoken to representatives of the Australian Polo Council and the New South Wales Association and been informed of the allegations referred to in the letter of 19 April 2005 as well as other allegations against Ms Witham.[3] The step of registering the business name was taken, Mr Hough said, because the second defendant had spent a significant sum on the relaunch of the magazine and to try to retrieve those costs the second defendant's board decided it should produce a magazine without the involvement of Ms Witham or *Australian Polo Magazine*.[4] On the evidence that was a decision of the board of the second defendant, not just a unilateral action by Mr Hough. Although he was the chief executive it was not a one man company.

[17] The second defendant did proceed to publish the magazine, *International Polo Leisure and Lifestyle*. It looked similar to *Australian Polo Magazine* and included references to intellectual property sourced to writers engaged by the second plaintiff and perhaps the first plaintiff and published photographs and magazine articles without the consent of the contributors and owners of those materials which had originally been prepared for the publication of the new *Australian Polo Magazine* envisaged by Ms Witham. Five more magazines were published under the title *International Polo Leisure & Lifestyle* by the second defendant but it went into liquidation and no longer carries on that business. Mr Hough's evidence was that the magazine made a significant loss which was why it ceased publication. The winding up of the second defendant occurred for reasons unassociated with that

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2 See ex. 22.

3 See at T4-14 to 4-17.

4 See T4-17, ll50-60.

magazine's lack of success. It had a significant number of other publishing activities.

[18] The first defendant's evidence was that the contributors to the magazine published by the second defendant who submitted invoices were paid by it and that Ms Witham was paid at the rate of $2,000 per week during the period she was employed by the second defendant until the termination of the arrangements with her after the receipt of the letter from the Australian Polo Council. He also said that he had returned the plaintiffs' mailing lists and other intellectual property by instructing that they be delivered to her then lawyers' office. He said the documents were not accepted at that office and that he then gave instructions to deliver them to an address in New Farm, the only address he had for Ms Witham.[5] I see no reason to doubt that he gave those instructions and did his best to return the information although Ms Witham says she did not receive it.

Discussion

[19] It seems to me that the breach of s. 52 of the *Trade Practices Act* alleged against the second defendant, that its publication of the magazine *International Polo Leisure & Lifestyle* was likely to mislead consumers into believing that it was in fact *Australian Polo Magazine* or affiliated with *Australian Polo Magazine* is made out. The versions of the two magazines supplied to me are similar in layout, design and content. They contain articles that are similar in layout, position in the magazine and in some cases in authorship where the authors had only consented to their work being published in *Australian Polo Magazine*. Some of the advertisements are also similar to those in the earlier magazines although that is explicable, no doubt, by the requirements of the advertisers.

[20] It is also my view that the first defendant was involved in that contravention because of his role as the managing director of the second defendant and his personal involvement in the planning of the relaunch of *Australian Polo Magazine* and his authorisation of the publication of *International Polo Leisure & Lifestyle* in place of *Australian Polo Magazine*. The probability that the plaintiffs had breached their agreement with the defendants by misleading them in respect of their entitlements to use the relevant mailing lists did not justify him in aiding in the publication of magazines deceptively similar to those previously published by the second plaintiff.

[21] Mr Hough is also sued for damages for breach of contract for failing to create Pub Co and for breaching an implied duty of good faith towards the plaintiffs by publishing *International Polo Leisure & Lifestyle*. Although the parties to the Shareholder, IP Rights, Royalty and Services Agreement included Mr Hough as well as the second defendant and they had agreed that Pub Co should commence as soon as reasonably possible, the shares in it were to be held by the second defendant and Ms Witham. It is not clear what steps were expected of Mr Hough in the formation of the proposed company beyond those that might be effected by him as an employee of the second defendant.

[22] By 24 March 2005 he asked Ms Witham in an e-mail whether she had arranged for all the intellectual property to be transferred to *Australian Polo Magazine* and said that he would "arrange the licence agreement and new company but need to confirm

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5 See T4-19.

that the IP sits in APM." She replied to him that she was in the process of doing it and would keep him informed of progress.[6] Pub Co was not formed and the second defendant did the work expected to be done by it until the relationship ceased. It seems clear that the decision not to form Pub Co was one principally for the second defendant and it is not apparent that any decision by the first defendant not to form it led to damage over and above any caused by the second defendant's decision.

[23] The implied duty of good faith is pleaded as an alternative to a pleading that the agreement created a fiduciary relationship. The terms of the agreement do not suggest that a fiduciary relationship was created and a particular provision was included that nothing in it was to be construed as creating or evidencing a relationship of partnership.[7] There was no relationship of dependency or vulnerability established between Ms Witham and the defendants. She did not have as much money as was then available to them but that, in itself, does not establish such a relationship. The elevation of a commercial relationship of this nature into a fiduciary relationship is not achieved easily. Nor does the common law necessarily imply an obligation that the parties to a contract should act in good faith in their dealings with each other.[8] If it were necessary to decide these issues I would conclude that it had not been established here that the conditions for the establishment of a fiduciary relationship existed nor that an obligation to act in good faith should be implied.

[24] Here, also, the allegation is that those obligations were breached by the failure to establish Pub Co and the publication of the *International Polo Leisure & Lifestyle* magazine. Both of those decisions were made by the second defendant on the evidence before me in circumstances where it is difficult to see how any role played by the first defendant could itself have created any loss.

Damages

[25] The damages claimed against the first defendant arising out of the breach of the *Trade Practices Act* are for the loss of the commercial opportunity to exploit the intellectual property and relaunch the magazine. There was no reliable evidence, however, of the worth of that commercial opportunity. It must be regarded as highly suspect having regard to the cessation of publication of the original *Australian Polo Magazine* in about 2000 and the lack of success of *International Polo Leisure & Lifestyle*. Ms Witham's original publishing company, Curlew Publishing, went into liquidation with a deficit of liabilities over assets. The explanation that it did so because of the dispute arbitrated by the World Intellectual Property Organisation is not convincing. That dispute did not relate to the publication of the magazine but to the use of two domain names and the evidence does not suggest that they were vital to the magazine's success. The ceasing of publication shortly after the termination of the New South Wales Polo Association's support seems to me to be a more likely explanation.

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6 See ex. 15.

7 Ex. 12 cl. 8.8.

8 See *Gold Coast Waterways Authority v Salmead Pty Ltd* [1997] 1 Qd R 346, *Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* [2001] QCA 212; *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203, 213-219 [34]-[82], *Re Kendells (NSW) Pty Ltd (In Liq)* [2005] QSC 064 [58]-[60] and *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115 at [43]. See also *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 [3]-[4], [25] and *CGU Workers Compensation (NSW) Ltd v Garcia* (2007) 69 NSWLR 680.

[26] Ms Witham was quite frank in acknowledging that she had no money and that the second plaintiff was also lacking in means. She contended that the second defendant's publishing of the competing magazine stopped her from approaching advertisers or other potential backers because to reveal the dispute to them would result in them losing interest in any polo publication. There may be some merit in that assertion. It is difficult to conclude, however, that she would have made money even if the second defendant had not published *International Polo Leisure & Lifestyle*. She and the second plaintiff clearly needed financial support to commence publishing. She said that if the competitor magazine had not been published that she would have been able to obtain such support from a number of other people, none of whom she called to give such evidence although I pointed out to her the potential relevance of such evidence. Nor did she lead any evidence about the possibility that she could have sold the intellectual property associated with the *Australian Polo Magazine* to any other person on the condition, for example, that she cease her involvement with it. In that context there was some evidence, albeit unreliable, that her reputation was not strong with the polo associations to which I have referred. If her failure to retrieve the mailing lists is relevant to this claim then I am satisfied that any failure was not caused by Mr Hough's conduct. He did his best to return that information to her.

[27] The lack of support from the Australian Polo Council and the New South Wales Polo Association therefore seems to me to have been likely to render any further attempted publication by her or interests associated with her highly problematical, if nowhere else at least in the minds of any potential advertisers or financial backers. Such people would also have been likely to find out quickly what the attitudes of those bodies were, as occurred with the second defendant.

[28] She attempted to lead some expert evidence of the value of the business. It had not been reduced into writing as a report and exchanged before the trial. Nor was a copy of any proposed written evidence provided to the defendant until just before the proposed expert was to give evidence on the fourth day of the trial in spite of earlier requests by me that anything written be provided to the defendant as soon as possible. I ruled that the report should not be admitted not only because of its late delivery but because of the inadequacy of its content by reference to the requirements of r 428 of the *Uniform Civil Procedure Rules* 1999.[9]

[29] In those circumstances the plaintiffs have not satisfied me that they have suffered any loss or damage arising out of the involvement of Mr Hough in the contravention of s. 52 by the second defendant. Mr Hough is sued, in this context, on the basis that he was knowingly concerned in the contravention of the *Trade Practices Act* alleged against the second defendant. Under that Act there is no cause of action until actual loss or damage is sustained and an award of nominal damages cannot be made.[10]

[30] I have already concluded that it has not been shown that there was a fiduciary relationship between the parties nor that there was an implied duty of good faith owed by Mr Hough to Ms Witham in the circumstances. Her failure to inform him and the second defendant of the earlier correspondence between the New South

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[9] See at T4-4 to 4-5.

[10] See *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 249 and s. 82 of the Act.

Wales Polo Association and her suggests that if such a duty or term existed it was she who had breached it.

[31] Nor has any failure simply by the first defendant to create Pub Co been shown to lead to damages suffered by the plaintiffs. Any chance to make money lost by the plaintiffs from the non-creation of that company stemmed from actions taken by the second defendant rather than Mr Hough. That chance was speculative and unproven at best for the reasons I have discussed above. The decision not to create the company and to publish the *International Polo Leisure & Lifestyle* magazine were made by the board of the second defendant, not simply by Mr Hough. In my view the plaintiffs have failed to establish that any separate action by Mr Hough in not creating Pub Co caused them loss. If I were wrong in that conclusion the damages arising from any failure by him to create Pub Co could only be nominal.

Conclusion and orders

[32] There should be judgment for the first defendant.