

SUPREME COURT OF QUEENSLAND

CITATION: *Alborn & Ors v Stephens & Ors (No 2)* [2009] QSC 372

PARTIES: **RICHARD MOLLISON ALBORN**
(first plaintiff)

AND

ALBORN FAMILY CORPORATION PTY LTD
ACN 080 955 595
(second plaintiff)

AND

SHAYKAR PTY LTD ACN 076 868 552
(third plaintiff)

AND

RAY STEPHENS
(first defendant)

AND

GLENYS MARGARET STEPHENS
(second defendant)

AND

AS&L PTY LTD ACN 087 729 048
(third defendant)

FILE NO/S: 7795/06

DIVISION: Trial Division

PROCEEDING: Civil Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 November 2009

DELIVERED AT: Brisbane

HEARING DATES: Submissions on the papers, submitted 14 August 2009, 2 September 2009 and 15 September 2009

JUDGE: Atkinson J

ORDERS: **1. The plaintiffs are to pay the defendants' costs on a standard basis of and incidental to the action (including reserved costs) except for so much of the trial was taken up the need to obtain supplementary disclosure by the defendants.**

2. The defendants are to pay the plaintiffs' costs on a

standard basis of so much of the trial as was taken up by the need to obtain supplementary disclosure by the defendants.

CATCHWORDS: DAMAGES – GENERAL PRINCIPLES – DIFFICULTY OF ASSESSING DAMAGES – where court invited further submissions as to the manner of assessment of remaining consideration, if any, to be paid by the third defendant to the third plaintiff – where difficulty in assessing damages due to available accounting material and information – whether any consideration remained unpaid

PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – AFFIDAVIT OF DOCUMENTS – EFFECT OF NON-DISCLOSURE – where orders made in 2007 required the defendants to make disclosure of particular source documents – where order required the first and second defendant to file and serve an affidavit in the event that the documents were not within their possession or under their control – where plaintiffs submitted that the defendants failed to comply with order by failing to file affidavit as to the circumstances in which a class of documents passed out of defendants’ possession or control – where a defendant gave sworn evidence as to loss of possession and control of the documents – whether compliance with order for disclosure

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – where court made orders in relation to this matter and invited further submissions as to costs – what costs order was appropriate in the circumstances

Uniform Civil Procedure Rules 1999 (Qld), r 223(2), r 225, r 361

Alborn & Ors v Stephens & Ors [2009] QSC 198, referred to *Anderson v Aon Risk Services Australia Ltd* [2004] QSC 180, cited

Mitchells Contractors Pty Ltd v Townsville –Thuringowa Water Supply Joint Board [2004] QSC 329, cited

Rathie v ING Life Ltd [2004] QSC 146, cited

COUNSEL: Morris AJ, QC, with Greenwood K A M for plaintiff
Dunning PJ, SC, with Nevison L J for respondent

SOLICITORS: Londy Lawyers for the plaintiffs
Gateway Lawyers for the defendants

[1] On 29 July 2009, the court made certain orders and delivered reasons for its decision in this matter. The orders made were:

“The claim by the first and second plaintiffs is dismissed.
The third plaintiff is entitled to payment of the remainder, if any, of the consideration owing as at 10 October 2001 once the value of the

third defendant's payment of the third plaintiff's liability under its bill of sale to AGC and the third plaintiff's trade debts is deducted from the agreed price of \$100,000 together with interest on any such amount. The counterclaim is consequentially dismissed."

- [2] The reasons for judgment concluded with an invitation from the court for further submissions from the parties as to the manner of assessment of the remaining consideration, if any, to be paid by AS&L Pty Ltd ("AS&L") to Shaykar Pty Ltd ("Shaykar") for the transfer of the beneficial interest in the Clontarf franchised store to AS&L. The court also invited submissions as to costs. The court received submissions by the plaintiffs as well as submissions and submissions in reply from the defendants.
- [3] Neither party suggested that the assessment should be referred to Mr Vincent who was a joint expert retained by the parties who had agreed to do accounting based on the facts as found by the court. Rather both made submissions as to what the court could or should find by way of quantifying the amount, if any, owing to the third plaintiff. Given neither party sought to have the consideration paid and owing referred to Mr Vincent, the court will assess whether any amount is owing and if so, how much, as best it can on the evidence.
- [4] The defendants submitted that no consideration remained unpaid by the defendants to the third plaintiff following acquisition by the defendants of the third plaintiff's equitable interest in the Clontarf store after deducting from the agreed price of \$100,000 the amount of payments made by the third defendant pursuant to the bill of sale to AGC and the assumption of other trade debts incurred by Shaykar.
- [5] The plaintiffs argued that there was a manifest inconsistency within the reasons for judgment and the form of the court's order. They submitted that having found that the first and second defendants agreed to pay \$100,000 and take over the third plaintiff's trade debts in relation to the Clontarf store and Shaykar's loan from AGC as far as it related to the Clontarf store, the court made final orders inconsistent with that finding by requiring the amount of the debts actually paid to be deducted from the sum of \$100,000. This submission confuses the amount of consideration with how it was to be paid. The amount of consideration agreed between the parties was \$100,000. The way in which that was to be paid was by AS&L's taking over Shaykar's loan to AGC and its trade debts. If the value of that did not reach \$100,000 then the remainder would still be owing.
- [6] With respect to quantifying the amount of consideration, if any, that remained to be paid by the third defendant to the third plaintiff the plaintiffs submitted that there was no evidence which allowed the court to determine the quantum of the amounts described in the order as the value of the third defendant's payment of the third plaintiff's liability under its bill of sale to AGC and the third plaintiff's trade debts.
- [7] They further submitted even if there were some evidence from which the quantum of that "value" could be gleaned or estimated, it was not evidence which the court was entitled to act upon, as it was not relevant to any issue raised on the pleadings and the plaintiffs therefore were not called upon to challenge such evidence at trial (let alone any "value") which might be gleaned or estimated from it.
- [8] Their submission that the findings made by the court were not open on the pleadings is not correct. The plaintiffs substantially succeeded in showing what was pleaded

in paragraphs 10 to 18 of the statement of claim, that there was an agreement between the parties by which Shaykar was the beneficial owner of the franchised businesses conducted at Morayfield and Clontarf. However the defendants substantially succeeded in proving the allegations set out in paragraphs 19 to 24 of the defence and counter-claim in which they alleged that from 30 September 1999, in the case of Morayfield, and 13 August 2000, in the case of Clontarf, AS&L acquired Shaykar's interest in those businesses. They alleged, in paragraph 20(b) of the defence and counterclaim, that the consideration for the transfer of Shaykar's interest in the Clontarf store was "AS&L assuming all liabilities outstanding in relation to management of the Clontarf store on any account whatsoever and that Shaykar would be released from and indemnified against any further liability or obligation arising with respect to the Clontarf store." This pleading was put in issue by the plaintiffs. In paragraphs 33(b) and (c) of the defence and counter-claim, the defendants claimed, in the alternative, that the plaintiffs derived a benefit to the detriment of the defendants and the plaintiffs would be unjustly enriched if the relief sought in the statement of claim were granted; and change of position as a result of inducement by the plaintiffs. This pleading and the response put the veracity of the material relied upon by the defendants as to the fact of AS&L'S taking on Shaykar's liabilities and the amount of the liabilities so paid.

[9] The plaintiffs further submitted:

"Even if the Plaintiffs had been on notice that such evidence was relevant to an issue (despite the absence of any issue raised on the pleadings) and had attempted to challenge it at trial, they could not do so because:

- (i) there had been no disclosure of relevant documents;
- (ii) the Defendants were (and remain) in contempt of an order for the disclosure of such documents; and
- (iii) an application during the course of the trial for further disclosure of such documents was refused."

[10] The plaintiff made a request to the defendants on 12 February 2007 for "Source financial documents evidencing the information contained in the document entitled "Shaykar's debts paid by AS&L Pty Ltd", which is one of the documents relied upon by the defendants to prove the quantum of the debts AS&L paid on behalf of Shaykar in respect of the Clontarf store. This document was referred to by the defendants in paragraph 3(b) of a request for further and better particulars of paragraph 19 and subparagraph 20(b) of the defence. They said that the liabilities therein referred to are more particularly set out in that document.

[11] On 13 March 2007, Helman J ordered the defendants to make disclosure of the documents set out in the schedule to the application which included the source documents for the document entitled "Shaykar's debts paid by AS&L Pty Ltd" by 13 April 2007. In the event that such documents were not within the possession or under the control of the defendants, they were ordered to file and serve an affidavit of each of the first defendant and second defendant pursuant to r 223(2) of the *Uniform Civil Procedure Rules* 1999 (UCPR). Rule 223(2) provides:

"The court may order a party to a proceeding (the '**first party**') to file and serve on another party an affidavit stating –

- (a) that a specified document or class of documents does not exist or has never existed; or

(b) the circumstances in which a specified document or class of documents ceased to exist or passed out of the possession or control of the first party.”

- [12] If the solicitor for a party has been given possession of all of the relevant documents, it may be appropriate for the court to order that the affidavit be provided by the solicitor.¹ However in this case the order was made against the defendants personally.
- [13] The plaintiffs submitted that the defendants failed to comply with the order. On 27 April 2007, Mr Leach, a solicitor acting on behalf of the defendants, swore an affidavit in which he deposed that the defendants had not retained any copies of any financial statements for the defendants for the financial year ended 30 June 2001, or any earlier period; that the defendants, despite search, had been unable to locate any bank statements for the period 1 July 2001 to 30 June 2002 and were unable to say when the documents ceased to exist or passed out of the possession or control of the defendants; and as to the documents directly relevant to the allegations in issue in paragraphs 19, 20(b) and 33 of the defence and the particulars of paragraph 20(b) of the defence, he said that they were delivered by the first defendant to the office of Marcus Johnston solicitor in September 2002, collected by Mr Alborn from that office and never returned. It was the documents related to the particulars of paragraph 20(b) of the defence which are here relevant.
- [14] The plaintiffs’ solicitor wrote to the defendants’ solicitor on 27 April 2007, reminding him that the order required an affidavit from each of Mr and Mrs Stephens and that an affidavit from their solicitor was insufficient. On 4 May 2007, the plaintiffs’ solicitor again wrote to the defendants’ solicitor about the defendants’ failure to deliver affidavits from each of them. He asserted that the first and second defendants were in contempt of court and that this matter would be raised with the trial judge.
- [15] During the defendants’ opening by Mr Dunning SC, the plaintiffs’ counsel quite properly objected to reference to diary entries which had not been disclosed. Rule 225 of the UCPR prevents a party, without leave of the court, tendering a document or adducing evidence of its contents unless it has been disclosed. The hearing was stood down to allow disclosure of the document to be attended to. Mr Morris QC on behalf of the plaintiffs said that there was an order for further disclosure made by Helman J but no further documents had been disclosed.
- [16] On the fourth day of trial, which was a Friday, when it became apparent that the defendants had possession of other documents which had not been disclosed and which might be directly relevant to matters in issue in these proceedings, I ordered the defendants to disclose to the plaintiffs any documents in their possession or under their control which were directly relevant to any issue in the proceeding by production of a copy of any such document by 12 noon on the Sunday at the street address of the plaintiffs’ solicitors. Disclosure was made in accordance with that order although disputes remained particularly as to documentation as to the number of hours of work performed by the first and second defendants in the franchised business. That dispute did not fall to be determined in the reasons for judgment

¹ *Mitchells Contractors Pty Ltd v Townville – Thuringowa Water Supply Joint Board* [2004] QSC 329 at [30].

once the nature of the agreements between the parties was found as the result of the trial as it was not necessary for an account to be taken.

- [17] During cross-examination of Mr Stephens, Mr Morris QC asked him about the documents provided to Mr Johnston. Mr Johnston acted as the defendants' solicitor in a mediation which occurred between the parties involved in this litigation and Subway. In the course of that cross-examination Mr Stephens said of those documents, "Mr Alborn removed those from Mr Johnston's premises to be photocopied [a]nd never returned them."² This statement was not then challenged. Mr Stephens was not further cross-examined on the question of the quantum of Shaykar's outstanding debts paid by AS&L with regard to the Clontarf store.
- [18] Mr Stephens' sworn evidence at the trial makes the complaint about his failure to provide an affidavit about his inability to disclose these documents otiose and there is no reason to reject Mr Stephens' sworn evidence that he was unable to disclose (or produce to Mr Vincent) the source documents evidencing the information in the document entitled "Shaykar's debts paid by AS&L Pty Ltd" because he delivered those documents to Mr Johnston; Mr Johnston gave those documents to Mr Alborn for Mr Alborn to photocopy them; Mr Alborn did not return them; and so Mr Stephens no longer has a copy of them.
- [19] In these circumstances I shall look at the available evidence as to the amount of consideration paid and remaining to be paid, if any.
- [20] The defendants referred to various parts of the report provided by Mr Vincent in support of their submission that no consideration remains unpaid. The Vincent report was of course prepared before the matter was heard at trial where the court had the benefit of all the evidence before it and before judgment was reached setting out the factual basis of the dealings between the parties as opposed to the conflicting instructions given by the parties to Mr Vincent. It therefore has those limitations. It is, however, helpful in setting out some of the transactions that occurred. It does not, however, quantify what debts of Shaykar's in respect of the Clontarf store were paid by AS&L but rather concludes that any such payments were incorporated into the profit and loss statement for that business.
- [21] As referred to in paragraph [30] of the reasons for judgment a bill of sale was granted by Shaykar to Westpac Banking Corporation ("Westpac") as agent for the Australian Guarantee Corporation ("AGC") over the store fittings and equipment for the franchised stores at Morayfield and Clontarf. According to the Vincent report, paragraph 4.2.2, the debt was \$220,000 which was not attributed between the two stores.
- [22] The court found that beneficial ownership of the Morayfield store was transferred by Shaykar to AS&L from 9 October 1999. Consideration for the transfer was Mr and Mrs Stephens' agreeing to forego any right to the \$40,000 they had invested in Shaykar and AS&L's taking on the responsibility of meeting Shaykar's debt to AGC in respect of the equipment in the Morayfield store and other debts owing by Shaykar in respect of the Morayfield store.
- [23] The beneficial ownership of the Clontarf Subway and Baskin-Robins store was transferred from Shaykar to AS&L for the consideration of \$100,000 from 14

² Transcript 5-51.

August 2000. In order to satisfy that consideration, AS&L took over responsibility for repaying that part of the loan from AGC to Shaykar in relation to the bill of sale over the equipment in the Clontarf store and Shaykar's trade debts in relation to the Clontarf store. If those payments exceeded \$100,000, no part of the consideration remains unpaid from AS&L to Shaykar. If they did not, then AS&L must pay the unpaid consideration to Shaykar.

- [24] The defendants informed Mr Vincent that they paid Shaykar's debts with regard to the Clontarf store in the amounts of \$156,062 in respect of the Subway franchise and \$22,472 in respect of the Baskin-Robbins franchise.³ The plaintiffs submitted that the assertion in the defendants' submission that these amounts were paid by the defendants is entirely unsubstantiated. The plaintiffs correctly identify in their submissions that Mr Vincent did not conclude that these amounts had been paid but rather included these figures as amounts provided to him by the defendants which he was unable to independently verify. He was unable to independently verify them because he was not provided with the source documents. Those source documents include the documents which, on the unchallenged evidence before me, were in the possession of the first plaintiff, which explains why Mr Stephens was not able to provide them to Mr Vincent.
- [25] An analysis of the breakdown of the debts which the defendants say they paid on behalf of Shaykar show that \$105,529 of those debts related to payment of the AGC loan (\$67,029 bill of sale repayments and \$38,500 residuary).⁴ These figures are contained in a document entitled "Subway & Baskin-Robbins Clontarf Store" which was given by the defendants to Mr Vincent and appears as part of Annexure 27 to his report. The figure of \$67,029 owing on the bill of sale with respect of the Clontarf store from 14 August 2000 is consistent with Mr Vincent's finding that the total debt owing to AGC in respect of the equipment at both Morayfield and Clontarf as at 30 June 2000 was \$159,173 which had reduced to \$137,646 by 30 June 2001. It certainly does not appear to overstate the figure repaid by the Stephens' company to AGC in respect of the moneys owing by Shaykar.
- [26] If one deducts the bill of sale repayments and residuary from the debts of \$178,534.52 asserted to have been paid by AS&L on behalf of Shaykar in respect of the Clontarf store, one is left with an asserted payment by AS&L of debts owing by Shaykar of \$73,005.52. The defendants conceded that the amount of \$1,346.30 should be deducted for the stock on hand and cash on the premises, leaving a net payment of \$71,659.22.
- [27] The document entitled "Shaykar's debts paid by AS&L Pty Ltd"⁵ set out with regard to the Subway & Baskin-Robbins Clontarf store that payments made by AS&L for arrears by Shaykar as at 14 August 2000 were:

Franchise Fitout Services Invoice from 24/5/2000	\$336.11
Energex Bill – Prior to 14/8/00	\$362.00
Optus Phone Bill – Prior to 14/8/00	\$235.15

³ Vincent Report pp17, 217.

⁴ Vincent Report p236: "Subway & Baskin-Robbins Clontarf Store".

⁵ Exhibit 1, document 132

Rent – unpaid invoice for outgoings – Prior to 14/8/00	\$271.04
Back rent & outgoings	\$17,711.93
Payment of back dry goods	\$4,018.00
Payment of back B & R Royalties	\$4,018.00
Payment of back Subway Royalties & add fund	<u>\$13,426.00</u>
	\$40,378.23

If one deducts from this the amount of \$1,346.30 for stock and cash on hand, one is left with a net figure of payment of debts in arrears of \$39,031.93.

- [28] In order to have satisfied the \$100,000 consideration, AS&L was obliged to pay at least \$32,971 worth of trade debts, being \$100,000 less the \$67,029 paid to AGC in respect of the bill of sale.
- [29] There is other evidence that Shaykar had significant debts with respect to the Clontarf store as at 14 August 2000. In fact it was to crystallise its losses and because the store was unable to be run economically, that Shaykar withdrew from operating the store. I am satisfied that in respect of the Clontarf store, AS&L made \$67,029 in repayments to AGC in respect of Shaykar's liability to AGC and a net payment of \$39,031.93 in respect of Shaykar's outstanding debts as at 14 August 2000 as well as continuing to pay trade debts accruing in Shaykar's name to the amount of \$71,659.22.
- [30] The evidence before me therefore shows that the defendants paid in excess of the \$100,000 consideration required to be paid for the Clontarf store and no consideration remains owing. Nothing put before me by the plaintiffs throws any doubt on that conclusion. Any income tax liability of Shaykar's which remains unpaid was not a trade debt. Even if it were, the consideration paid by the defendants is already demonstrably greater than the agreed value of the consideration to acquire the interest of Shaykar. As there is no consideration outstanding, there are no moneys owing by the defendants to the plaintiffs and therefore no further order is necessary.

Costs

- [31] On 27 December 2008, the defendants offered to settle this litigation by paying a significant sum of money to the plaintiffs. That offer was rejected on 27 February 2009. Rule 361 of the UCPR applies where a plaintiff obtains a judgment that is not more favourable to the plaintiffs than the offer to settle. In this case, the plaintiff failed to obtain any judgment in their favour. In those circumstances, r 361 does not apply and the matter is left to the general costs discretion of the court.⁶
- [32] The defendants submitted that the appropriate order for costs is:

⁶ *Rathie v ING Life Ltd* [2004] QSC 146; *Anderson v Aon Risk Services Australia Ltd* [2004] QSC 180.

- (a) that the plaintiffs pay the defendants' costs (including reserved costs) to be assessed on the standard basis from the commencement of this proceeding to 27 December 2008;
- (b) that the plaintiffs pay the defendants' costs to be assessed on the indemnity basis from 28 December 2008.

[33] In this case the factor which suggests such an order is that the plaintiffs failed in the action after rejecting a substantial offer. The plaintiffs, however, succeeded on some issues although they failed on the issues which would have entitled them to payment. The defendants failed to give all proper disclosure until during the trial. It could not be said that the plaintiffs had no prospects of success and should not have brought the action or necessarily accepted the offer.

[34] I therefore conclude that the order as to costs should be the defendants are entitled to their costs of the action on a standard basis except insofar as costs were incurred in obtaining further disclosure from the defendants during the trial. The plaintiffs are to pay the defendants' costs of and incidental to the action (including reserved costs) except for so much of the trial was taken up the need to obtain supplementary disclosure by the defendants. The defendants are to pay the plaintiffs' costs of so much of the trial as was taken up by the need to obtain supplementary disclosure by the defendants.