SUPREME COURT OF QUEENSLAND

CITATION:	*The Presbyterian Church of Queensland v Hodson* [2010] QSC 236
PARTIES:	**THE PRESBYTERIAN CHURCH OF QUEENSLAND ACN 015 755 489** (first plaintiff/applicant) **Rev PETER JAMES WHITNEY, EDWARD GEORGE NANKERVIS, KEITH RAYMOND GILLIES, DONALD LEWIS, PHILLIP BRUCE WEBSTER, ESTELLE NERIDA BRAUER, WILLIAM BARRY BRETTLE, IONE ANNE BRETTLE, SIMON JOHN WHITNEY, MARY MILLAR, GEOFFREY CHARLES JOYNER, OWEN ARTHUR CHAPMAN, MARGARET ANNE MITCHELL AND MARGARET LILLIAN WETHERALL as REPRESENTATIVES OF THE PENINSULA PRESBYTERIAN CHURCH** (second plaintiff/not a party to the application) v **PHILIP FRANK ARTHUR HODSON** (defendant/respondent)
FILE NO/S:	BS 2931 of 2008
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2010
JUDGE:	Fryberg J
ORDERS:	**1. Order that pursuant to rules 390 and 394 of the Uniform Civil Procedure Rules the evidence in chief of the plaintiffs in respect of the trial of the claim and statement of claim be given by affidavit.** **2. Order that the defendant file and serve an affidavit identifying the source of funds used for the items and payments referred to in paragraph 34(b) of the defence, being items (a), (c) – (e), (h) and (i) of paragraph 86 of the statement of claim on or before 7**

July 2010.

3. **Order that the affidavit referred to in order 2 specify the amount spent by the defendant, if any, on maintaining Lot 8, as referred to in paragraph 42 of the defence.**
4. **The application is otherwise dismissed.**
5. **No order as to costs.**

CATCHWORDS: Procedure – Supreme Court procedure – Queensland – Procedure under Rules of Court – Other matters before trial – Pre-trial procedural directions

COUNSEL: S C Fisher (sol) for the applicant
The respondent appeared on his own behalf

SOLICITORS: Neumann & Turnour Lawyers for the applicant
The respondent appeared on his own behalf

HIS HONOUR: I have before me an application for a number of procedural orders relating to the trial of this action. The action is between, in essence, the Presbyterian Church of Queensland and various other representative plaintiffs and a former office bearer in the church.

The defendant has been convicted of misappropriating $31,000, at least, of the church's money. He pleaded guilty to that. He denies that he misappropriated any greater sum than that.

The plaintiff claims that he misappropriated some $290,000 or so, and claims that this was part of what he pleaded guilty to. No doubt it will not be difficult for the plaintiff to prove that if it is true.

The plaintiff seeks to have orders made that the defendant give his evidence in chief by affidavit and that the onus of proof be reversed and that the defendant not be allowed to cross-examine witnesses other than the plaintiffs.

There might be a question as to whether any parishioners, who are apparently the witnesses other than the plaintiffs, to which that is intended to refer, are, in fact, other than the plaintiffs, since the statement of claim indicates that the group of plaintiffs identified by the heading "Second Plaintiff" are merely representatives of the Peninsular Presbyterian Church and that that is an unincorporated association. It would not be difficult to infer that parishioners were, therefore, part of the Peninsular Representative Church and were, in fact, plaintiffs. Be that

as it may, the application seeks to exempt them from cross-examination.

Their evidence consists of estimates of the amounts which they contributed to the church over a substantial period of time. The defendant challenges these amounts, and the only ground advanced by the plaintiff for prohibiting cross-examination is that the parishioners will be inconvenienced and there will be logistic difficulties in getting them all - there are some 70-odd of them - to the Court. The cross-examination may also take some time.

I see no reason to think that the cross-examination will be prolonged, and, in any event, it is a matter which, if there is an abuse of the right of cross-examination, can be dealt with by the trial judge. The fact that witnesses have to be organised and that there is some cost involved is inherent in the fact that the witnesses are being called. That is the plaintiff's own decision.

I am not prepared to make the order last mentioned, that is in relation to the cross-examination.

As to the reversal of the onus of proof, the plaintiff's submission was that this is the accurate position at law in relation to the claim for breach of fiduciary duty, and that since that is the position the onus should be reversed in the other causes of action in order to achieve procedural efficiency.

That argument can, of course, be stood on its head, and one might say if the plaintiff has chosen to dress up the same facts in four or five different guises, most of which require the plaintiff to bear the onus of proof, then why should not the plaintiff carry the onus for the one claim, the breach of fiduciary duty, on which the plaintiff does not carry the onus of proof? In any event, I see no reason why any order of the sort should be made.

If the plaintiff is correct in its analysis of the correct onus of proof in relation to a claim for breach of fiduciary duty, it does not need the order. If it is not correct about it then it should not have the order.

As to the order seeking that the respondent give evidence in chief by affidavit, the respondent is unrepresented, and although he has shown some capacity to create affidavits in the past, I see no reason in the material before me why there should be any departure from the ordinary course of trial in this Court.

The ordinary course of trial is for evidence to be given viva voce. To give evidence in chief on affidavit is a luxury ordinarily reserved for commercial cases where the perception seems to be that cost does not matter. The reality is that giving evidence in chief by affidavit usually causes increased cost in overall terms.

In the case where the defendant is unrepresented it seems to me that it would place an unfair burden upon him in getting his case ready. It is unnecessary. The issues are by and

large reasonably well defined by the pleadings, and by an outline of the defendant's criticisms of the plaintiff's evidence regarding quantum, provided by the defendant pursuant to the order of Daubney J made on the 4th of November 2009. In my judgment that document adequately sets out the position.

Paragraph 1 of the application seeks an order that the evidence in chief of the applicants on the trial in respect of the claim and statement of claim be given by affidavit. That is not opposed by the defendant so I shall make an order in accordance with that paragraph.

There are two other minor matters which I think the defendant ought to clarify. The first relates to paragraph 34(b) of the defence, where the defendant has pleaded that he used the misappropriated amount for general living expenses rather than the acquisition of particular items or contributions to superannuation as alleged. That relates to a list of items included in paragraph 86 of the statement of claim.

I think it would be appropriate for the defendant to verify that use of money and I shall order that the defendant file and serve an affidavit identifying the source of funds used for the items and payments referred to in paragraph 34(b) of the defence, being items (a), (c) to (e), (h) and (i) in paragraph 86 of the statement of claim, on or before 7 July 2010.

In addition, in paragraph 42 of the defence, the defendant

denies that the purloined money was used to maintain a certain block of land which he owned and says that he will provide particulars when they are available. He submitted before me that, in fact, no money has ever been spent on maintaining Lot 8.

Rather than order a separate document of particulars I shall further order that the affidavit, which I have already ordered, also specify the amount spent by the defendant, if any, on maintaining Lot 8, as referred to in paragraph 42 of the defence.

With the exception of those three orders the application is dismissed.

...

The applicants seek an order for costs. They have, however, substantially been unsuccessful on the application. Their limited amount of success did not take up much of the time spent in the argument.

Moreover, I have the overall impression that the statement of claim is a speculative document and that the application today was designed to avoid the embarrassment of having to actually prove the speculative allegations in it. In the circumstances it seems to me that there is no reason to make any order for the costs of the proceedings today. There will be no order as to costs.
