The Queen v Danvers; Grope; Hamilton [2008] NTSC 24

PARTIES:	THE QUEEN v JOHN DANVERS (A PARTNER IN THE LAW FIRM GROPE HAMILTON LAWYERS) On the application of THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE QUEEN v PETER GROPE (A PARTNER IN THE LAW FIRM GROPE HAMILTON LAWYERS) On the application of THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE QUEEN v MARK ERIC HAMILTON (A PARTNER IN THE LAW FIRM GROPE HAMILTON LAWYERS)

TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	118, 121 & 122 OF 2007 (20731217, 20731220 & 20731221)
DELIVERED:	6 JUNE 2008
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JUDGMENT OF:	RILEY J

CATCHWORDS:

CONTEMPT – *Criminal Property Forfeiture Act* – Restraining Orders – ambiguity

Cases referred to:
Australian Competition and Consumer Commission v Collings Construction Co Pty Ltd (Unreported NSWSC 2 July 1997)
Madeira v Roggette Pty Ltd [1990] 2 Qd R 357
A-G v Newspaper Publishing Plc and Others [1988] 1 Ch 333

REPRESENTATION:

Counsel:

Applicant:	Mr L Silvester
Respondents:	Mr A Dal Cin

Solicitors:

Applicant:	Solicitor for the Northern Territory
Respondents:	Grope Hamilton Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Danvers; Grope; Hamilton [2008] NTSC 24
Nos 118, 121 & 122 of 2007 (20731217, 20731220 & 20731221)

BETWEEN:

THE QUEEN

v

JOHN DANVERS (A PARTNER IN THE LAW FIRM GROPE HAMILTON LAWYERS)
Respondent

On the application of

THE DIRECTOR OF PUBLIC PROSECUTIONS
Applicant

AND

THE QUEEN

v

PETER GROPE (A PARTNER IN THE LAW FIRM GROPE HAMILTON LAWYERS)
Respondent

On the application of

THE DIRECTOR OF PUBLIC PROSECUTIONS
Applicant

AND

THE QUEEN

v

MARK ERIC HAMILTON
(A PARTNER IN THE LAW FIRM
GROPE HAMILTON LAWYERS)
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 6 June 2008)

[1] The applicant has commenced separate proceedings by Originating Motion seeking orders that the respondents John Danvers, Peter Grope and Mark Hamilton be punished for contempt. The applicant has sought leave to amend its pleadings in each matter. The respondents resist the applications and have each sought orders striking out the respective Originating Motions on various grounds. The matters were heard together as a matter of convenience.

[2] The applicant has filed and served affidavits containing all of the evidence upon which it proposes to rely in the proceedings.

[3] At all relevant times the respondents were each members of a South Australian law firm, Grope Hamilton Lawyers and Mr Hamilton was the

managing partner of the firm. From 1 July 2006 the firm represented Monsoon Homes Pty Ltd (“Monsoon”).

[4] On 30 March 2006, on the application of the Director of Public Prosecutions, an order of this court was made pursuant to the provisions of the *Criminal Property Forfeiture Act* restraining property of Monsoon including "the following bank accounts: (iii) CBA - Monsoon Homes Pty Ltd - account number 5903 10440725." On 26 May 2006, following negotiations between Michael Trevor Prescott of Prescott's Barristers and Solicitors, then the legal representative of Monsoon, and the Director, the order was amended to provide:

> "3. Paragraph 6 of the order made 30 March 2006 is further varied such that the sixth respondent (Monsoon) is appointed pursuant to sections 46(1)(c) and 109(2) of the *Criminal Property Forfeiture Act* to control and manage the property restrained at paragraph 1(c)(iii) of that order, namely CBA account number 5903 10440725 ("the account"), while the order is in force.
>
> 4. The variation in paragraph 3 of this order is made for the purpose of meeting the reasonable business expenses of the sixth respondent, pursuant to section 46(1)(e) of the *Criminal Property Forfeiture Act*, and is made subject to the following directions pursuant to section 46(1)(d) of that Act:
>
> (a) the sixth respondent will cause only such funds to be withdrawn from the account as are necessary for the running of the sixth respondent's business in the normal course;
>
> (b) the sixth respondent will, within seven days of the date of this order, provide the applicant with an initial projected cash flow statement for a period of one month, setting out;

(i) details of all proposed contracts and existing contracts to be undertaken (including name of contractor/client, properties worked on and amount to be received) and any amounts expected to be banked to the account;

(ii) an estimate of all expenses and outgoings expected to be incurred;

(iii) an estimated balance remaining in the account at the end of the month;

(c) the sixth respondent will thereafter provide the applicant with a projected cash flow statement setting out the same information on a monthly basis;

(d) the sixth respondent will at all reasonable times make available to the applicant all records of deposits to and withdrawals from the account and all records of receipts and expenditures of the business carried on by the sixth respondent and in any event report to the applicant the balance on the account at the end of each calendar month."

[5] On 1 July 2006 Mr Prescott joined the firm of Grope Hamilton Lawyers and thereafter that firm represented the interests of Monsoon. It is not in dispute that between 11 January 2007 and 2 May 2007 seven cheques were drawn on the nominated restrained account and the amounts were paid in respect of legal fees and disbursements (including the fees of counsel) incurred by Grope Hamilton Lawyers in representing the respondents to the proceedings being James Mick Burnett and Monsoon. The total amount paid was $166,643.78. In addition it is alleged that, on 7 March 2007, a cheque in the amount of $34,162.73 payable to Monsoon and drawn by Poatina Pty Ltd was deposited by Monsoon into the account of Grope Hamilton Lawyers as a

third party deposit in respect of the legal fees of Monsoon. The total amount alleged to have been paid to Grope Hamilton Lawyers was therefore $200,806.51.

[6] There was a legal challenge to the restraining orders made by the respondents and, on 21 November 2007, the Court of Appeal set aside those orders and, at the same time, made interim orders in similar terms providing for the restraining of the property. In effect the original orders remained in place until set aside by the Court of Appeal and were then replaced by the interim orders. On 18 December 2007, by consent, a single judge of the Supreme Court enlarged the interim restraining orders of 21 November 2007 for a further period. At all material times there was a restraining order in place in respect of the identified bank account.

[7] When the payments made by Monsoon to Grope Hamilton Lawyers came to the attention of the Director a demand was made on Mr Danvers, Mr Grope and Mr Hamilton for the return of the funds. No repayment was made.

[8] In relation to the proceedings against Mr Danvers and Mr Grope the applicant seeks to amend the pleadings to allege that:

> "18. In retaining the said sum of $200,806.51 and/or not restoring the said funds to Monsoon CBA account, the respondent has engaged in conduct which has a real tendency to interfere and did interfere with the due administration of justice in proceedings.
>
> 19. In retaining since 4 October 2007 or alternatively 14 November 2007, the respondent knew that the sums totalling $200,806.51

paid to Grope Hamilton Lawyers as aforesaid were restrained funds and had been dealt with and continue to be dealt with in breach of section 55 of the CPFA. Further, the respondent knew that the said sums were paid and received by Grope Hamilton Lawyers in breach of the Restraining Order, the May Order and s 154 CPFA."

[9] In relation to Mr Hamilton, it is alleged that he was aware of the existence of the restraining order and the amendment to the order and "knew that the payment of fees and disbursements in connection with those legal services out of the sixth respondent's CBA account would be unlawful" being in breach of those orders. The evidence upon which the applicant proposes to rely is to the effect that Mr Hamilton vigorously pursued Monsoon for payment of the Grope Hamilton Lawyers accounts whilst aware of the existence of the restraining order. He was successful in obtaining the payments totalling $200,806.51. On 21 May 2007, 4 October 2007 and 14 November 2007 letters were sent to Mr Hamilton seeking the return of those funds.

[10] The applicant wishes to amend the pleading to allege against Mr Hamilton the following:

"17. In his role in procuring and permitting Grope Hamilton Lawyers to receive, bank and retain the said sum of $200,806.51 the Respondent engaged in conduct which had a real tendency to interfere and did interfere with the administration of justice in the proceedings.

18. In his role in procuring and permitting Grope Hamilton Lawyers to receive, bank, retain and deal with the restrained funds, the respondent engaged and continues to engage in conduct in breach of s 55 of the Act. In engaging in such

conduct, there was a real tendency to interfere with the administration of justice and the respondent has in fact, interfered with the administration of justice in the proceedings.

19. By letters dated 4 October and 14 November 2007 the Solicitor for the Northern Territory on behalf of the Director of Public Prosecutions wrote to the Respondent which inter alia called for the return of the funds.

20. The Respondent has not responded to letters from the solicitors for the applicant dated 4 October and 14 November 2007 requesting that they restore the proceeds of the cheques and the third party deposits totalling $200,806.51 to the CBA account.

21. In retaining since 21 May 2007, alternatively 4 October 2007 or alternatively 14 November 2007, the Respondent knew that the sums totalling $200,806.51 paid to Grope Hamilton Lawyers as aforesaid were restrained funds and had been dealt with in breach of section 55 of the CPFA. Further, the Respondent knew that the said sums were paid and received by Grope Hamilton Lawyers in breach of the Restraining Order, the May Order and section 154 CPFA.

22. In retaining the said sum of $200,806.51 and/or not restoring the said funds to Monsoon's CBA account, the respondent has engaged in conduct which has a real tendency to interfere and does interfere with the administration of justice in proceedings No's 36 and 37 of 2006 in this Honourable Supreme Court of the Northern Territory."

After Acquired Property

[11] The primary ground relied upon by Mr Hamilton, Mr Grope and Mr Danvers for resisting the proposed amendments and seeking orders striking out each of the Originating Motions is the submission that the restraining order as amended did not extend to the funds which are the subject of complaint and, further, that the restraining order was ambiguous such that it cannot support a charge of contempt.

[12] The money paid to Grope Hamilton Lawyers was paid out between 11 January 2007 and 2 May 2007. The evidence relied upon by the applicant revealed that on 9 January 2007 the amount standing to the credit of the relevant bank account was $1325.90. On 10 January 2007 the sum of $276,600 was paid into the account. The payment came from the sale of an unrelated property by Paotina Pty Ltd and that property had not been the subject of the restraining order. The money from which the payment to Grope Hamilton Lawyers was made was therefore money received after the date of the restraining order, and also after the date of the variation, and was money which was not otherwise the subject of any restraining order.

[13] The original order, being the restraining order of 30 March 2006, for present purposes, simply "restrained" the "following bank accounts" and, inter alia, referred to "CBA -Monsoon Homes Pty Ltd" and identified the account number. The effect of the order was that there could be no dealings with the account. The account was effectively frozen. Thereafter, on 26 May 2006, at the request of Mr Prescott on behalf of Monsoon, the order was varied to enable Monsoon "to control and manage" the account while the order was in force. The variation was expressed in the order to be "made for the purpose of meeting the reasonable business expenses of (Monsoon) pursuant to section 46(1)(e) of the *Criminal Property Forfeiture Act*" and was made subject to various directions detailing the nature of the permitted dealings with the account. Section 46(2) of the Act provided that "in subsection

(1)(e), reasonable living and business expenses does not include legal expenses referred to in section 154."

[14] The orders made on 30 March 2006 were made pursuant to the terms of section 43 and section 44 of the *Criminal Property Forfeiture Act*. Section 43 permits orders to be made in relation to "property specified in the application" and, in this case, the property to which restraint was applied was specifically identified. Section 44, in contrast to section 43, permits orders to be made in relation to "the property of a person" and, by operation of subsection 44(2), the restraining order “can apply to all or any property that is owned or effectively controlled by the person at the time of the application for the restraining order, whether or not any of the property is described or identified in the application” and also can apply to "all property acquired by the person … after the restraining order is issued."

[15] It was argued by the respondents that the property described in the restraining order existed at the date of the order and therefore the natural and intended effect of the order was to apply to the property existing at that date and falling within the descriptions provided in the order. The order, so it was submitted, did not express itself as applying to any future property and, on its terms, the order would not be breached if Monsoon were to bank future funds into a different bank account. No order as to future acquired property had been sought.

[16] Following the amendment to the order Monsoon was permitted to operate the account for the purpose of meeting the reasonable business expenses of Monsoon and Monsoon was directed to cause only such funds to be withdrawn from the account as were necessary for the running of the business in the normal course. It was clear from the directions which formed part of the order that it was anticipated that some funds may be "expected to be banked to the account". Plainly the order contemplated funds being placed into the account and withdrawn from the account.

[17] Reference to the order made on 30 March 2006 makes it clear that the order related to specific and identified property. It did not purport to apply to all of the property of Monsoon and, importantly for present purposes, it did not apply to property acquired after the making of the restraining order. There was no order made at all regarding "all property acquired... after the restraining order is issued".

[18] The variation order made on 26 May 2006 did not alter that position. Whilst it permitted Monsoon to control and manage the identified bank account it did not purport to vary the order to apply to all of the property of Monsoon or to any after acquired property. It permitted the use of the money in the bank account for the purpose of meeting the reasonable business expenses of Monsoon subject to the supervision of the Director and, ultimately, the direction of the court. In that way it permitted the supervised expenditure of the money in the restrained bank account. It permitted the funds otherwise preserved by the order to be reduced for

legitimate business expenses. It provided a mechanism to enable the Director and the court to supervise the depletion of those funds. It was not expressed to have any impact upon, and it did not have any impact upon, moneys subsequently paid into the account such as the sum of $276,600 received on 10 January 2007.

[19] In order to have restrained any funds acquired after the date of the order it would have been necessary for the order to specifically address that issue. Such an order could only have been made pursuant to the provisions of section 44(2) of the Act in relation to "all" property acquired by Monsoon after the restraining order was issued. Counsel described such an order as a "blanket order". No such order was made. It follows that the money that was paid out to Grope Hamilton Lawyers did not come from the funds restrained by the order.

[20] In support of that conclusion the respondents point out that an order in the nature of a restraining order should be construed contra proferentem the party seeking the order, in this case the Director of Prosecutions. Reference was made to the observation of Bainton J in *Australian Competition and Consumer Commission v Collings Construction Co Pty Ltd*[1] that "if there be any ambiguity, uncertainty or want of clarity in an order whether it be mandatory or prohibitive it should be construed contra proferentem, the proferens being not the judge pronouncing the order, but the party seeking it." The order should be "clear and ascertainable on its face."

[1] (Unreported NSWSC 2 July 1997)

[21] In the circumstances the funds which were withdrawn from the account and paid to Grope Hamilton Lawyers were not the subject of any restraining order. The evidence relied upon by the applicant establishes that the funds were after acquired property and no order made by the court placed any restriction upon those funds. That being so the proceedings against the respondents to this application cannot succeed.

[22] That is sufficient to resolve these proceedings, however other issues were raised in the course of the argument and it is appropriate that I address these issues.

Ambiguity

[23] In my view, and contrary to the submissions of the respondents, the order in its amended form was not ambiguous. The requirement was that any withdrawal from the account had to be necessary for the running of the business in the normal course. The applicant contended that it was not clear whether the payment of legal fees in this case was necessary for the running of the business in the normal course.

[24] The order itself made direct reference to section 46 of the Act which, by operation of subsection (2), specifically prohibited the payment of "legal expenses referred to in section 154" of the Act. Section 154 provided that property the subject of a restraining order under the Act is not to be released to meet the legal expenses of a person that relate to the forfeiture of the

property or criminal proceedings. The Court had no power to order the release of funds to meet legal expenses.

[25] In any event, and without reference to section 46(2) of the Act, the payment of legal fees relating to the proceedings commenced by the Director of Public Prosecutions arising out of an alleged breach of the *Criminal Property Forfeiture Act* could not, reasonably, be regarded as part of the running of the business "in the normal course". This I regard as plain on the face of the order.

[26] Further, whilst it is unnecessary to go to section 46 of the Act the requirements of the section, which is specifically referred to in the order, make it clear that the legislative scheme does not permit such payments to be made. If there had been any concern, clarification was readily available by reference to the section. That was a reasonable and convenient way of identifying the obligations and the form of the order was negotiated by, and consented to, through Mr Prescott representing Monsoon. Monsoon was prepared to have its obligations spelt out in that way: *Madeira v Roggette Pty Ltd*[2]. Those obligations were readily ascertainable. Mr Prescott was, according to the evidence, aware of the relevant statutory provisions.

The third party cheque

[27] The respondents to this application submitted that there could be no breach of the order in relation to the third party cheque paid by Poatina Pty Ltd to

[2] [1990] 2 Qd R 357 at 363 affirmed on appeal at [1992] 1 Qd R 394

Monsoon, which cheque was not deposited into the restrained account but was, rather, paid directly into the account of Grope Hamilton Lawyers. Given that the restraining order applied only to the identified account the submission of the respondents has great force. There was no requirement on the part of Monsoon to pay any money received into the account or, indeed, to deal with such moneys in any particular way. There can be no breach of the order by virtue of funds bypassing the restrained account and being paid directly into the account of the lawyers. In my opinion no sustainable allegation of contempt against the respondents Mr Grope, Mr Hamilton or Mr Danvers is available in relation to this cheque.

Did the restraining order lapse?

[28] The respondents referred to section 51(1) of the *Criminal Property Forfeiture Act* which, at the relevant time, provided that a restraining order had effect for a period not exceeding three months. The section has subsequently been amended to exclude reference to the period of three months. On the basis of the terms of the section at the relevant time it was submitted that a restraining order made under the Act lapsed by operation of the statute upon expiry of the three months. Further it was submitted that any extension of the order under section 51(2) of the Act was required to be made during the life of the order and once an order had lapsed it could no longer be extended. The only avenue for the Director in those circumstances would be to apply for a fresh order.

[29] The respondent submitted that, upon its proper construction, any extension of the three month life of an order under the Act was to be calculated from the date of the making of the order and not from any date specified in the order as the starting date. If this were not so, it was argued, the intention of the legislature could be defeated by the making, on the same day, a series of orders, each operating in defined future three month periods.

[30] Reference to section 51 of the Act as it then existed does not reveal a restriction on the power of the court to extend the duration of an order in the manner suggested by the respondents. Section 51(2) provided that the court "that made a restraining order may extend *the duration of the order* for a *further* period not exceeding three months" (emphasis added) and, by virtue of section 51(3), the court may make such orders on as many occasions as the court sees fit. The phrase "the duration of the order" refers to the duration of the initial order imposed under section 51(1) of the Act. It is the duration of that order that may be extended for a further period not exceeding three months. The "further" period dates from the expiry of the period of the earlier order unless otherwise specified. The same approach is applicable to subsequent extensions of time pursuant to section 51(3).

[31] It follows that I do not accept the argument of the respondents in this regard.

[32] The respondents also argued that when the restraining order was extended on 8 December 2006 for a period of three months the order lapsed on 7 March 2007 and, therefore, the order made on 8 March 2007 purporting to extend

the restraining order, whilst being a valid order, had no operation because the earlier order had lapsed. This fails to recognize the effect of section 28(1) of the *Interpretation Act* which provides that, where in an Act, a period of time dating from a given day is allowed or limited for a purpose, the time shall be reckoned exclusive of such day. In this case the effect of the order was that the three month period expired on 8 March 2007 the day on which it was again extended.

[33] Further, the order remained in force until set aside. If the respondents wished to challenge those orders for want of jurisdiction or any other reason it was incumbent upon them to pursue such form of appeal or application for judicial review as may have been appropriate in the circumstances. In the meantime the orders as extended had to be obeyed.

Danvers and Grope - contempt

[34] The applicant does not allege that Mr Danvers or Mr Grope played any part in the payment of the money from the Monsoon account to Grope Hamilton Lawyers or, indeed, that they were even aware payment had been made. It is not alleged that they became aware of the restraining order before receiving letters of demand from the Director dated in October and November 2007. The sole basis of the allegation of contempt made against each of these respondents is that, having received the letters of demand, they did not restore the funds to the Monsoon account. It is asserted that each respondent had thereby engaged in conduct "which has a real tendency to

interfere and did interfere with the due administration of justice in proceedings".

[35] This is not a case where the respondents, Mr Danvers and Mr Grope, are alleged to have received a specific item of property capable of being identified and returned. The effect of the payment out of the money was to diminish a fund against which the Director, if successful in the principal proceedings, may have had recourse. It was a fund that the restraining order made by the court sought to preserve. It was the case for the applicant that the respondents are in contempt for failing to replenish that fund.

[36] The primary submission on behalf of the applicant was, of course, that it was Monsoon that reduced the fund and Monsoon that defeated the relevant restraining order. In my view it cannot be said that either Mr Grope or Mr Danvers has defeated the orders by failing to replenish the fund. They did not interfere with the course of justice by destroying in whole or in part the subject matter of the proceedings. On the case of the applicant that was done by Monsoon. It was necessarily alleged by the applicant that it was Monsoon that, with the relevant knowledge, "prevented the court from conducting the proceedings in accordance with its intention"[3].

[37] There is no evidence to suggest the money was paid to the firm of Grope Hamilton Lawyers in circumstances of the making of Mr Danvers or Mr Grope. There was no evidence to suggest they even knew that payment

[3] A-G v Newspaper Publishing Plc and Others [1988] 1 Ch 333 at 380

had been made until the letters of demand were received. They did not know of the existence of the restraining order at the time of the alleged breach by Monsoon and there is nothing to suggest that they were other than innocent bystanders. Neither Mr Grope nor Mr Danvers was ordered by the court to do anything and they were not ordered by the court to refrain from doing anything. They did not assist Monsoon to breach the order and they did not in any way aid or abet the breach. They did not acquiesce in any breach. They did not knowingly conduct themselves so as to interfere with or frustrate the order of the court or, more broadly, the administration of justice. They were the passive recipients of a benefit in the normal course of their business.

[38] In my opinion the allegations against the respondents Mr Grope and Mr Danvers, taken at their highest, cannot sustain a finding of contempt.

[39] The proceeding for contempt against each of the respondents, Mr Hamilton, Mr Grope and Mr Danvers is dismissed.

[40] The rulings I have made may have implications for other parts of these proceedings and I invite the parties to submit draft orders.

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