FEDERAL COURT OF AUSTRALIA

Humphreys v McDaniels [2013] FCA 1061

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| Citation: | Humphreys v McDaniels [2013] FCA 1061 |
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| Parties: | **ROBERT HUMPHREYS & MORIA CARTER IN THEIR CAPACITY AS RECEIVERS & MANAGERS OF CERTAIN PROPERTY OF SEACHANGE STORAGE PTY LTD (RECEIVERS & MANAGERS APPOINTED) v THOMAS MICHAEL MCDANIELS and SEACHANGE STORAGE PTY LTD** |
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| File number: | QUD 371 of 2013 |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 22 August 2013 |
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| Date of hearing: | 22 August 2013 |
|  |  |
| Place: | Brisbane |
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| Division: | GENERAL DIVISION |
|  |  |
| Category: | No catchwords |
|  |  |
| Number of paragraphs: | 28 |
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| Counsel for the Applicants/Plaintiffs | Mr M Trim |
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| Solicitor for the Applicants/Plaintiffs | Minter Ellison |
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| Solicitors for the First Respondent/Defendant | The First Respondent appeared in person |
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| Solicitor for the Second Respondent/Defendant | The Second Respondent appeared in person |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 371 of 2013 |

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| BETWEEN: | ROBERT HUMPHREYS & MORIA CARTER IN THEIR CAPACITY AS RECEIVERS & MANAGERS OF CERTAIN PROPERTY OF SEACHANGE STORAGE PTY LTD (RECEIVERS & MANAGERS APPOINTED)Plaintiff |
| AND: | THOMAS MICHAEL MCDANIELSFirst DefendantSEACHANGE STORAGE PTY LTDSecond Defendant |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 22 AUGUST 2013 |
| WHERE MADE: | BRISBANE |

Upon the applicants by their counsel giving the usual undertakings as to damages:

THE COURT ORDERS THAT:

1. The Second Respondent by its director the First Respondent, forthwith make available for inspection all of the books and records of the Second Respondent including without limitation all books and records that relate to the self storage business, SEACHANGE STORAGE PTY LTD (the Business) conducted from the land situated at Lot 21 on SP 185352, Country of Livingstone, Parish of Yeppoon in the State of Queensland, title reference 50605310.

2. Until the hearing and determination of the Originating Application or until further earlier order, and save for the purpose of complying with any Court order, the First and Second Respondent be enjoined with dealing in any with any asset of the Second Respondent including without limitation, the business.

3. The Second Respondent by its director, the First Respondent, take all necessary steps (including by executing all documents reasonably required by the Applicants) to enable the Applicant to:

(a) take control of the assets of the second respondent including without limitation all tangible and intangible assets in whatever form including without limitation any and all bank accounts operated by the second respondent or on its behalf; and

(b) undertake and conduct the business.

4. Upon their taking of control of and, undertaking the Business, the Applicants maintain all necessary and proper books and records in respect of the undertaking of the Business and make available a copy of the same to the Second Respondent for inspection within a reasonable time within the making of the request for inspection.

5. The costs of this interlocutory application be reserved.

**AND THE COURT FURTHER ORDERS THAT:**

1. The oral application made today in Court by the Applicants/Plaintiffs by their counsel for the amendment of the Originating Process be deemed sufficient and filing of a Notice of Motion in respect of that interlocutory application be dispensed with.

2. The Originating Process be amended in the form handed to the Court on 22 August 2013 and attached to this Order and marked “*Attachment A to the orders made on 22 August 2013*”.

3. The Applicants/Plaintiffs file and serve any further affidavits upon which they seek to reply by no later than close of business on 27 September 2013.

4. The Defendants are to file and serve any affidavits upon which they seek to reply, including any affidavits in response, by 11 October 2013.

5. The Originating Process filed on 8 July 2013 (as amended) be set down for final hearing on 18 October 2013 at not before 10.15am.

6. The costs of and incidental to today’s hearing be reserved.

7. The parties have liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| GENERAL DIVISION | QUD 371 of 2013 |

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| BETWEEN: | ROBERT HUMPHREYS & MORIA CARTER IN THEIR CAPACITY AS RECEIVERS & MANAGERS OF CERTAIN PROPERTY OF SEACHANGE STORAGE PTY LTD (RECEIVERS & MANAGERS APPOINTED)Plaintiff |
| AND: | THOMAS MICHAEL MCDANIELSFirst DefendantSEACHANGE STORAGE PTY LTDSecond Defendant |

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| --- | --- |
| JUDGE: | LOGAN J |
| DATE: | 22 AUGUST 2013 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

1 Mr Robert Humphreys and Ms Moira Carter have been appointed by the Bank of Queensland Limited as receivers and managers of the assets and undertakings of Seachange Storage Pty Ltd (Seachange Storage), pursuant to a fixed and floating company charge dated 28 June 2006. That charge is a registered charge. It was given by Seachange Storage, which has become the second defendant in these proceedings. The receivers and managers appointment is also referrable to a registered mortgage which the Bank of Queensland holds over real property in Central Queensland owned by Seachange Storage.

2 There is a degree of controversy as to the extent of the property which is the subject of the registered charge. So as to resolve that controversy the receivers and managers filed an application in the Court on 25 June 2013 seeking declaratory orders as to the extent of property, the subject of the charge.

3 Originally, only Mr Thomas Michael McDaniels was named as a defendant to the originating application. That seems to have been because of a degree of uncertainty on the part of the receivers and managers as to whether particular property, a business which I shall shortly detail, fell within the terms of the charge or was separately the property of Mr McDaniels personally.

4 As the name of the company might suggest, a storage business is conducted on the Central Queensland property. On the evidence to hand it is an ongoing business.

5 Seachange Storage has come by court order to be added as a further defendant to the originating application.

6 There was initially some difficulty experienced on the part of those acting on behalf of the receivers and managers in serving Mr McDaniels. As a result and following the joinder of Seachange Storage as an additional defendant, I made orders providing for a particular mode of service on him. Those orders proved to be sufficient to draw the proceedings to the attention of both Mr McDaniels and Seachange.

7 Mr McDaniels is the director of Seachange. It was apparent from his submissions to me this afternoon that he identifies himself closely with the company in the sense, and I mean no criticism of him in this regard, of not always drawing a distinction between himself and the company.

8 There is, as one might expect from the very appointment of receivers and managers something of a history to this matter.

9 The receivers and managers, who are each registered and official liquidators, were appointed by the Bank of Queensland pursuant to the charge and mortgage mentioned on 1 March 2013. Ms Carter had earlier undertaken, on and from 23 October 2012, investigations in respect of Seachange Storage on the instructions of the Bank of Queensland. Those investigations had, *inter alios*, involved her reviewing the financial affairs of Seachange Storage and her obtaining from Seachange Storage a copy of certain of its books and records.

10 Those investigations have disclosed the conduct on the land at Central Queensland of the storage business to which I have referred already. Ms Carter deposes that there is situated there a large industrial warehouse. That warehouse provides rooms, lockers and containers in which customers can store and access their goods in return for which customers pay a fee depending on the volume of storage that they occupy. As described by her, what is conducted there is a typical self storage business.

11 Ms Carter further deposes that, during the time when she was undertaking investigations in her capacity as accountant, she did not see any transaction, documents or other records in relation to Seachange Storage in its own right occupying the land concerned pursuant to a tenancy at will or otherwise from Seachange Storage in its capacity as trustee. She deposes that the first knowledge which she had of any such asserted relationship was in a reference to a “tenancy at will” in a report as to affairs, which was prepared by Seachange Storage as trustee. That report is included in the evidence before me. I note that the entry to which Ms Carter refers indeed appears in it and that the document is signed by Mr McDaniels.

12 Following the appointment of Mr Humphreys and Ms Carter as receivers and managers, they directed email correspondence to Mr McDaniels requesting his assistance in accessing the land concerned and requesting from him the books and records of Seachange Storage. That was on 12 April 2013. On 15 April 2013, Ms Carter received an email from a firm of solicitors, Delaney & Delaney. More accurately, she was an information addressee to an email directed by a Mr Warwick Mahler of Delaney & Delaney solicitors to Mr Bindi of Minter Ellison, the solicitors for the receivers and managers. That email provides as follows:

Although your clients will be well aware that we act in this matter and correspond with your firm on our client’s behalf, Ms Carter persists in communicating with our client direct (sic) in relation to matters of substance. Please see the email below. [I interpolate that this is a reference to Ms Carter’s email to Mr McDaniels of 12 April]

Our client provided your clients with a report as to affairs last week. Based on the contents of that report, it is clear that the only assets of the trust (sic) is the real estate and there should be no further need for your clients to communicate with our client concerning procedural matters. Accordingly, we ask that all future communications be made exclusively through this office. As previously advised the business is not conducted by the trusts (sic). The books and records of the business are not property of the trust and your client has no entitlement to them. Your clients are not entitled to possession as they’ve demanded and possession will not be given to them. As a further matter, our client reports to us that your client caused a telephone to the business to be disconnected. This has caused damage to the business for which our client holds your clients responsible. All of our client’s rights are reserved accordingly.

13 Later, when Minter Ellison inquired of Delaney & Delaney whether that firm had instructions to accept service of the originating process in its original form, the response received was that they did not hold such instructions.

14 A copy of the deed of charge concerned is in evidence. For present purposes, it is not necessary to reach any concluded view as to its true construction. It is, though, necessary, because the receivers and managers seek interim relief, at least to make an assessment as to the strength, *prima facie*, of the case of the receivers and managers as to the construction of the deed of charge and the extent to which it captures particular property of Seachange Storage. For that purpose it is necessary to set out the following clauses from the deed of charge.

Part 8, if you are trustee:

Trust deed. You must give us a copy of the trust deed certified by you that is complete, correct and up to date.

You are bound in both capacities. This charge binds you in your personal capacity and in your capacity as trustee of the trust. This charge secures the whole of the legal and beneficial interest in the *property*. This charge secures all the secured money, whether you owe the secured money on your own behalf or as trustee of the trust.

15 Part 17 contains definitions. “Property” is defined as follows:

Property means all your assets and undertakings both present and future including but not limited to uncalled and called but unpaid capital (including “premiums”) on your shares. If you are a trustee, the property includes all assets and undertakings both present and future held by you or to which you are entitled as trustee of the trust.

16 The argument on behalf of the receivers and managers is that, when one reads this definition and that portion of part 8 to which I have referred in the context of the deed of trust as a whole, the conclusion to be reached is that the property of Seachange Storage, whether held in its own right or in its capacity as trustee, falls within the terms of the charge. That is so, so the submission goes, even though the chargor’s name as specified in the cover sheet for the charge is Seachange Storage as trustee for Yeppoon Storage Trust and Kingdom Development Trust.

17 This afternoon and having made informal contact both with the Court’s registry and, in turn, the details of that informal contact having been passed on to the solicitors acting for the receivers and managers, Mr McDaniels appeared personally. He provided, as a condition of his being permitted to appear, an address for service. He also sought and was granted, for the purposes of this afternoon’s hearing, leave to appear on behalf of Seachange Storage in his capacity as a director of that company. He also furnished to the Court details of the address for service preferred for the company.

18 Mr McDaniels sought an adjournment of the proceeding, including particularly an adjournment of an application made by the receivers and managers for interim relief.

19 The nature of the application for interim relief is for the provision of the books and records of the self storage business for the taking of control of the business pending trial by the receivers and managers and for related relief.

20 Mr McDaniels informed me that he, personally, and also Seachange Storage wish to receive legal advice as to their rights in respect of the interim application and the substantive relief sought in the originating application.

21 It will be apparent from the history which I have given that, at least when interested, Mr McDaniels has been able to access legal advice in the past. As I have said, there is a history to this matter. In light of that history, it seems to me that it was incumbent upon Mr McDaniels knowing, as he did of today’s proceeding, to move with great despatch in seeking legal advice. It is apparent enough that there is a practitioner who must, at least inferentially, have some general passing familiarity with the matter at issue. In those circumstances, and having regard to what seems to me, *prima facie* – and I emphasise *prima facie* – a construction of the deed of charge which would favour the receivers and managers, I am not disposed to grant an adjournment of the application for interim relief.

22 I also take into account in that regard, Ms Carter’s evidence as to what her investigations last year disclosed. There is a need, in my view, for the receivers and managers to have possession not just of the land concerned but also of the business pending a hearing and determination of the originating application.

23 Such relief should only be granted on terms that include the giving of a usual undertaking as to damages by the receivers and managers. Such an undertaking has been given. A term of the order ought also to be the keeping by the receivers and managers of all necessary and proper books and accounts in respect of the operation of the business.

24 I intend also to order that the receivers and managers make available a copy of the same to Seachange Storage for inspection within a reasonable time of the making of a request for inspection.

25 What influences me particularly to make these orders is the apparent strength of the construction for which the receivers and managers contend and the results of the investigation to which Ms Carter refers. I have taken into account where the balance of convenience might lie in that regard. There is obviously an interest on the part of Mr McDaniels in seeing that Seachange Storage continues to operate or at least someone operates the business. That someone ought, in my view, to be the receivers and managers. If it ultimately proves to be the case that, notwithstanding the preliminary view mentioned, the case is one in which Seachange Storage and Mr McDaniels enjoy forensic success, then they will also enjoy the benefit of the usual undertaking as to damages and of the ability readily to ascertain the takings of the business as a result of the obligation to keep books and records.

26 Such is the apparent identification of Mr McDaniels’ with the company, it seems to me that the orders ought to require Seachange Storage to take particular steps by its director, in other words, by Mr McDaniels.

27 For these reasons then, the orders that I make are as follows:

1. By way of interim orders upon the applicants by their counsel giving the usual undertaking as to damages, the court orders the second respondent by its director, the first respondent, forthwith to make available for inspection all of the books and records of the second respondent including, without limitation, all books and records that relate to the self storage business, Seachange Storage, the business conducted from the land situated at Lot 21, on SP185352, County of Livingstone, Parish of Yeppoon in the State of Queensland, Title reference 50605310.

2. Until the hearing and determination of the originating application or further earlier order, and save for the purpose, singular, of complying with any court order, the first and second respondents be enjoined from dealing in any way with any asset of the second respondent including, without limitation, the business.

3. The second respondent by its director, the first respondent, take all necessary steps including executing all documents reasonably required by the applicants to enable the applicants to:

(a) take control of the assets of the second respondent including, without limitation, all tangible and intangible assets in whatever form including, without limitation, any and all bank accounts operated by the second respondent or on its behalf; and

(b) undertake and control the business.

4. Upon their taking control of and undertaking the business, the applicants maintain all necessary and proper books and records in respect of the undertaking of the business and make available a copy of the same to the second respondent for inspection within a reasonable time of the making of a request for inspection.

5. The costs of this interlocutory application be reserved.

28 The other orders that I make are in respect of the further conduct of the substantive proceeding. They are in terms of the draft (save that I have put where the word “applicants” appear in the text of the orders, “applicants/plaintiffs). I have also added as the date on which the originating process will proceed to final hearing, 18 October 2013, not before 10.15 am.

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| I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 22 August 2013