FEDERAL COURT OF AUSTRALIA

Ross v Cotter [2015] FCA 310

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| Citation: | Ross v Cotter [2015] FCA 310 |
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| Parties: | **DAVID ROSS, SHAHIN HUSSAIN AND RICHARD ALBARRAN AS JOINT AND SEVERAL RECEIVERS OF ANC TRANSPORT PTY LTD (RECEIVERS APPOINTED) ACN 137 400 081 v NORMAN COTTER and ANDREA COTTER** |
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| File number: | QUD 684 of 2014 |
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| Judge: | **REEVES J** |
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| Date of judgment: | 2 April 2015 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for deemed service – application for default judgment – where failure to attend Court on return date – where failure to file notice of address for service – whether utility in making declarations |
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| Legislation: | *Corporations Act 2001* (Cth)  *Federal Court of Australia Act 1976* (Cth)  *Federal Court Rules 2011* (Cth) |
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| Cases cited: | *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564  *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665; [2006] FCA 1427  *Australian Competition and Consumer Commission v EDirect Pty Ltd (in liq)* (2012) 206 FCR 160; [2012] FCA 976  *Australian Competition and Consumer Commission v Grove & Edgar Pty Ltd* [2008] FCA 1956  *Australian Securities and Investments Commission v China Environment Group Ltd* [2013] FCA 286  *Chanel Limited v Ayad* [2005] FCA 820  *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421  *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388  *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89  *Welsh v Digilin Pty Ltd* [2008] FCAFC 149  *Yeo v Damos Earthmoving Pty Ltd, Re Beachwood Developments Pty Ltd (in liq)* [2011] FCA 1129 |
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| Date of hearing: | 12 March 2015 |
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| Place: | Brisbane |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 32 |
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| Counsel for the Applicants: | MK Callanan |
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| Solicitor for the Applicants: | J Waterman of Taylor David Lawyers |
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| Solicitor for the First and Second Respondents: | The First and Second Respondents did not appear |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 684 of 2014 |

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| BETWEEN: | DAVID ROSS, SHAHIN HUSSAIN AND RICHARD ALBARRAN AS JOINT AND SEVERAL RECEIVERS OF ANC TRANSPORT PTY LTD (RECEIVERS APPOINTED) ACN 137 400 081  Applicants |
| AND: | NORMAN COTTER  First Respondent  ANDREA COTTER  Second Respondent |

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| JUDGE: | REEVES J |
| DATE OF ORDER: | 2 April 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The first and second respondents pay the applicants the sum of $94,995.26.
2. The first and second respondents pay the applicants’ costs of the proceeding fixed in the sum of $8,252.20.

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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| BETWEEN: | DAVID ROSS, SHAHIN HUSSAIN AND RICHARD ALBARRAN AS JOINT AND SEVERAL RECEIVERS OF ANC TRANSPORT PTY LTD (RECEIVERS APPOINTED) ACN 137 400 081  Applicants |
| AND: | NORMAN COTTER  First Respondent  ANDREA COTTER  Second Respondent |

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| JUDGE: | REEVES J |
| DATE: | 2 April 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# Deemed service on Mr Cotter

1. Rule 10.23 of the *Federal Court Rules 2011* (Cth) (the Rules) provides that a party may apply to the Court, without notice, for an order that a document is taken to have been served on a person, on a date mentioned in the order, if two criteria are met. In these reasons, I will describe this process as deemed service. The first criterion under r 10.23 is whether it is not practicable to serve the document on the person in the way required by the Rules. In this context, the word “practicable” has been held to have a wide meaning which will depend on the circumstances of the particular proceeding: see *Australian Securities and Investments Commission v China Environment Group Ltd* [2013] FCA 286 at [11]–[15] per Besanko J. The second criterion under r 10.23 is that the party applying provides evidence that the document has been brought to the attention of the person to be served. This is obviously a question of fact.
2. The applicants in this proceeding have applied under r 10.23 for deemed service of certain documents on the first respondent, Mr Cotter. The documents in question are the originating application filed 18 December 2014 and the related affidavit of Mr Ross sworn 15 December 2014 (the originating documents). Under r 8.06, both these documents must be served personally on each of the respondents. As to the first criterion, I have before me evidence from Mr Waterman, the solicitor for the applicants, that:
3. a process server employed by him has attempted to serve the first respondent, Mr Cotter, at his last known residential address and ascertained that he no longer resides at that address;
4. the process server concerned then attempted to contact Mr Cotter by mobile telephone and left a voice message, but Mr Cotter did not respond to that message; and
5. the applicants, or, more specifically, their solicitor, is not aware of Mr Cotter’s current residential address.
6. Based on this evidence, I am satisfied that, in the circumstances of this proceeding, the applicant has established it is not practical to serve the originating documents on Mr Cotter in the way required by the Rules.
7. As to the second criterion, I also have evidence before me from Mr Waterman that:
8. the second respondent, Mrs Cotter, was served personally with the originating documents on 19 January 2015 at, what I infer was, her place of work at Bundall in the State of Queensland;
9. the second respondent, Mrs Cotter, and the first respondent, Mr Cotter, are married;
10. from email exchanges that have occurred between Mrs Cotter and Mr Waterman, the applicants’ solicitor, it is apparent that Mrs Cotter and her husband have discussed the originating documents that were served on her. The last of those email exchanges occurred on 11 February 2015: see at [12] below.
11. Based on this evidence, I am satisfied that the originating documents have been brought to the attention of Mr Cotter.
12. For these reasons, I consider the applicants have met both of the criteria set out in r 10.23 and I will therefore order that the originating application filed 18 December 2014 and the affidavit of Mr Ross sworn 15 December 2014 are taken to have been served on the first respondent, Mr Cotter, by no later than 11 February 2015.

# Default Judgment

1. Following on from the above order, the applicants have applied under rr 5.22 and 5.23(2) of the Rules for default judgment against both Mr and Mrs Cotter. Relevantly, r 5.22 of the Rules provides that:

A party is in default if the party fails to:

1. do an act required to be done, or to do an act in the time required, by these Rules; or
2. comply with an order of the Court; or
3. attend a hearing in the proceeding; or
4. prosecute or defend the proceeding with due diligence.
5. The grounds of default relied upon by the applicants are those prescribed in rr 5.01 and 5.02 of the Rules, as follows:

**5.01** **Parties to attend Court on return date**

A party, or the party’s lawyer, must attend the Court on the return date fixed in the originating application.

…

**5.02 Parties to file notice of address for service before return date**

A respondent who has been served with an originating application must file a notice of address for service, in accordance with Form 10, before the return date fixed in the originating application.

(Emphasis in original)

1. The defaulting conduct of Mr and Mrs Cotter, relied upon by the applicants, is as follows:
2. the failure by Mrs Cotter to appear on the return date fixed for the first directions hearing in the proceeding, 12 February 2015, in default of r 5.01 of the Rules;
3. the failure by Mrs Cotter to file a notice of address for service before the abovementioned return date, in default of r 5.02 of the Rules;
4. the failure by Mrs Cotter to appear at the adjourned directions hearing in the proceeding on 12 March 2015, in further default of r 5.01 of the Rules; and
5. given that Mr Cotter is taken to have been served with the originating documents by no later than 11 February 2015 (see at [6] above), the failure by him to appear at either of the directions hearings described above, or to file a notice of address for service before the return date fixed for either, or both, of those directions hearings, in default of rr 5.01 and 5.02, respectively.
6. The following are the circumstances in which this conduct occurred. On 18 December 2014, the applicants commenced this proceeding by filing the originating documents. As I have already recorded above: Mr and Mrs Cotter are husband and wife; Mrs Cotter was served personally with the originating documents on 19 January 2015; but attempts to serve Mr Cotter were unsuccessful. Accordingly, on 12 March 2015, I made an order under r 10.23 of the Rules for deemed service of the originating documents on Mr Cotter: see at [6] above.
7. During the period from 28 January 2015 to 12 March 2015, the applicants’ solicitor, Mr Waterman, made numerous unsuccessful efforts to elicit a response from Mr and Mrs Cotter regarding the applicants’ claims in this proceeding. Those attempts included the following. By email on 28 January 2015, Mr Waterman emailed the originating documents to Mr and Mrs Cotter and notified them that a directions hearing was to occur in the proceeding on 12 February 2015. In the same email, Mr Waterman put Mr and Mrs Cotter on notice that the applicants would be seeking to have judgment entered against them at that hearing.
8. On 1 February 2015, Mrs Cotter responded by email to Mr Waterman and stated that she would contact him about the matter shortly. This further contact did not eventuate. On 11 February 2015, Mr Waterman again emailed Mr and Mrs Cotter, at Mrs Cotter’s email address, noting that he had made numerous unsuccessful attempts to contact them via telephone. Mr Waterman reminded Mr and Mrs Cotter that the matter was listed for hearing the next day, 12 February 2015. Later on 11 February 2015, Mrs Cotter sent a reply email to Mr Waterman, stating:

I have been waiting for the past week for a response from a third party family member to respond on whether they can help…We are not in a position to make a payment arrangement…I wish I had funds to give by tomorrow, but I don’t. I am a where [sic] that court case is tomorrow, so it looks like you will get a judgment against us…

1. Mr and Mrs Cotter did not appear at the first directions hearing on 12 February 2015. At the applicants’ request, the proceeding was adjourned to a further directions hearing to be held on 12 March 2015 so that they could make an application for default judgment at that hearing.
2. On 25 February 2015, Mr Waterman sent a further email to Mr and Mrs Cotter notifying them that the matter had been adjourned to 12 March 2015 and that the applicants intended to seek judgment against them at that hearing. Mr and Mrs Cotter did not appear at that adjourned directions hearing and the applicants then applied for default judgment against both Mr and Mrs Cotter.
3. To date, neither of Mr Cotter, nor Mrs Cotter, has filed a notice of address for service.
4. In *Chanel Limited v Ayad* [2005] FCA 820, Jacobsen J said, of a similar set of circumstances in an application for default judgment under O 35A of the former Federal Court Rules that (at [25]):

It is clear that the respondents have not only been served with the proceedings but have been informed of today’s application and a proposal to seek default judgment. However, by their failure to attend they refuse to acknowledge the proceeding. There is no purpose served by delay. The power to enter judgment by default under the various paragraphs of order 35A to which I have referred is plainly enlivened…

1. In *Yeo v Damos Earthmoving Pty Ltd, Re Beachwood Developments Pty Ltd (in liq)* [2011] FCA 1129 (*Yeo*) at [9], Gordon J held that rr 5.22 and 5.33 of the Rules are akin to O 35A of the former Federal Court Rules. I respectfully agree.
2. The facts set out in [10]–[15] (inclusive) above clearly show that Mr and Mrs Cotter were aware of this proceeding, they were aware of the dates fixed for the two directions hearings in the proceeding, and they were aware that the applicants would seek judgment against them if they failed to appear at those hearings. Furthermore, neither of them has filed a notice of address for service as required by r 5.02. In my view, these facts therefore establish that Mr and Mrs Cotter are both in default of the above described Rules (see [8]) for the purposes of r 5.22.
3. As recorded above, the applicants have applied for default judgment under r 5.23(2). That rule relevantly provides:

(2) If a respondent is in default, an applicant can apply to the Court for:

(a) an order that a step in the proceeding be taken within a specified time; or

(b) if the claim against the respondent is for a debt or liquidated damages – an order giving judgment against the respondent for:

(i) the debt or liquidated damages; and

(ii) if appropriate, interests and costs in a sum fixed by the Court or to be taxed; or

(c) if the proceeding was started by an originating application supported by a statement of claim, or if the Court has ordered that the proceeding continue on pleadings—an order giving judgment against the respondent for the relief claimed in the statement of claim to which the Court is satisfied that the applicant is entitled; or

(d) an order giving judgment against the respondent for damages to be assessed, or any other order; or

(e) an order mentioned in paragraph (b), (c) or (d) to take effect if the respondent does not take a step ordered by the Court in the proceeding in the time specified in the order.

1. The discretion conferred by r 5.23 is broad and unconfined: *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388 at 396 per Wilcox and Gummow JJ (in relation to an earlier equivalent Rule) and *Welsh v Digilin Pty Ltd* [2008] FCAFC 149 at [14] per Tamberlin, Greenwood and Collier JJ (in relation to O 35A of the former Federal Court Rules). I consider these observations apply equally to rr 5.22 and 5.23 of the Rules: see [17] above. Furthermore, note 1 to r 5.23 of the Rules draws attention to the fact that under r 1.32 “the Court may make any order that the Court considers appropriate in the interests of justice”.
2. In their originating application, the applicants sought the following declaratory relief:
3. A declaration that the money in the sum of $89,406.73 received from Scott Pols Pty Ltd ACN 139 762 011 in respect to debts validly assigned at law pursuant to the Full Service Factoring Agreement entered into between Bibby Financial Services Australia Pty Limited ACN 101 657 041 and ANC Transport Pty Ltd (Receivers Appointed) ACN 137 400 081 on 25 July 2013, as currently held on trust by the Defendants (sic) for Bibby Financial Services Australia Pty Limited ACN 101 657 041.
4. A declaration that the money in the sum of $89,406.73 received from Scott Pols Pty Ltd ACN 139 762 011 in respect to debts validly assigned at law pursuant to the Full Service Factoring Agreement entered into between Bibby Financial Services Australia Pty Limited ACN 101 657 041 and ANC Transport Pty Ltd (Receivers Appointed) ACN 137 400 081 on 25 July 2013, be paid to David Ross, Shahin Hussain and Richard Albarran as joint and several Receivers of ANC Transport Pty Ltd (Receivers Appointed) ACN 137 400 081 by the Defendants (sic).
5. In addition, they sought pre-judgment interest on the sum of $89,406.73 mentioned above and costs.
6. This Court also has a wide discretionary power to make declarations of right under s 21 of the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act): see *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 (*Forster*) at 437–438; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (*Ainsworth*) at 581–582; and *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 99. In *Australian Competition and Consumer Commission v Grove & Edgar Pty Ltd* [2008] FCA 1956 at [19], I identified some of the constraints upon the use of this discretionary power, as follows:

… that the Court has to ensure that the declaration sought is directed to determining a legal controversy and not to answering abstract or hypothetical questions: see *Ainsworth* at 582. Further the Court is required to ensure that the party seeking the declaration has a real interest in seeking that relief: see *Forster* at 437 and *Ainsworth* at 582. And, finally, the Court has to ensure that there are sufficient consequences flowing from the making of the declaration that it is appropriate for it to exercise its discretion to do so.

1. In my view, the discretionary power conferred by the Rules identified above, combined with the discretionary power in s 21 of the Federal Court Act, gives the Court ample power to order a default judgment for the declaratory relief sought by the applicants subject, in the case of the latter, to the constraints described above: see *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665; [2006] FCA 1427 at [35]–[59] per Kiefel J and the cases cited by myself in *Australian Competition and Consumer Commission v EDirect Pty Ltd (in liq)* (2012) 206 FCR 160; [2012] FCA 976 at [23]. Before deciding what effect, if any, those constraints have on the content and form of the relief in this matter, it is appropriate to describe the events that led to that relief being claimed by the applicants.
2. As I have already mentioned above, the applicants’ initiating application is supported by an affidavit of Mr David Anthony Ross, one of the joint and several receivers of ANC Transport Pty Ltd (ANC). That affidavit discloses, among other things, that:
3. in April 2014, Mr Ross and his fellow receivers were appointed as receivers of ANC;
4. on or about 25 July 2013, ANC entered into a Factoring Agreement with a company called Bibby Financial Services Australia Pty Ltd ACN 101 657 041 (Bibby) whereby it assigned certain of its debts to Bibby and received moneys in return;
5. clause 3.4 of the Factoring Agreement mentioned above provided that ANC: “… must hold all money received in respect of any debt except money paid to it by Bibby, as fiduciary for and on trust for Bibby and must account to Bibby for such monies in its original form on the day of receipt by [ANC]”;
6. during the period relevant to this proceeding, Mr Douglas Cruickshank was the sole director and secretary of ANC. However, because he was not in good health, his step-daughter, Mrs Cotter, together with her husband, Mr Cotter, had “the full control of the operations and running of [ANC] …”;
7. during the course of the receivership of ANC, Mr Ross has been able to peruse the books and records of Bibby;
8. during the period from approximately 18 November 2013 to 11 February 2014, ANC assigned to Bibby the debts represented by a number of invoices it had issued (the assigned debts) to a company called Scott Pols Pty Ltd (Scott Pols);
9. each of those invoices contained a notification that: “This invoice has been assigned to [Bibby]. All payments must be made payable and sent to [Bibby at its address]”;
10. the end result of these transactions was that, as at the end of the period mentioned above, Scott Pols owed a total balance of $89,406.73 to Bibby in respect of the assigned debts;
11. however, contrary to the terms of the notification described above, between 25 October 2013 and 17 April 2014, Scott Pols paid the total sum of $185,790.37 direct to ANC. This sum included the balance of the assigned debts described above;
12. upon their receipt, these moneys were all deposited into Mr Cotter’s personal bank account. Mrs Cotter was a joint signatory of that bank account;
13. on 30 April 2014 and 21 May 2014, the applicants’ solicitors sent letters to Mr and Mrs Cotter demanding payment of the amount of $89,406.73, it being the balance of the assigned debts described above; and
14. Mr and Mrs Cotter did not subsequently pay the said amount to either the applicants, or to Bibby.
15. Based on this evidence from Mr Ross, I consider the applicants have established their claim against Mr and Mrs Cotter for the payment of the sum of $89,406.73. Accordingly, while it is expressed as declaratory relief, I consider paragraph 2 of the relief sought by the applicants (see [21] above) essentially constitutes a claim for “a debt or liquidated damages” within the terms of r 5.23(2)(b). Even if I am incorrect in this conclusion, I consider that the words “or any other order” in r 5.23(2)(d) are broad enough to cover all of the relief sought by the applicants, including the declaratory relief sought in their originating application and an order for payment of the sum of $89,406.73.
16. The only question which then remains is whether I should make an order for the declaratory relief sought in paragraphs 1 and 2. In that respect, if I proceed to make an order that the respondents pay the applicants the sum of $89,406.73, which is the primary object of the relief claimed by them, I do not consider there is any utility in making the declaratory orders they have sought. Put differently, in those circumstances, I do not consider “there are sufficient consequences flowing from the making of [those] declaration[s] that it is appropriate … to exercise [my] … discretion to do so” (see the concluding words of the quote at [23] above). For these reasons, I consider an order should be simply made that the respondents pay the applicants the sum of $89,406.73.
17. It is worth adding that Gordon J adopted a similar approach when her Honour encountered a not dissimilar situation in *Yeo*. In *Yeo*, the plaintiff, who was the liquidator of a company, commenced proceedings to recover 11 payments made by the company to an unsecured creditor on the grounds they were unfair preferences and insolvent transactions, such that they were voidable pursuant to the apposite provisions of the *Corporations Act 2001* (Cth). The plaintiff sought declarations that the payments were of the kinds variously described immediately above, and sought an order that the total amount of the 11 payments be paid to him. Gordon J decided that she should make an order for the payment of that total amount to the plaintiff, but her Honour declined to make the declarations sought by the plaintiff because she considered there was no utility in making those orders in the circumstances: see *Yeo* at [15]–[18].
18. In addition to an order for the payment of the above sum, the applicants sought orders for interest and costs. The broad discretionary power under r 5.23 I have identified above obviously extends to the making of these orders.
19. As to interest, s 51A(1) of the Federal Court Act provides that in any proceedings for the recovery of money, the Court “shall, upon application, unless good cause is shown to the contrary”, order that interest be included in the sum for which judgment is given at such rate as the Court thinks fit. Federal Court Practice Note CM-16 specifies that the Court should apply an interest rate that is 4% above the cash rate last published by the Reserve Bank of Australia. In their written submissions, the applicants provided the details of the prevailing cash rate during the period from 17 April 2014 to 12 March 2015, together with a calculation that showed the total amount of interest due as $5,254.17. To this I have added a further amount of $334.36 for the further period of 21 days that has elapsed since 12 March 2015. The total amount of interest calculated at the applicable rate is therefore $5,588.53.
20. As to costs, s 43 of the Federal Court Act confers upon the Court a wide discretion in relation to costs. This discretion must, of course, be exercised judicially. The Court also has power under r 40.02(b) of the Rules to fix costs in a lump sum. The applicants have sought such an order. To support this application, Mr Waterman has affirmed an affidavit setting out, in short form, the details of the costs and disbursements claimed by the applicants in accordance with the items set out in Schedule 3 of the Rules. The total amount of costs and disbursements claimed is $8,252.20. Accordingly, I am satisfied that the applicants are entitled to an order for costs in this amount fixed as a lump sum.

# CONCLUSION

1. For these reasons, I propose to order default judgment for the applicants against Mr and Mrs Cotter under r 5.23(2) of the Rules in the sum of $103,247.46 made up as follows:
   1. $89,406.73 for the claim;
   2. $5,588.53 for interest in accordance with s 51A of the Federal Court Act; and
   3. $8,252.20 for costs in accordance with s 43 of the Federal Court Act and fixed under r 40.02 of the Rules.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves. |

Associate:

Dated: 2 April 2015