



Your Ref:JYG:JRO: 20-519-9527

ALLENS ARTHUR ROBINSON ✓

DISTRICT COURT
OF WESTERN AUSTRALIA
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LEVEL 2, CENTRAL LAW COURTS,
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Dear Sirs

**DOMAINS AUSTRALASIA P/L v NORRISH
DISTRICT COURT ACTION No. 2046 of 2005**

I refer to the above matter which was heard before Registrar Kingsley on 21 February 2006 when the decision was reserved.

The Registrar has now given his decision.

Please find enclosed a copy of the Reasons for Decision given on 6 June 2006.

The matter has been listed before Registrar Kingsley in Chambers on 23 June 2006 at 2.30pm.

Yours faithfully

ACTING ASSOCIATE TO
REGISTRAR KINGSLEY

6 June 2006

c.c. ZILKENS & CO
Ref: RAZ:pjh:053460

c.c. JACKSON MCDONALD
Ref: EXL:JEB:2075688

c.c. **BRADLEY STEDMAN NORRISH**
62 Belleview Crescent
Dianella WA 6059

Enc.

JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA
IN CHAMBERS

LOCATION : PERTH

CITATION : NOMINET UK & ANOR -v- NATIONAL
AUSTRALIA BANK LIMITED & ANOR
[2006] WADC 83

CORAM : REGISTRAR KINGSLEY

HEARD : 21 FEBRUARY 2006

DELIVERED : 6 JUNE 2006

FILE NO/S : CIV 2046 of 2005

BETWEEN : NOMINET UK
Applicant

DOMAINS AUSTRALASIA PTY LTD
Plaintiff

AND

NATIONAL AUSTRALIA BANK LIMITED
Garnishee

BRADLEY STEDMAN NORRISH
Defendant

Catchwords:

Practice - Applicant seeks to cancel a debt application order pursuant to s 103 of the *Civil Judgments Enforcement Act 2004* - Applicant seeks order pursuant to s 55 of the *Civil Judgments Enforcement Act 2004* - Consideration of what is an available debt within meaning of s 46C *Civil Judgments Enforcement Act 2004*

Legislation:

Civil Judgments Enforcement Act 2004
District Court Act 1969
District Court Rules 2005

Result:

Debt appropriation order found to be invalid

Representation:

Counsel:

Applicant	:	Mr G M Abbott
Plaintiff	:	Mr R A Zilkens
Garnishee	:	No appearance
Defendant	:	No appearance

Solicitors:

Applicant	:	Allens Arthur Robinson
Plaintiff	:	Zilkens & Co
Garnishee	:	Jackson McDonald
Defendant	:	Not applicable

Case(s) referred to in judgment(s):

Alphapharm Pty Ltd v Smithkline Beecham (Australia) Pty Ltd (1994) 49 FCR
250
Daglish v Jarvie 2 Mac & G 231
Garrard v Email Furniture Pty Ltd (1993) 32 NSWLR 662
Murcia & Associates (a firm) v Grey & Ors [2001] WASCA 240
Thomas A Edison Ltd v Bullock (1912) 15 CLR 679
Z Ltd v A & Ors [1982] 1 All ER 556

Case(s) also cited:

Nominet UK v Diverse Internet Pty Ltd (No 2) [2005] FCA 1773
Nominet UK v Diverse Internet Pty Ltd [2004] FCA 1244
Nominet UK v Diverse Internet Pty Ltd [2005] FCA 669

Perth Mint v Mickelberg [1985] WAR 117
Kensington Income Tax Commissioners; Ex parte Princess Edmond de Polignac
[1917] 1 KB 486
Walton v Gardiner (1993) 177 CLR 378
Williams v Spautz (1992) 174 CLR 509

1 **REGISTRAR KINGSLEY:** Domains Australasia Pty Ltd ("Domains") obtained a debt appropriation order ("DAO") against National Australia Bank ("NAB") on 5 October 2005 in the sum of \$158, 717.78. The DAO relates to funds held by NAB in the name of the judgement debtor, (Norrish).

2 Nominet UK ("Nominet") has brought two applications under the *Civil Judgments Enforcement Act 2004* ("*CJE Act*"), for alternative orders;

- i. a Form 22 application pursuant to s 103 *CJE Act*, on the basis that Nominet has a claim on or interest in the appropriated debt, that the DAO be cancelled, alternatively;
- ii. a Form 7 application pursuant to s 55 *CJE Act* that NAB's objection be allowed with the consequence that the DAO be set aside, cancelled or cease to have effect.

3 In the further alternative, Nominet, pursuant to either s 103 or s 55 *CJE Act*, seeks that the DAO be varied on the basis that the transaction giving rise to the judgment by Domains against Norrish was a sham and the DAO is an abuse of process.

History - Nominet

4 Nominet, in 2003 commenced Federal Court proceedings against Diverse Internet Pty Ltd and Internet Payments Pty Ltd, and against Bradley Norrish and Chesley Rafferty who controlled the companies. On 19 May 2005 Nicholson J had granted a Mareva injunction in the Federal Court proceedings requiring preservation of assets in the name of and under the control of Norrish. By letter dated 20 May 2005 the solicitors for Nominet wrote to NAB, who were identified on the certificates of title as mortgagor and first secured creditor of land in the name of Norrish, enclosing the orders made by Nicholson J. The fourth respondent to the orders was Chesley Paul Rafferty.

5 The Federal Court on 22 September 2004 found that Norrish and Chesley Rafferty, together with three others, were liable to Nominet for damages and costs in amounts to be assessed.

History - Domains

6 Domains, and its ultimate holding company Firebird Corporation Pty Ltd ("Firebird"), were established on 26 October 2004. The sole director of Domains and Firebird was Chesley Rafferty. His directorship ceased on 23 June 2005 when Blair Rafferty, the brother of Chesley, became a director of Domains and Firebird.

7 In February 2005 a demand for payment of \$154,427.66 was issued by Domains to Chesley Rafferty. This was on the basis that Chesley Rafferty was jointly and severally liable with Norrish for the amount of those monies. In April 2005, Norrish executed a guarantee and indemnity, and a mortgage over his property, in favour of Domains. The mortgage over Norrish's property was never registered.

8 Norrish owned real estate in East Perth which, by June 2004, had been sold and the proceeds of sale were being held by Norrish's bank, NAB.

9 On 19 May 2005 the Mareva injunction was made against the property of Norrish. In June 2005 Domains were aware of the Mareva injunction because on 20 June 2005 the solicitors for Domains informed Nominet's solicitors that Domains would make an application to vary the Mareva orders. In fact no such application was brought.

10 In September 2005 a writ was issued out of the District Court against Norrish by Domains. Judgment in default of appearance was entered on 5 October 2005. Domains, as judgement creditor, then made an application for a DAO against NAB and the DAO whilst dated 5 October 2005, was issued on 11 November 2005.

The Application for DAO

11 An application, dated 9 November 2005, was made to the Court by Domains for an enforcement order (Form 6). The enforcement process required was a debt appropriation order, and the third person named was NAB. The Form 6 application is signed by the firm of solicitors for Domains and dated 9 November 2005. In support of the Form 6 application, Domains filed an affidavit sworn by Blair Rafferty, a director of the plaintiff, on 25 October 2005.

12 Blair Rafferty deposes he is authorised to make the affidavit on behalf of Domains, that Domains commenced proceedings to recover an outstanding amount, that Norrish failed to comply with the writ, and that the judgment sum plus interest together with costs is still owed by Norrish to Domains under the judgment obtained on 5 October 2005.

13 A Form 18 DAO was then issued by the Court directed to NAB. The DAO is dated 5 October 2005 but has a filed stamp of 11 November 2005.

14 As a preliminary issue, I raised the question as to whether the DAO was in fact validly made. From a perusal of the Court file it would appear

that the DAO was made administratively. It is the duty of an officer of the Court exercising a judicial function to satisfy themselves they have jurisdiction, even in the absence of any issue raised by the parties themselves (*Murcia & Associates (a firm) v Grey & Ors* [2001] WASCA 240 at [14]).

Validity of the DAO

15 After I raised the issue as to whether the DAO had been validly made, the matter was adjourned for further submissions.

16 An application for a DAO is made to the Court pursuant to s 49 of the *CJE Act*. Subject to s 20(1) and s 22, the Court may make an order. The DAO issued by the District Court is exhibited to the affidavit of Naomi Margaret Johnston, sworn 21 November 2005, at p 15. The DAO has the court's seal affixed, but no signature or mark by any person.

17 Section 3 *CJE Act* defines "court" as having the meaning affected by s 5 and s 9. Section 5 *CJE Act* states that the Act applies to the District Court in the exercise of its civil jurisdiction. Section 9(3) *CJE Act* provides that rules of court may be made by the court referred to in s 5 to prescribe applications and requests that it may be dealt with by an officer of the court, other than an officer who may constitute the court.

18 Section 7 *District Court Act 1969* establishes the District Court of Western Australia and, at s 8(1)(b), the Court shall be constituted by a District Court judge. For the purposes of s 9(3), r 63 *District Court Rules (2005)* prescribes that an application under s 49(1) *CJE Act* may be dealt with by a Registrar of the Court. Thus only a Registrar has been prescribed by the *District Court Rules* as having the power to deal with application for a DAO.

19 A Registrar is defined at s 6 of the *District Court Act* as the Principal Registrar, a Registrar, or a Deputy Registrar appointed under s 25 of the *District Court Act*. Section 25 *District Court Act* provides that the Governor may appoint a Principal Registrar, a Registrar, or a Deputy Registrar, and the functions of a Registrar are as set out in the *District Court Act* and in the Rules of Court.

20 The *District Court Rules 2005* draw a distinction between Registrar's who are legally qualified and those who are not. A legally qualified Registrar may deal with any proceedings that a Judge in chambers may deal with (r 8(1)). Whilst r 63 does not specify whether it is to be a legally qualified Registrar or not who deals with an application

under s 49(1) *CJE Act*, it is clear that no Registrar dealt with the application.

21 Therefore, as s 49 *CJE Act* specifies that an officer who constitutes the Court (a Judge of the Court), or some other officer prescribed by a Rule of Court (a Registrar) are to deal with applications under the Act, and as none of the prescribed persons has dealt with the application, I am of the opinion that the DAO is a nullity.

Affixing the Court Seal

22 The DAO has been affixed with a seal of the Court. All writs, summonses, certificates, warrants, and other processes issued out of the District Court "shall be sealed or stamped with the seal of the Court" (s 9 *District Court Act*). The *Rules of the Supreme Court 1971* ("RSC") apply to the District Court, where there is no special provision in the *District Court Rules* (s 87 *District Court Act* and r 6 *District Court Rules*). Order 43 r 3(1) RSC requires every judgement to be marked to show by whom it was made and O 43 r 3(2) provides that an order is sufficiently authenticated if signed by a Registrar and sealed with a seal of the Court.

23 In my opinion, whilst the DAO has been sealed with the seal of the Court, there has been no authentication of the order. Further, the fact that the seal has been affixed does not overcome the essential fact that the order is a nullity.

Can Order 2 Rules of the Supreme Court assist

24 Order 2 of the RSC provides that a Registrar has the discretion to rectify any non-compliance with the rules. However, in this matter it is not a case of non-compliance with the Rules. Order 2 RSC cannot rectify the situation where there has been a complete lack of jurisdiction in the making of the order. A lack of jurisdiction is not a procedural irregularity.

Conclusion

25 In my opinion the DAO, as it was not issued by the Court under the hand of Registrar, is a nullity.

26 Can Domains now make a fresh application to seek a DAO.

The Nature of an Application for a DAO

27 Section 49 *CJE Act* provides the judgement creditor may apply to the court for a DAO where a person owes an available debt to the judgement debtor. There is no requirement that the application be served on any

party. On the granting of a DAO, rights affecting third parties are created. The person named in the DAO (the third person), upon service of the DAO, must pay the full debt to the judgement creditor, if due and payable at the time the DAO was made with seven days of service of the DAO, and in any other case with seven days of the debt becoming due and payable.

- 28 In my opinion the application for a DAO is an application made *ex parte*. The definition of *ex parte* is that it is an application in Court without notice to the other party. It is the duty of a party who brings an *ex parte* application which creates rights that otherwise would not exist, to bring to the attention to the Court all material facts.
- 29 In *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 the majority of the Court held that a party who applies *ex parte* for an order, in the exercise of a judicial or quasi judicial power, is required to meet a high standard of candour and responsibility to bring to the notice of the decision maker all facts material to the determination of the application, including facts which the absent party, if present, would presumably rely upon in defence of the application. In his reasons Mahoney AP referred to *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 where Isaacs J at 681 commented that there are instances where justice could not be done unless the subject matter of the suit were preserved. Where there is a danger of destruction by one party, or irremediable or serious damage being imminent, a party may come to court and ask for its interposition even in the absence of the opponent. But when that party does so, the Court is asked to disregard the usual requirement of hearing the other side, and therefore the party moving incurs a most serious responsibility. Isaacs J refers to *Daglish v Jarvie* 2 Mac & G 231 which is authority for the proposition that it is a duty of a party asking for an injunction *ex parte* to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say that he was not aware of their importance. *Uberrima fides* is required, and the party inducing the Court to act in the absence of the other party fails in his obligation, unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application.
- 30 Whilst the application for a DAO is not as serious as an application for an injunction, nevertheless rights of parties are affected. In my opinion the applicant for a DAO has a duty to draw to the Court's attention all material facts which a party would have brought forward in their defence to the application.

31 Nominet had obtained a Mareva injunction on 19 May 2005. In June 2005 Domains were aware of the Mareva injunction because on 20 June 2005 the solicitors for Domains informed Nominet's solicitors that Domains would make an application to vary the Mareva injunction. No such application was brought. On 20 May 2005 NAB were notified of the Mareva injunction. In my opinion there was a duty on Domains to put to the Court, by way of affidavit, the fact of the Mareva injunction.

32 The affidavit, sworn by Blair Rafferty on 25 October 2005 in support of the DAO, makes no mention of the Mareva injunction.

33 The reason why Domains had an obligation to bring the fact of the Mareva injunction to the attention of the Court is that, in my opinion, once the Mareva injunction had been served on NAB, there was no longer an available debt within the meaning of s 46 *CJE Act*. The content of a DAO is prescribed by s 50 *CJE Act*. Section 50(1)(d) requires the applicant to identify the available debt to which the DAO applies.

Available debt

34 An available debt is defined in s 46 *CJE Act*. An available debt is any obligation on the part of a person to pay money to the debtor. Significantly, the obligation, at the time of the making of the DAO, is to be current and unconditional, or will arise upon fulfilment of one or more conditions under an existing agreement or trust, the will of a deceased, or an issued share or other marketable security, may arise in an existing cause of action, or is imposed by a written law as a result of an event that has occurred. I say significantly because the DAO must identify the available debt.

35 The effect of a Mareva injunction is well stated in *Z Ltd v A & Ors* [1982] 1 All ER 556. According to Denning MR as soon as the Judge makes an order for a Mareva injunction restraining disposal of assets, the order takes effect at the very moment it is pronounced. Even though the order has not then been drawn up, even though it has not then been served on the defendant, it has immediate effect on every asset covered by the injunction. Every person who has knowledge of the injunction must do what they can reasonably do to preserve the asset, and must not assist in any way in the disposal of it. Otherwise they are guilty of a contempt of court. Denning MR goes on to say that once a bank is given notice of a Mareva injunction affecting goods or money in its hands, it must not dispose of them, nor allow the defendant or anyone else to do so, except by authority of the Court. If the bank or any of its officers should knowingly assist in the disposal of them, it will be guilty of a contempt of

court, for it is an act calculated to obstruct the course of justice. Denning MR goes on to say that this is not new law. A customer can only authorise a bank to do what is lawful for the bank to do and not that which is unlawful. Thus, any prior mandate from the customer is automatically annulled when the bank receives notice of the Mareva injunction. Denning MR goes on to say that the juristic principle is that as soon as the bank is given notice of the Mareva injunction it must freeze the defendant's bank account. It must not allow any drawings to be made on it neither by cheques drawn before the injunction nor by those drawn after it.

36 In my opinion the debt owing by NAB to Norrish is not an available debt. The debt is not current and unconditional. Norrish cannot lawfully direct NAB to dispose of the monies held by it, without first dealing with the Mareva injunction.

37 I accept I am now dealing with this matter with the benefit of hindsight. I am aware there is a Mareva injunction in place. As the application for a DAO is *ex parte*, and now being aware that Domains has not discharged its obligation to the Court in relation to bringing to the attention of the Court the fact of the Mareva injunction, in my opinion any application now for a DAO is one that would not succeed.

38 If I am wrong in relation to the foregoing, the issue that first needs to be determined is the status of Nominet in bringing the two applications.

Status of Nominet

39 Nominet makes two applications;

1. Pursuant to s 103 *CJE Act* that the DAO be cancelled.
2. Pursuant to s 55 *CJE Act* that NAB's objection be allowed with the consequence that the DAO either be set aside, cancelled or cease to have effect.

Section 103

40 Section 103 *CJE Act* provides that if a court makes an order under the *CJE Act*, a person who is affected by, or whose property is affected by, the original order, may apply to the Court for an order that amends or cancels the original order. Nominet submits that it is a person who is affected by the original DAO. What is the meaning to be given to the words "affected by" in the context of this Act.

41 "Affected by" is one of those phrases whose meaning is determined by the context, in this case by the purpose and scope of the *CJE Act*. The *CJE Act* is an Act to provide for the enforcement of judgments given in the civil jurisdiction of various courts. The Act has the effect of unifying the enforcement regime of civil judgements throughout the State. The *CJE Act* affects the rights of judgement creditors, judgement debtors, and the debtors of judgement debtors.

42 In *Re Gasbourne Pty Ltd* [1984] VR 801, Nicholson J. at 833 considered that the expression "affected by" required a detrimental effect on the person concerned that is likely to be significantly greater than or different from the effect on the general public. The meaning of "affected by" was also considered by the Full Court of the Federal Court in *Alphapharm Pty Ltd v Smithkline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250. At pp 258-259 Davies J stated:

" The general principles covering standing, including the phrase 'interests are affected', have been considered in numerous cases, many of which were referred to by a Full Court of this Court in *US Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 526-530. The person whose interests are affected must have an interest other than that which attaches to members of the general public and other than that of a person merely holding a belief that a particular type of conduct should be prevented or a particular law observed. The adjectives 'real', 'genuine' and "direct" have been used to describe the relationship required. The term 'interests are affected' does not make use of an adjective, but it requires that the applicant demonstrate genuine affection of an interest which attaches to him.

Relevant proprietary and financial interests have traditionally been considered to be sufficient. See eg. *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64; *Broadbridge v Stammers* (1987) 16 FCR 296; New South Wales *Fish Authority v Phillips* (1970) 1 NSW 725; *Association of Data Processing Service Organisations v Camp* (1969) 397 US 150. Indeed, in recent years, most attention has been given to those circumstances in which persons without any proprietary or commercial or tangible interest have, nevertheless, been thought to have standing to take part in the administrative process or in legal proceedings. See eg. *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Onus v Alcoa*

Australia Ltd (1981) 149 CLR 27; *Ogle v Strickland* (1987) 13 FCR 306; the *US Tobacco case*; *Telecasters North Queensland Limited v Australian Broadcasting Tribunal* (1988) 82 ALR 90; *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200 and *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509."

43 Nominet is a judgement creditor of Norrish. In the usual course Nominet would be able to satisfy its judgement by attaching funds held by others for the credit of Norrish, in this case NAB. The DAO has a direct impact on the financial interests of Nominet as a member of a specific class of persons, namely, as a judgement creditor. Nominet's financial interests are also affected in that, if it is not allowed to contest the making of the DAO, the effect of the Mareva injunction is rendered nugatory. In my opinion Nominet is a person affected by the making of the DAO and therefore has standing to bring this application.

44 The orders available to a Court on an application under s 103 *CJE Act* are that the DAO be amended or cancelled. A DAO is based on there being an "available debt" (s 46 *CJE Act*). As I have already commented that in my opinion there is no available debt, and therefore the DAO ought never to have been made. That being the case the appropriate order would be that the DAO be cancelled.

Section 55

45 Section 55 *CJE Act* provides that a judgment creditor who is served with an objection by a third person who is served with a debt appropriation order may allow the objection. If the judgment creditor does not allow the objection within seven days of the date of service of the objection, then any of the third person, judgment debtor or any other person whom the third person claims, owns or has a claim on or interest in the appropriated debt may apply to the Court for an order that the objection be allowed.

46 The NAB were served with the DAO and the evidence by way of the affidavit of Naomi Margaret Johnston sworn 21 November 2005 is that NAB object to the DAO. The NAB, through Johnston, states that Nominet claims an interest in the appropriated debt.

47 The fact that Nominet claims an interest in the appropriated debt is clear. Nominet has a judgment for damages and there is a Mareva injunction preserving the assets of Norrish. Thus Nominet is a person, other than the judgement debtor, who has a claim on the appropriated

debt. I am of the opinion that Nominet has standing under s 55(2)(c) *CJE Act* to apply to the Court for an order that the objection be allowed.

48 Under s 55 *CJE Act* the Court may allow an objection. The consequences of allowing an objection is that the DAO ceases to have effect (s 51(6) *CJE Act*). In my opinion, as Nominet has a claim on the appropriated debt, it would be appropriate to allow the objection, with the consequence that the DAO ceases to have effect.

49 I will hear Counsel on the form of orders, and on costs.