

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : RED CHAMBER CO -v- RED CHAMBER FOODS
AUSTRALIA PTY LTD [2015] WASC 198

CORAM : MITCHELL J

HEARD : 27 MAY 2015

DELIVERED : 27 MAY 2015

PUBLISHED : 29 MAY 2015

FILE NO/S : CIV 1482 of 2015

BETWEEN : RED CHAMBER CO
First Plaintiff

RED CHAMBER AUSTRALIA PTY LTD
Second Plaintiff

AND

RED CHAMBER FOODS AUSTRALIA PTY LTD
First Defendant

PETER JAMES ROBERTS
Second Defendant

CAROL GODBOLT-ROBERTS
Third Defendant

REDCOURT CORPORATION PTY LTD
Fourth Defendant

Catchwords:

Practice and procedure - Application for freezing orders - Alleged breach of fiduciary duty

Legislation:

Rules of the Supreme Court 1971 (WA), O 52A r 5

Result:

Orders made

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr T J Carmady
Second Plaintiff	:	Mr T J Carmady
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	No appearance
Fourth Defendant	:	No appearance

Solicitors:

First Plaintiff	:	Williams + Hughes
Second Plaintiff	:	Williams + Hughes
First Defendant	:	Zilkens & Co
Second Defendant	:	Zilkens & Co
Third Defendant	:	Zilkens & Co
Fourth Defendant	:	Zilkens & Co

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

Duckworth v Water Corporation (No 2) [2012] WASC 163
Logan v Camm & Whitson [2008] QSC 255
Macri v Thobaven [2010] WASC 18
Mitchell v Saengjan (1994) 117 FLR 273
X v Y [2013] WASC 339

MITCHELL J:

(This judgment was delivered extemporaneously and has been edited from the court's record of the decision.)

Overview

1 The plaintiffs have applied for orders to reinstate Ms Carole Godbolt-Roberts as a defendant to this action and to join her and Cartesian Consulting Pty Ltd (Cartesian) as defendants pursuant to O 18 r 6 of the *Rules of the Supreme Court 1971* (WA) (RSC). The plaintiffs also seek leave to discontinue their action against the first and fourth defendants. A minute of proposed amended writ of summons and minute of proposed statement of claim have also been filed with the Court, and leave is sought to amend those documents in accordance with the minutes.

2 The plaintiffs also seek freezing orders pursuant to O 52A of the RSC against Peter Roberts, the second defendant; his wife Carole Godbolt-Roberts; Cartesian; and a company called Roberts Port Quays Pty Ltd (Port Quays), which is a company controlled by Mr Roberts and Ms Godbolt-Roberts. Port Quays is not an existing or proposed party to these proceedings.

Background - the first proceedings

3 This claim is the second action brought in this court against Mr Roberts since December 2014. The first, CIV 2752 of 2014 (First Proceedings), was a claim by Red Chamber Co (Red Chamber USA), a US company, against the second plaintiff Red Chamber Australia Pty Ltd (Red Chamber Australia) and its director Mr Roberts.

4 In essence it was contended by Red Chamber USA that it had:

1. established Red Chamber Australia as a subsidiary to carry on the Red Chamber Group's Australian operations;
2. financed Red Chamber Australia's operations for around 13 years; and
3. expressly agreed with Mr Roberts, Red Chamber USA's nominee to run its Australian operations, that all issued shares legally owned by him in Red Chamber Australia were held on trust for Red Chamber USA.

MITCHELL J

5 The proceedings were brought after Mr Roberts denied the above matters and refused to transfer title to the shares. Mr Roberts initially filed a defence but consented to judgment in that action around 30 March 2015.

6 Consent orders were filed in the First Proceedings and Red Chamber USA became registered as the legal owner of the shares in Red Chamber USA on or around 2 April 2015.

The present proceedings as originally formulated

7 The plaintiffs originally alleged that, from around January 2014, Mr Roberts diverted the business of Red Chamber Australia to Red Chamber Foods Pty Ltd (Red Chamber Foods), a company whose shares were owned by Mr Roberts and his wife Carole Godbolt-Roberts. This was done without the authorisation or consent of Red Chamber USA.

8 These proceedings were commenced by an indorsed writ filed on 1 April 2015, a day after Mr Roberts had consented to judgment in the First Proceedings. Mr Roberts' solicitors had, by this time, also indicated that Mr Roberts was prepared to consent to transferring the shares in Red Chamber Foods to Red Chamber Australia.

9 These proceedings were commenced as an action by Red Chamber USA and Red Chamber Australia against Mr Roberts, Red Chamber Foods, Ms Godbolt-Roberts and Redcourt Corporation Pty Ltd (Redcourt). The plaintiffs alleged, amongst other things, that:

1. Red Chamber USA was the beneficial owner of the shares in Redcourt;
2. Red Chamber Australia was the beneficial owner of the shares in Red Chamber Foods (via constructive trust);
3. Mr Roberts had breached his fiduciary and statutory duties in diverting the business of Red Chamber Australia to Red Chamber Foods; and
4. Ms Godbolt-Roberts had knowingly assisted in Mr Roberts' breach of fiduciary duty.

10 Redcourt was another company whose shares were held by Mr Roberts but was alleged to be owned beneficially by Red Chamber USA. The plaintiffs allege that Redcourt was another corporate vehicle established to carry on the Red Chamber Group's Australian operations.

11 On 8 April 2015, orders were made by consent that Red Chamber Australia was, and had at all times been, the beneficial owner of all issued shares in Red Chamber Foods. Mr Roberts transferred legal title in the shares the same day.

12 On 8 April 2015, Mr Roberts transferred legal title in the Redcourt shares to Red Chamber USA. This was done without any orders being made by the Court.

13 In summary, by 8 April 2015, Red Chamber USA had gained control of Red Chamber Australia, Red Chamber Foods and Redcourt. Consequently the plaintiffs propose to discontinue these proceedings against Redcourt and Red Chamber Foods. I accept that it is appropriate, in the circumstances, that leave to discontinue against those parties be granted.

The proposed claims

14 The plaintiffs have now adduced evidence, in particular the affidavit of James Sheridan sworn 20 May 2015 and supported by the affidavit of Ming Shin Kou, that, since Mr Roberts' removal as a director of the three Australian companies, it has come to light from a review of books and records that there are additional claims against Mr Roberts, Ms Godbolt-Roberts and Cartesian.

15 Mr Sheridan's evidence is that a number of books and records of the companies have been deleted or destroyed on the instructions of Mr Roberts, and that Mr Roberts caused Redcourt to pay funds it had received from Red Chamber Australia or Red Chamber Foods to him or for his personal benefit. This appears to have occurred principally after the incorporation of Red Chamber Foods in late 2013. The evidence is that Mr Roberts has effectively conflated his finances with those of Red Chamber Australia, Red Chamber Foods and Redcourt. The evidence is that Red Chamber Australia and Red Chamber Foods made payments to Redcourt, which Mr Roberts then caused to be paid to him or on his behalf, of about \$2.2 million between 1 July 2011 and 31 March 2015.

16 There is also evidence that Red Chamber Australia Pty Ltd entered into a 'Consultancy Agreement' dated 22 March 2010 with Cartesian, a company controlled by Ms Godbolt-Roberts. This agreement, entered into without the knowledge of Red Chamber USA, resulted in payments to Cartesian of approximately \$870,000.

17 The plaintiffs' claims are set out in the minute of proposed statement of claim filed in these proceedings. Essentially, the claim is that Mr Roberts breached his fiduciary duty owed to the plaintiffs and that Ms Godbolt-Roberts and Cartesian knowingly participated in that breach of duty.

The reinstatement of Ms Godbolt-Roberts, and joinder of Cartesian, as defendants

18 The plaintiffs say that the entry by Red Chamber Australia into a consulting agreement with Cartesian was a breach of fiduciary duty by Mr Roberts. Ms Godbolt-Roberts is the sole shareholder and director of Cartesian. It is said that Cartesian and Ms Godbolt-Roberts have knowingly assisted Mr Roberts' breach of fiduciary duty.

19 Ms Godbolt-Roberts was originally named as a defendant in these proceedings but the action was discontinued against her on 2 April 2015 at the request of Mr Roberts. The plaintiffs acceded on what they indicated to be 'purely pragmatic grounds' and on the basis that 'all claims against Mrs Roberts are expressly reserved, including the right to seek to have her joined to the current proceedings or to issue new proceedings against her'.

20 As there has been no settlement or determination on the merits of the claims against Ms Godbolt-Roberts, the Court has an inherent power to 'reinstate' these proceedings against her.¹

21 I accept the plaintiffs' submission that the proceedings be reinstated against Ms Godbolt-Roberts.

22 I also accept the plaintiffs' submission that an order should be made under O18 r 6 RSC to add Cartesian as a party. The claim against Cartesian arises out of the same set of facts as the claims against the other defendants, and the presence of Cartesian as a party is necessary to ensure that all matters in dispute in the action may be effectively and completely determined and adjudicated upon.

Jurisdiction for freezing order

23 Order 52A r 2 of the RSC provides that the court may make an order (a freezing order) upon or without notice to the respondent, for the purpose of preventing the frustration or inhibition of the court's process by

¹ *Macri v Thobaven* [2010] WASC 18 [18]; *Logan v Camm & Whitson* [2008] QSC 255 [32] - [35]; *Duckworth v Water Corporation (No 2)* [2012] WASC 163 [13].

seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partially unsatisfied.

24 In order to obtain a freezing order the plaintiffs must show:

1. a good arguable case: O 52A r 5(1)(b); and
2. a danger that a prospective judgment against the respondents will be wholly or partially unsatisfied because any of the following might occur:
 - (a) the respondent(s) might abscond; or
 - (b) the assets of the respondents might be removed from Australia or disposed of, dealt with or diminished in value: O 52A r 5(4).

Application brought ex parte

25 This application has been brought ex parte (as these applications most commonly are) on the basis that the plaintiffs apprehend a real risk that the defendants may take steps to dissipate assets if provided notice.

26 I agree that it is appropriate that the order sought be made ex parte, with the orders operating for a short period and with provision for the parties to apply to have the orders set aside.

Good arguable case

27 Having considered the minute of statement of claim and the affidavit evidence adduced by the plaintiffs, I am satisfied that the plaintiffs have a good arguable case against Mr Roberts, Ms Godbolt-Roberts and Cartesian for breach of fiduciary duty, in the case of Mr Roberts, and knowing participation in that breach in the case of Ms Godbolt-Roberts and Cartesian.

28 The evidence discloses that Mr Roberts:

1. diverted the business of Red Chamber Australia to Red Chamber Foods, a company owned by him and his wife;
2. used Red Chamber Australia and Red Chamber Foods to fund his personal living expenses; and

3. caused Red Chamber Australia to enter into a consulting agreement with Cartesian, a company owned and controlled by his wife.

29 Each of the above is an arguable breach of the fiduciary duties owed by Mr Roberts to Red Chamber Australia and indeed to Red Chamber USA.

30 I am also prepared to infer that Ms Godbolt-Roberts, and therefore Cartesian, knew of Mr Roberts' breaches of fiduciary duty. The evidence of Mr Kou is that Ms Godbolt-Roberts visited Red Chamber USA in the past and had been informed of corporate arrangements which it had put in place. It may be inferred from this evidence that Ms Godbolt-Roberts knew of the facts giving rise to Red Chamber USA's interest in the Australian companies.

31 The plaintiffs accept that some of the amounts paid to Mr Roberts, or on his behalf, may have related to legitimate expenses incurred as part of Red Chamber Australia's business operations. However, given the lack of documentation, including the destruction or removal of Redcourt's business records by Mr Roberts, the plaintiffs indicate that they have no way of verifying such amounts. The plaintiffs submit that the onus is on Mr Roberts to justify any payments made to him or made on his behalf.

Danger that judgment will not be satisfied

32 A danger that the prospective judgment may be unsatisfied can be inferred in the present case where the plaintiffs' prima facie case against the defendants involves gross dishonesty, and there is evidence that Mr Roberts, with the knowing participation of other defendants, has dishonestly diverted funds from the plaintiffs. Documents and records which would assist in proving that conduct have been destroyed. In those circumstances the inference is open that Mr Roberts and Ms Godbolt-Roberts are persons who, unless restrained, will take steps to avoid paying any judgment which might ultimately be obtained.

33 It is also relevant to note that Mr Roberts ran a case in the First Proceedings where he maintained that there had been no declaration of trust in relation to the shares in Red Chamber Australia, despite documentary evidence to the contrary. He sought to explain away the contemporaneous documentation as fabrications by him to mislead the Family Court of Western Australia in divorce proceedings against his ex-wife. If Mr Roberts did not mislead the Family Court, he was instead

misleading this court in CIV 2752 of 2014 when he indicated that this was his defence.

34 Further there is evidence that in the immediate lead-up to handing over to Red Chamber USA ownership and control of Red Chamber Australia and Red Chamber Foods, between around 30 March and 8 April, Mr Roberts caused over \$350,000 to be paid to him from Red Chamber Australia and Red Chamber Foods, and used a company (Red Chamber Australia) in which he had no beneficial interest to give a guarantee for a personal home loan borrowing, for no benefit to Red Chamber Australia.

35 There is also evidence that a Churchlands property owned by Mr Roberts is on the market. Given Mr Roberts' previous conduct, the plaintiffs are understandably concerned that there is a very real risk that the sale proceeds may be dealt with or disposed of in such a way as to put them beyond the reach of the plaintiffs.

36 The plaintiffs also note that Ms Godbolt-Roberts has connections to South Africa.

37 In *X v Y*², Pritchard J noted that:

The interests of justice may support the granting of a freezing order to prevent the dissipation of assets in the hearing of an action even though the risk of dissipation is less probable than not. As for the evidence to establish the risk of dissipation, it is rarely the case that there is any direct evidence to establish a danger of dissipation of assets. It is more often the case that the Court will be invited to draw the inference that a danger exists having regard to other conduct of a party. In this respect, it is well established that in determining whether there is a danger of a party disposing of assets in order to defeat a judgment, the court is permitted to consider the evidence adduced by the applicant to establish its claim to the substantive relief sought. In *Patterson v BTR Engineering (Australia) Ltd* at [326], Meagher JA observed:

'Normally proof of the first ingredient alone [ie a good arguable case against the defendant] will not suffice; normally one cannot infer a risk of dissipation of assets from the mere fact that the plaintiff has a prima facie cause of action. In normal circumstances this is particularly so in cases like the present, where there is no evidence at all what the defendant's assets are. However, in exceptional cases (of which the present is unfortunately one) one can infer the existence of the latter ingredient partly or wholly from proof of the former. This may well be the situation in all cases where the plaintiff's prima facie case against the defendant involves proof of gross dishonesty.' (footnotes omitted)

² *X v Y* [2013] WASC 339 [35].

38 It is not a prerequisite that the plaintiffs demonstrate how the respondents may take steps to avoid a judgment being enforced against them. There may be cases where the factors taken together 'give rise to such a feeling of unease that ... there is sufficient danger that the defendant will deal with, in some fashion, her assets in such a way that the plaintiff, if it were to succeed in this action, will not be able to have the judgment satisfied'.³

39 In this case I am satisfied that there is a real risk that the defendants will take steps to avoid judgment being enforced against them. I infer this risk from the facts to which I have referred.

Freezing order against Port Quays

40 Order 52A r 5(5) of the RSC provides that a freezing order can be made against a non-party to the proceeding if the court is satisfied, having regard to all the circumstances, that:

- (a) there is a danger that a judgment or a prospective judgment be wholly or partly unsatisfied because:
 - (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
 - (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
 - (iii) a process in the Court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, under which process the third party may be obliged to disgorge assets or contribute towards satisfying the judgment or prospective judgment.

41 Mr Roberts and Ms Godbolt-Roberts are the sole directors and shareholders of Port Quays. If a judgment is obtained against either or both of them, there is a real prospect that their respective interests in that company (including their interest in the equity in the property at Unit 66, 18 Port Quays Road, Wannanup) would need to be sold to meet the judgment. There is evidence before me that Port Quays is the registered proprietor of that property, acquiring it in December 2011 after the commencement of the misappropriation of funds.

³ *Mitchell v Saengjan* (1994) 117 FLR 273, 284; *X v Y* [37].

Balance of convenience

42 Given that a freezing order is a discretionary remedy, if the other prerequisites are made out, the balance of convenience must favour the grant of the order before it is appropriately made.

43 There is an obvious potential prejudice to the plaintiffs if the freezing orders are not made, in that they may be unable to recover funds prima facie due to them in that event. There is no evidence of any particular prejudice to the persons to be subject to the freezing orders if they are made, and the terms of the orders do not absolutely prevent the persons from dealing with any assets.

44 It does not appear that any innocent party has a relevant interest in the various entities or properties the subject of the proposed freezing order which would be prejudiced by the making of the orders.

45 The plaintiffs in their proposal have inserted proposed par 12 as a means of dealing with the sale of the Churchlands property. It is proposed that the net sale proceeds of any such sale be preserved.

46 For those reasons, I propose to make the following orders, subject to hearing submissions from counsel as to the detail of their formulation:

1. The time for the hearing of this summons be abridged.
2. Compliance with O 59 r 9 be waived.
3. The proceedings be discontinued against Red Chamber Foods Pty Ltd and Redcourt Corporation Pty Ltd.
4. Cartesian Holdings Pty Ltd (ACN 141 513 279) be added as a defendant to the action.
5. The plaintiffs have leave to reinstate the proceedings against the third defendant, Carole Godbolt-Roberts.
6. The plaintiffs have leave to amend the writ of summons in terms of the minute of proposed amended writ of summons filed 21 May 2015.
7. The plaintiffs have leave to amend the statement of claim in terms of the minute of proposed statement of claim filed 21 May 2015.

47 I also will make freezing orders substantially in the terms sought against all four respondents.