

 **Re CHARLES HENRY PTY LTD (in liq) ; BURNESS (in his capacity as liquidator) v LATIMER BC200501686**

Unreported Judgments Federal Court of Australia · 12 Paragraphs

Federal Court of Australia — Victoria District Registry

Ryan J

VID 1009 of 2004

15 November 2004, 11 February, 4 April 2005

In the Matter of Charles Henry Pty Ltd (In Liquidation) (ACN 055 501 070): Burness (In His Capacity As Liquidator) v Latimer [2005] FCA 343

## Headnotes

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### Ryan J.

[1] On 27 August 2004, a summons was issued by a Registrar of the Court pursuant to s 596A of the Corporations Act 2001 for the examination of Mr Maxwell Roger Latimer (“the examinee”). That summons was returnable on 14 October 2004.

[2] On 14 October 2004, a Registrar of the Court further adjourned the summons directed to the examinee to 10.15 am on 15 November 2004. The report of listing of the Court on that day records that the Registrar reserved the question of the liquidator’s costs and there is an annotation to the effect that the liquidator was to provide conduct money to the examinee to facilitate his attendance on the adjourned hearing date.

[3] On 15 November 2004, the summons came on before a Registrar of the Court who referred the matter to myself upon the non-appearance of the examinee. On the same day, after hearing oral evidence, I issued a warrant for the arrest of the examinee pursuant to s 597(6) of the Corporations Act and r 11.10(2) of the Federal Court (Corporations) Rules 2000. The order I made also reserved the liquidator’s costs of that day (ie, 15 November 2004) and of the issue of warrant.

[4] It appears that the examinee was later apprehended pursuant to the warrant and brought by police to Melbourne, where he was examined before a Registrar on 11 February 2005. At the completion of his examination on that day, the Registrar, AFTER consultation with me, discharged the warrant whereupon an application was made on behalf of the examinee for conduct money for his return to Queensland. Additionally, the liquidator sought costs thrown away pursuant to my order of 15 November 2004.

[5] As I apprehend it, because there was a dispute as to the facts bearing on the respective claims of the liquidator and the examinee for costs, the Registrar gave directions for the filing of affidavits followed by written submissions in relation to costs. Pursuant to those directions, Mr Edwards, solicitor for the examinee, filed an affidavit on 23

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February 2005 and a further affidavit and submissions as to costs on 15 March 2005. The solicitor for the liquidator filed an answering affidavit on 25 February and submissions in relation to costs on 4 March 2005 respectively.

[6] There is a marked divergence between the account given on behalf of the liquidator and that on behalf of the examinee of the circumstances leading to the issue of a warrant for the arrest of the examinee. I interpolate that neither party has sought to exercise the right reserved by the Registrar to cross-examine the deponent of the other side's affidavits.

[7] The salient facts may be summarised as follows:

- On 14 October 2004 a summons under s 596A of the Corporations Act 2001 for the examination of the examinee came before Registrar Connard.
- The examinee did not appear. However, Mr Edwards appeared, he says, as Counsel (not solicitor) for the examinee in circumstances where the examinee's solicitor, Mr Buxton, had been unable to attend. Mr Edwards spoke in support of an application by Mr Buxton for an adjournment of the examination. That application was based on the impecuniosity of the examinee and had been foreshadowed by Mr Buxton on 13 October 2004. Mr Edwards says further that he had not then been retained as the examinee's solicitor and it was not until 9 February 2005 (ie, after the arrest) that he was actually instructed to act on behalf of the examinee. His involvement on 14 October had only been for the limited purpose of seeking an adjournment of the application. I note that some confusion as to dates and circumstances is apparent in Mr Edwards' first affidavit.
- On 14 October 2004, the Registrar adjourned the examinee's examination to 10.15 am on 15 November and, amongst other things, indicated that the liquidator should provide conduct money to the examinee to facilitate his travel from Queensland to Melbourne for the examination.
- It is common ground that the Registrar told Mr Edwards that he was to advise the examinee of the adjourned date for the examination. Mr Edwards has deposed that he carried out that instruction by advising Mr Buxton, who was then the solicitor for the examinee, of the fact of the adjournment.
- Mr Fice, the solicitor for the liquidator, has deposed that he faxed confirmation of an electronic airline ticket for the examinee to Mr Edwards on 3 November 2004 in conformity with the Registrar's direction. Exhibit "EF-5" to Mr Fice's affidavit is a copy of that facsimile message. It is addressed to W P Edwards via facsimile (03) 9863 9404. Mr Fice has deposed that he advised the liquidator to fax the documents to Mr Edwards personally because he (Mr Edwards) had appeared for the examinee on 14 October and the Registrar had specifically told him to advise the examinee of the need to attend the adjourned hearing. Exhibit "EF-6", the fax transmission report, confirms the transmission to which Mr Fice has deposed.
- Mr Edwards has sworn that, following the 14 October hearing, except to advise Mr Buxton, he had no further knowledge of the matter until 16 November when he was telephoned by Mr Fice asking whether he had received the ticket. Mr Edwards' affidavit confirmed; "Mr Fice went on to say [the liquidator] had sent me a letter and had emailed the tickets to my office." Later on the same day, he says, he became aware of the 3 November fax from the liquidator which he had definitely not received before 16 November. He then deposed to down-loading the emailed air ticket from his email.
- The header details on the covering letter and the details of the sender of the electronic ticket are clearly those of the liquidator but it is to be observed that the fax number of the addressee was (03) 9863 9404 whereas the fax number on documents filed by Mr Edwards in this proceeding after 31 January 2005 is 9863 9416. Mr Fice has deposed that the fax number, 9863 9404, appeared on Mr Edwards' letterhead on letters dated on 14 October 2004 and 21 December 2004. Those letters are exhibits "EF-7" to Mr Fice's affidavit and confirm that assertion. There is no evidence before the Court to explain how or when Mr Edwards' fax number was changed. The ticket does bear the fax header details of the liquidator and Mr Fice denies that it was emailed.

[8] Having considered all the material, I am persuaded to accept Mr Fice's account of what occurred. Mr Edwards

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is clearly mistaken in his first affidavit in respect of some dates and events and digresses to refer to proceedings numbered V3276/03 which had no relation to the present matter. The liquidator's letter of 3 November 2004 and the ticket details clearly bear the liquidator's fax details as sender, the fax number for Mr Edwards was apparently correct at the time, and there is a transmission log confirming transmission.

[9] In *Re Equiticorp Finance Ltd; Ex parte Brock [No 2]* (1992) 27 NSWLR 391, Young J considered a claim for compensation by an auditor (examinee) for time spent in preparing and performing other work to comply with a summons. That case is instructive but not directly relevant for present purposes because the Registrar, in this case, in effect, directed the provision of conduct money. The liquidator complied with that direction by providing an e-ticket valid on the Virgin Blue airline but the examinee did not take advantage of it to attend the adjourned examination without a warrant having been issued for his arrest.

[10] The failure of the examinee to attend the adjourned examination on 15 November 2004 is not excused by the fact that Mr Edwards had been retained to appear as Counsel, not solicitor, for the examinee at the hearing on 14 October 2004. Despite the capacity in which he was retained, Mr Edwards was under a duty to convey the effect of the Registrar's direction to the examinee. I consider that Mr Edwards discharged that duty because I accept his evidence that he advised Mr Buxton (the solicitor on the record for the examinee) of the adjourned hearing date. There is no evidence as to what, if anything, Mr Buxton told the examinee. However, the preferable inference is that he was informed of the substance of the Registrar's direction. Given the Registrar's warning about the consequences for the examinee if he failed to attend at the adjourned examination, on the inference which I prefer to draw in the absence of evidence from Mr Buxton or the examinee, the examinee acted in cavalier disregard of the Registrar's direction and warning. Those circumstances are, I consider, sufficient to disentitle the examinee to reimbursement of his return airfare after the examination on 11 February 2005.

[11] Rule 11.10(2)(b) of the Federal Court (Corporations) Rules 2000 provides that, in addition to making an order for the arrest of a person who fails to attend an examination, the Court may:

make any other orders **that the Court thinks just or necessary**.

(emphasis added)

[12] In light of the circumstances outlined at [10] above, I consider it entirely just and necessary that the examinee, on whose instructions his legal advisers presumably acted, should pay the liquidator's costs thrown away by reason of the examinee's non-attendance on 15 November 2004. I shall accordingly order that the examinee, Latimer, pay the liquidator's costs thrown away by reason of his non-attendance on 15 November 2004. Those costs are to include the costs of and incidental to the application for costs. There will be a further order that those costs be taxed in default of agreement.

## Order

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1. The respondent, Maxwell Roger Latimer, pay the applicant's costs thrown away by reason of the respondent's non-attendance at the examination fixed for 15 November 2004, including the costs of and incidental to the applicant's application for costs.
2. The costs ordered by para 1 of this order be taxed in default of agreement.

Note: Settlement and entry of orders is dealt with in O 36 of the Federal Court Rules.

Counsel for the applicant: *Mr A Bristow*

Counsel for the respondent: *Mr W P Edwards*

Solicitors for the applicant: *Charles Fice & Co*

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Solicitors for the respondent: *Buxton & Associates*

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