DISTRICT COURT OF QUEENSLAND

CITATION:	*The MCF Group Pty Ltd v Coleman & Ors* [2015] QDC 130
PARTIES:	**THE MCF GROUP PTY LTD ACN 100 683 369** **(applicant/plaintiff)** **v** **DAVID COLEMAN** **(first respondent/defendant)** **AND** **COLEMAN'S QUARRY LTD CN 349574** **(second respondent/defendant)** **AND** **FLEETCON PTY LTD ACN 167 643 389** **(third respondent/defendant)** **AND** **EURO AUCTIONS (UK) LTD ACN 153 847 066** **(fourth respondent/defendant)**
FILE NO/S:	1367/15
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 May 2015 *ex tempore*
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2015
JUDGE:	Samios DCJ
ORDER:	**1. Dismiss the applications filed 9 April 2015 and 22 April 2015.** **2. Order the plaintiff to pay the first, second and third defendant's costs of the applications to be assessed on the standard basis.**
CATCHWORDS:	PRACTICE – INJUNCTIONS AND DECLARATIONS – where the applicant/plaintiff claimed that it owned a number of excavators in the possession of the first, second, third and fourth respondent/defendant – where the applicant/plaintiff

seeks to extend an injunction prohibiting the sale of excavators in the possession of the first, second, third and fourth respondent/defendant – whether the applicant/plaintiff is the owner of the excavators – whether there is a serious issue to be tried – whether the balance of convenience favours the granting of the injunction – whether applicant/plaintiff's undertaking as to damages is sufficient

COUNSEL: Mr P Trout for the applicant/plaintiff

Mr D Marks for the first, second and third respondent/defendant

No appearance for the fourth respondent/defendant

SOLICITORS: Pattison Law for the applicant/plaintiff

McKeering Down Lawyers for the first, second and third respondent/defendant

No appearance for the fourth respondent/defendant

[1] HIS HONOUR: On 7 April 2015, the applicant filed a claim and statement of claim in this court. In it the applicant sought against the defendants damages. Although the amount varies with respect to particular defendants the effect was that the plaintiff claimed it owned a number of excavators which were either going to be sold or disposed of and not returned to the plaintiff by the various defendants. There was also a claim with respect to a utility the plaintiff claimed it owned, and likewise has not been returned by the relevant defendant.

[2] The monetary claims made in the statement of claim were within the jurisdiction of the District Court. On the 9th of April 2015, the applicant made an ex parte application for injunctions. These were granted by Judge Rackemann. He ordered that on the usual undertaking as to damages each of the respondents be restrained from dealing with or disposing with the plant described in the order. The plant was an excavator, 13 tonnes, and an excavator, 28 tonnes. That was until further order of the court.

[3] Her Honour Judge Bowskill, on 17 April 2015, extended the restraining order made by his Honour Judge Rackemann until 4pm, 28 April 2015. The matter was then set down for 28 April 2015, for a hearing of the continuation of the injunction. The matter came before his Honour Judge Dorney on 28 April 2015. Again on the usual undertaking. His Honour ordered the restraining order made by Judge Rackemann be extended to 4pm on 14 May 2015. His Honour's order also said that an application, filed 22 April 2015, be heard on 14 May 2015. Further he ordered that the matter be set down for 14 May 2015, for hearing of the continuation of the injunction. His Honour made some directions about further affidavits.

[4] The application filed on 22 April 2015 by the applicant was headed an application for possession of plant. As I understand it, it sought again to be given possession of those two particularly, excavators, and then in the alternative sought on the undertaking of the applicant not to sell, and to insure the plant – that the plant be released into the possession and custody of the applicant immediately to be stored by the applicant at its own cost until pending further hearing of the matter. Regarding the other plant and the Toyota utility being five in number, the order sought in this application was that the first, second, and third defendants disclose to the applicant the whereabouts of that plant and the Toyota utility.

[5] I have had difficulty understanding exactly what the applicant seeks. At the end of the day I understand the applicant to seek an order that the fourth respondent deliver to it the two particular excavators I have described, and that there be a restraining order made against the other defendants from dealing with or disposing with that plant. There are variations to orders sought. I have in fact three draft orders before me.

[6] On an application of this kind two issues arise. One is whether there is a serious question to be tried. The other issue is the balance of convenience. The parties are clearly in dispute about whether there was an agreement and what were the terms of that agreement. That is, whether it was agreed as I understand it that the first defendant would sell and the applicant would buy from the first defendant this plant. That is, as I understand the evidence, the first defendant and the second defendant which is a company he controls, and the third defendant, another company which he controls have their base, as I can understand it, in Ireland. The first defendant apparently on one view had had this equipment in Ireland, and he wanted to use it to make money which he could not do in Ireland because of the state of business in Ireland. The plaintiff claims to have bought the equipment and it was then transported to Australia. The affidavits are not very specific about what was agreed or not agreed, but as to who owns the equipment it seems it was used here in Australia. It seems the parties got into dispute with each other as to who owed who money, and now two of these pieces of equipment are in the yard of Euro Auctions UK Limited, the fourth defendant in these proceedings. They have not appeared today, but I take it that they are in effect saying they will abide an order of the court.

[7] Where the other equipment is no one knows. It certainly has not been deposed to, and certainly not deposed to by the first defendant. I am prepared to accept there is a serious question to be tried as to what was agreed between the parties, and whether that agreement was varied through the term of their relationship. However, while I am prepared to say there is a serious question to be tried that is subject to the fact that the evidence indicates there is doubt about payment.

[8] The plaintiff claims he has evidence exhibited to his affidavit of payment; however, the Westpac Bank document he is referring to refers to the word "pending" which suggests there is not yet an answer so I have no express evidence from the plaintiff of payment. On the other hand the three defendants that are participating in these proceedings point to documents which come from the Bank of Ireland which says that money has not been received for payment of the two invoices relating to the two machines. In addition there is a conflict in the letter from Whelan Plant Sales Limited which, on one view of it, supports the first defendant – but I will call them the defendants – that the two particular machines referred to were paid by the second defendant rather than paid for by the plaintiff.

[9] This leads me to conclude there is some doubt about the claim by the plaintiff to have paid for this equipment. There is also with respect to the utility references in the emails to the utility being registered into the name of the first defendant. That is, on the one hand the plaintiff claims the utility was the plaintiff's utility whereas the emails suggest it was being registered in the name of the first defendant. Mr Trout of counsel referred me to the email which suggests that fines were being incurred in the name of that utility, and that was the reason for its registration in the first defendant's name. Even if that was so it adds to the doubt about ownership.

[10] In addition there are emails that on one view of it suggests that Mr Michael Coleman who is the actor for the plaintiff, was referring – and other people were referring to your machines. The inference, Mr Marks of counsel, who appears for the defendants, said, is that they were referring to and acknowledging the machines belong to the defendants.

[11] When looking at the balance of convenience, though, while I have those reservations I have just mentioned, the applicant would seek to either have these machines that are in the possession of the fourth defendant come into his possession so that they could be used and make money and he would insure them while that is being done, or that they would be stored. There is a suggestion from the plaintiff's side of the bar table that two of the other machines have already found their way to Ireland and they would like to ensure something be done about the remaining machines.

[12] If that were to take place, that is, the plaintiff have possession of the machines so that they can be worked, then if they did belong to the defendants they would be reduced in their value by wear and tear. Again, if they were simply stored, again, if they did belong to the defendants they would deteriorate, in my opinion, because a trial would not come on for some time, and those defendants would not be able to use them for the benefit of earning income from those machines. The same argument might apply with respect to the plaintiff, that is, if the plaintiff is in fact the owner of these machines, by not having the use and benefit of the machines it is losing income it might otherwise make.

[13] It is a difficult exercise to deal with. That is, the exercise of this discretion. The balance of convenience is evenly balanced in the circumstances of this case. The doubt I have about the ownership evidence that has been put before me, that I have mentioned earlier, also leaves me equally in a position of equal balance. What does tip the scale, here, in the conclusion I reach is the value of the undertaking. That is, on the evidence I have before me, I conclude that the undertaking offered by the plaintiff is of doubtful value.

[14] Even the undertaking offered by Mr Michael Coleman, I conclude, is of doubtful value. That is, I doubt that his undertaking or that of the company can meet any damages that the respondents may suffer. That is because, from what I see in the material, at best he's a beneficiary. He does not appear to have any assets in his own name. I take the trust of which he is the beneficiary is a discretionary trust. It has made little profit. The business of which he may be a controller, though, has doubtful assets. And when the add-backs are put back, as demonstrated by Mr Marks of counsel, the – I cannot locate the exhibit at this stage. However, my recollection is it does not lead to a positive position. In any event, in addition, as Mr Marks of counsel pointed out, the primary trading seems to be of a horse racing venture. And when one considers all these aspects, without particulars of what the plaintiff has and what Mr Michael Coleman has in his own name, it just leaves me to lack the confidence I would want to have for the balance to tip in the plaintiff's favour.

[15] On the other hand, as I've said, because of those doubts I have about proof of ownership of the equipment and including the utility and because of the concern about the balance of convenience, in that both parties can argue they would suffer, it is the undertaking, in the end, that leads me to, in the exercise of my discretion, to dismiss both applications that are before the court. Now, that'll be dismissing the applications – just excuse me for a moment – dismiss application – applications filed - - -

[16] MR MARKS: That might be the 9th of April 2015

[17] HIS HONOUR: 9th of April 2015 and 22nd of April, was it?

[18] MR MARKS: Yes, your Honour. It's document - - -

[19] HIS HONOUR: Of 2015.

[20] HIS HONOUR: On the question of costs, I consider that in this case they should follow the event. In addition, the undertaking, to my mind, was always dubious and has not been strengthened at any stage of the proceedings. It is on that basic ground that the applications failed. I order the plaintiff to pay the first defendant, second defendant and the third defendant's costs of the applications, to be assessed on the standard basis. Yes, thank you.

[21] HIS HONOUR: All right. Well, they'll be the orders. That is, that I've dismissed the applications filed 9 April 2015 and 22nd April 2015, and I order the plaintiff to pay the first defendant, second defendant, third defendant's costs of the applications, to be assessed on the standard basis. Yes, thank you, Madam Bailiff. Adjourn the court.