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# Précis Paper

## A consideration of *Jetobee Pty Ltd (in liquidation) v Smith & Young Pty Ltd (No 3)* [2015] NSWSC 1526

Jarrod White and Ian Benson discuss this interesting case that raises a number of issues relevant to commercial law and litigation.

**Discussion Includes**

- What factual circumstances led to the claims before the Court?
- What was Jetobee seeking?
- What agreement did Smith & Young allege?
- Who has the burden of proof in respect of the existence of the agreement between the companies?
- How did section 140 of the *Evidence Act* apply in this respect?
- To what extent does *Briginshaw* still apply in litigation under the *Evidence Act*?
- On what bases did the Court conclude that the agreement had been concocted?

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## A consideration of *Jetobee Pty Ltd (in liquidation) v Smith & Young Pty Ltd (No 3)* [2015] NSWSC 1526

1. In this edition of BTV, Jarrod White (Barrister) and Ian Benson (Solicitor) discuss the New South Wales Supreme Court's (Beech-Jones J) decision in *Jetobee Pty Ltd (in liquidation) v Smith & Young Pty Ltd (No 3)* [2015] NSWSC 1526 which considered allegations that a director concocted an agreement with another company in which he was a director in order to avoid liability for debts. Mr White acted for the successful plaintiff, Jetobee Pty Ltd, which was in liquidation.

Background

2. Both the defendant-company, Smith & Young Pty Ltd, and the plaintiff-company, Jetobee Pty Ltd, were controlled by a single director. They had substantial indebtedness to the St George Bank including a loan facility ('**the facility**') Smith & Young secured by a mortgage over real property, and which was guaranteed by Jetobee. Jetobee subsequently went into liquidation in 2014. The liquidator took an assignment of the bank's debt and sought recovery of the principal and possession of the Smith & Young property used to guarantee the facility.

3. In response to the registration of a transfer of mortgage by the liquidator, the common director asserted that Smith & Young was not indebted and no amount was secured by the mortgage because he had created an agreement ('**the agreement**') which had the effect that Jetobee had assumed the debts owed by Smith & Young to the St George Bank, discharging the debt. As Beech-Jones J confirms at [27]:

> *"If such an agreement was made then Jetobee could not sue Smith & Young for recovery of the debt as it had already contractually bound itself to repay it on Smith & Young's behalf."*

4. Accordingly, Smith & Young sought a discharge of the mortgage whilst Jetobee alleged the agreement was concocted and sought a judgment for debt from Smith & Young.

5. It should be noted that Beech-Jones J did raise a concern about the nature of the claims raised by Jetobee at [21] but, as explained by his Honour, this was ultimately irrelevant:

> *"At this point I note that the wording of this demand [by the liquidator for payment of the principal] appears to involve an exercise of Jetobee's rights of subrogation as a guarantor. However, this case as pleaded seeks recovery of the "Debt" that was assigned. There is a potential conundrum with Jetobee's claim namely that, if the "Debt" owing by Smith &*

*Young to St George was discharged, how could Jetobee take an assignment of that debt and how could the mortgage secure its repayment? If that potential conundrum had been raised as an issue in these proceedings and resolved adversely to Jetobee then presumably Jetobee might have also simply sued in exercise of such rights of subrogation that it possessed, although there may scope for argument as to whether that extends to enforce the mortgage. However it is unnecessary to consider this further because, as I have stated, the sole basis raised by Smith & Young for avoiding liability is the agreement that was said to have been entered into around January 2013."*

Burden of Proof

6. An initial matter that was briefly dealt with in Beech-Jones J's judgment, was the relevant burden of proof to be met by the parties. At [6], his honour explains that:

> *"Although Smith & Young bore the onus of proof of the agreement that it asserts operates to defeat Jetobee's claim, the allegation that Mr Young concocted the documents said to prove its existence invokes s 140(2) of the Evidence Act 1995 and the principle stated in Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336 ("Briginshaw"). Notwithstanding the seriousness of the allegation and bearing in mind Briginshaw's admonitions against relying on "inexact proofs, indefinite testimony, or indirect inferences" (Briginshaw at 362 per Dixon J), I am positively satisfied that the letters and the facsimile confirmations said to support the sending of those letters to Wappetts were concocted some time after a liquidator was appointed to Jetobee and that no such agreement was entered into prior to that time. As the alleged existence of the agreement was the foundation of Smith & Young's defence, it follows that Jetobee succeeds in its claim."*

7. So the question was: who actually has to prove what and to what standard in circumstances where a defence is raised and it is then alleged that it is based on a concoction?

8. As his Honour stated, plaintiffs always have the burden of proving their case. That said, Smith & Young had the onus to prove that any prior agreement had indeed been established. The relevance of s 140 of the *Evidence Act 1995* (NSW) and the decision of the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336 arises with respect to the claim that the agreement was concocted. Both the act and *Briginshaw* provide for a shifting burden of proof which is sensitive to the gravity of the allegation that is being made:

**SECTION 140:**

***Civil proceedings: standard of proof***

*(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.*

*(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:*

*(a) the nature of the cause of action or defence, and*

*(b) the nature of the subject-matter of the proceeding, and*

*(c) the gravity of the matters alleged.*

9. Allegations of concoction are very serious and thus s 140 would require that significant evidence would be required to meet the burden.

10. It should be noted that the test in *Briginshaw* requires the judge to be *actually persuaded* that an allegation of the kind in this case is substantiated. It is an open question as to whether this same requirement is necessary under the *Evidence Act* regime: *Qantas Airways Limited v Gama* (2008) 167 FCR 537. This distinction was not a particular issue in the resolution of the case as his Honour found that the plaintiff had substantially met the burden required of it.

Strong Adverse Credit Findings

11. In addition to these evidentiary issues, an important background circumstance to understand was a very strong adverse credit finding made against the common director. The director had admitted on oath that he had lied to a bank by giving misleading statements about his financial affairs in applications for finance. As this was ultimately a case involving significant financial issues where the underlying debt was owed to a bank, this sort of admission was extremely detrimental to his credit. Moreover, and also by his own admission, he had made misleading statements about his financial position in contested family court proceedings. Misleading statements to a court are considered very seriously.

12. As a result, Beech-Jones J determined at [43] that unless the director's evidence could be corroborated by some independent source he was not inclined to accept his evidence.

13. Beyond his word, the only additional evidence provided by the defendant as to the existence of the agreement prior to Jetobee's liquidation were records of a fax that was allegedly sent to the companies' accountants instructing them to make arrangements in accordance with the agreement. The reliability of this evidence was central to the resolution of the claim in the plaintiff's favour and will be discussed below.

The Reasoning of the Court in Determining the Agreement had been Concocted

14. In his judgment, Beech-Jones J concludes that he was satisfied that the alleged agreement was concocted after the liquidator was appointed for 3 primary reasons:

    i. Firstly, there was a significant discrepancy in the documentation purportedly recording the agreement faxed to the director's accountant in that the confirmation failed to appear in the transmission log of the fax machine;
    ii. Secondly, evidence provided by the accountant was that she had received no fax relating to the agreement;
    iii. Thirdly, the subsequent conduct of the director was inconsistent with the existence of the agreement.

15. In relation to the second reason, the accountant's evidence that she had not received any fax relating to the agreement was curiously part of the defendant's evidence. The defendant had chosen not to read the contents of the affidavit in court so the plaintiff took the unusual decision of reading an affidavit that had not been prepared to assist its case. Notwithstanding obvious concerns, the plaintiff read the affidavit because the case, and more specifically the evidence of the agreement, had essentially been reduced to whether such a fax had been sent. So, to have the recipient, who is a professional person, uninterested in the outcome of the case, say under oath that they simply have no recollection of such a fax, was very significant.

16. The third reason relates to the consideration Jetobee was alleged to have gained from the arrangement. In return for assuming Smith & Young's liability for the facility, the director argued that Jetobee's indebtedness to him, in a personal capacity, would be reduced. However, no such reduction was recorded in reports he provided to the liquidator.

<u>Further unsuccessful arguments</u>

17. The plaintiff also led further arguments to substantiate the claim that the agreement was concocted but they were not relied upon. One such argument related to the commercial reasonableness of such an agreement. The defendant alleged that the deal had important tax implications for the companies, whilst the plaintiff alleged there was simply no commercial justification for the deal. His Honour found at [37] that: "the belief testified to by [the director] as to the actual or potential taxation advantages of transferring the debt in the manner he asserts he did is one that was reasonably open to a person in his position with his level of business acumen".

18. However, his Honour further stated:

> *"In the end result, however, I do not accept that he in fact had that belief because I do not accept that he committed the companies to the agreement or even adverted to this issue. However I reach that conclusion based on matters other than the supposed lack of any commercial justification for the agreement. Otherwise I note that the contention put forward by Jetobee, namely that the agreement is a concoction, has an obvious commercial justification, namely avoiding Smith & Young's liability. While clearly that is not sufficient to justify a finding that the agreement is a concoction, the existence of a motive to concoct the agreement is relevant to my assessment of that issue."*

19. In this way, the case reiterates the difficulties courts have in trying to trace the motivations of commercial behavior with particular actions often susceptible of more than possible motivation.

Implications

20. *Jetobee* is unlikely to generate much precedential value. However, it is a useful case for practitioners and business people in underlining the importance that strong credit findings can have in disputes and also in reinforcing the need for in depth preparation in making significant claims such as concoction.

**BIOGRAPHY**

Jarrod White

Jarrod White was admitted as a solicitor in 1997 being called to the NSW Bar in 2002. He is entitled to practice in all Australian jurisdictions. Before being called to the Bar, he was an associate to the Hon Justice Beaumont in the Federal Court of Australia. He frequently presents on banking and insolvency issues and has published the following article: "Silence is Golden? The significance of selective answers to police questioning in New South Wales" (1998) 72 Australian Law Journal 539.

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Cases

*Briginshaw v Briginshaw* (1938) 60 CLR 336
*Qantas Airways Limited v Gama* (2008) 167 FCR 537

Legislation

*Evidence Act 1995* (NSW)