

HIGH COURT OF AUSTRALIA

GLEESON CJ
HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

COLIN ANTHONY MEAD

APPELLANT

AND

LUCY GUITAR MEAD

RESPONDENT

Mead v Mead [2007] HCA 25
22 May 2007
S123/2007

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Family Court of Australia made on 25 August 2006.*
3. *Remit the matter to a differently constituted Full Court of the Family Court of Australia for hearing and determination in accordance with the reasons of this Court.*
4. *The costs of the appeal to the Full Court, including the costs of the proceedings in that Court up to and including its order of 25 August 2006, are reserved to the Full Court that hears and determines the appeal to that Court.*

On appeal from the Family Court of Australia

Representation

D J Fagan SC with V V Bedrossian for the appellant (instructed by Etheringtons Solicitors)

The respondent appeared in person

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

1 GLEESON CJ. This is an appeal from a decision of the Full Court of the Family Court of Australia which, by majority, (Holden and Coleman JJ, May J dissenting), allowed an appeal from Cohen J in relation to proceedings for contempt brought by the appellant against the respondent. Although the respondent was represented by senior and junior counsel at the application for special leave to appeal to this Court, she is without legal representation in the present appeal.

2 The proceedings for contempt arose out of orders made by Judicial Registrar Johnston on 30 August 1999, by Rose J on 7 September 1999 and by Cohen J on 2 November 2001. For present purposes the operative order was that of Rose J who, on 7 September 1999, ordered:

"That upon the wife giving the usual undertaking in relation to damages, I continue the orders made 30 August 1999 until further order."

The person referred to in that order as "the wife" was the present respondent. The orders made on 30 August 1999 were made by Judicial Registrar Johnston on the application of the present respondent and they included the following order:

"That pending further order of the Court, the Husband and the Wife be and are hereby restrained from selling, transferring, encumbering, alienating or otherwise dealing with any real property in which they currently have an interest."

There were two acts of the respondent that were said to have been in contravention of the order of Rose J. The first was that on or about 20 December 2001 she signed as mortgagor a mortgage over a property in which she had an interest, being a property known as the Quoin Island Resort in Queensland. The second was that on or about 14 February 2003 she signed as transferor a transfer of property in which she had an interest, being certain property at Katoomba in New South Wales.

3 The husband made an application to have the respondent dealt with for contempt of court pursuant to s 112AP of the *Family Law Act* 1975 (Cth). In accordance with the usual procedure, the issue of alleged contempt was dealt with separately from the issue of penalty. At a hearing before Cohen J in late 2004, the husband, the present appellant, adduced evidence to demonstrate that the wife, the present respondent, was in contempt of court, the alleged contempt being contravention of the order made by Rose J, on 7 September 1999.

4 One of the issues that arose, and the issue that is relevant to the present appeal, concerned the respondent's awareness of the order of Rose J. The

question was identified by Cohen J, in his reasons for judgment, by reference to a decision of the Family Court¹ as follows:

"It must be taken now that the established requirement is not that there be service of a sealed copy of the court order, but that the court must be satisfied beyond reasonable doubt that the person knew of the contents of the order in so far as they relate to the alleged contempt and knew that the order had been made."

It appears from the reasons for judgment of the Full Court that there was no dispute in the Full Court that this was the test to be applied. On that issue, Cohen J made the following finding:

"In the matter before me the order allegedly breached was made on the application of the respondent. An identical order had been made ex parte by Judicial Registrar Johnston on 30 August 1999. It was made in the terms of the interlocutory application which had been filed on behalf of the wife. On the return day, 7 September 1999, Justice Rose, after a defended application, continued the orders made by the Judicial Registrar. It is inconceivable in the absence of any suggestion to that effect that the applications made to the Judicial Registrar and to Justice Rose were made without the wife's informed instructions to make them or that she did not know the orders she had sought were made in the form she had sought and therefore that she did not know the contents and meaning of Justice Rose's order."

In her dissenting judgment in the Full Court, May J concluded that there was ample evidence before Cohen J to support that finding and that no error had been shown in the reasons of Cohen J given for reaching that finding.

5

This Court does not have before it the evidence that was before Cohen J and the Full Court. It appears from some of the things said in the reasons for judgment in the Full Court, that in addition to the matters to which Cohen J referred in his reasons, there was evidence to show that, between the time of the making of Rose J's order and the dealings in property in question, there had been further proceedings between the appellant and the respondent relating to the question of sales of property and variation of the order made by Rose J and, in addition, that at some time between the first relevant dealing and the second relevant dealing the respondent had personally examined the whole of the court file. We were informed that this appeared from an affidavit, sworn by the respondent in other proceedings, that was tendered in evidence before Cohen J.

1 *In the Marriage of P & C Georgopoulos* (1982) 8 Fam LR 807 at 809.

3.

6 Having found contempt, Cohen J, in separate proceedings, dealt with the question of penalty and imposed penalties that subjected the respondent to terms of imprisonment. Those orders apparently were stayed and remain stayed pending the outcome of the appellate proceedings. We are not concerned with the issue of penalty. It was the subject of an appeal to the Full Court of the Family Court, but in the events that occurred it was unnecessary for the Full Court to deal with that matter. It appears that, in the course of the proceedings relating to penalty, the present respondent gave evidence but we are not aware of what she said.

7 The majority in the Full Court of the Family Court allowed the appeal against the finding of Cohen J that there had been contempt. The majority attributed to Cohen J legal error in the way in which he considered the question whether it had been shown beyond reasonable doubt that the respondent knew of the order of Rose J.

8 In this Court, the appellant submits that the basis upon which the majority in the Full Court allowed the appeal was affected by error of law. For the reasons that follow, this submission should be accepted.

9 The key paragraphs in the reasons of the Full Court are pars 68 to 87. It is unnecessary to set them out. It is sufficient for present purposes to say that the majority in the Full Court took the view that, because communications between the present respondent and her solicitors were the subject of legal professional privilege, it was not open to the primary judge to draw an inference that she knew the terms and meaning of Rose J's order in circumstances where the evidence did not show either that she was in court when the order was made or that she had been served with a sealed copy of the order. Since the most likely source of the respondent's knowledge of the order was her solicitor, the majority appeared to think that drawing an inference that she knew of the order would in some way be inconsistent with legal professional privilege. There is no such inconsistency.

10 No question of legal professional privilege arose in the proceedings before Cohen J. Neither the respondent nor her solicitor gave evidence, nor was there any attempt on the part of the appellant to adduce any evidence about communications between the respondent and her solicitor. The rule relating to legal professional privilege does not prevent the drawing, from events and circumstances, of inferences about the knowledge of a party, even if the probable source of such knowledge is a privileged communication. It is a rule that precludes the adducing of evidence in certain circumstances, but it is a rule that had no bearing on the present case.

11 If, as Cohen J and May J concluded, the facts and circumstances of the case supported, indeed compelled, an inference that the respondent knew of, and understood the meaning of, the order made by Rose J, then the consideration that

neither she nor her solicitor could have been obliged to reveal communications that passed between the two of them did not stand in the way of acting on the basis of such an inference.

12 The circumstances that were regarded by Cohen J and May J as relevant included the following. The order made by Rose J was made on the application of the respondent through her solicitor. The nature of the order was not difficult to comprehend. The evidence indicated that the parties to the proceedings in the Family Court had extensive property interests. The order of Rose J was a general freezing order that prevented both parties from alienating any of their property interests until further order of the Court. Following the making of Rose J's order, there were further proceedings between the parties relating to variations of those orders and, as was earlier mentioned, there was an occasion on which the respondent inspected the court file.

13 The majority in the Full Court also criticised that part of the reasons of Cohen J in which he said:

"It is inconceivable in the absence of any suggestion to that effect that the applications made to the Judicial Registrar and to Justice Rose were made without the wife's informed instructions to make them ..."

There was argument in the Full Court based on decisions such as *Weissensteiner v The Queen* (1998) 178 CLR 217 as to the relevance in criminal proceedings of the circumstance that an accused person has not given evidence. In the present case all that Cohen J did was to point to the incontrovertible fact that he was dealing with the question of inferences to be drawn from the events and circumstances of the case in the absence of any countervailing evidence that might have been given by the respondent or her solicitor. It was a fact he could hardly have ignored. He simply pointed to the fact that the evidence upon which he had to decide the case was that adduced by the present appellant and he then asked himself legitimately what was the inference to be drawn in that state of affairs.

14 Because the majority in the Full Court of the Family Court erroneously considered that the law relating to legal professional privilege was an impediment to the drawing by Cohen J of the inference that he drew, and by implication concluded that the law similarly precluded the Full Court from drawing any such influence, the parties to the appeal to the Full Court have not had a proper consideration of the first of the grounds of appeal to the Full Court, which was that Cohen J erred in concluding as a fact that the respondent was aware of the terms of the orders made by Rose J on 7 September 1999 and that the order had been made.

15 This Court does not have before it the evidence necessary to enable it to reach a conclusion on that first ground of appeal. We are in a position to conclude that the Full Court erred in law in its approach to its consideration of

5.

the decision of Cohen J, but it remains for the Full Court to deal with the first ground of appeal upon proper principles consistently with the reasons of this Court in this appeal.

16 Upon a further hearing by a differently constituted Full Court of the Family Court it will be open to the parties to canvass the whole of the evidence that was before Cohen J and to do that in the light of this Court's identification of the errors made by the majority of the Full Court in the judgment which gives rise to this appeal.

17 I propose that this Court should make the following orders:

1. Appeal allowed with costs.
2. Set aside the orders of the Full Court of the Family Court of Australia made on 25 August 2006.
3. Remit the matter to a differently constituted Full Court of the Family Court of Australia for hearing and determination in accordance with the reasons of this Court.
4. The costs of the appeal to the Full Court, including the costs of the proceedings in that Court up to and including its order of 25 August 2006, are reserved to the Full Court that hears and determines the appeal to that Court.

HAYNE J: I agree.

CALLINAN J: I agree.

HEYDON J: I agree.

CRENNAN J: I agree.

GLEESON CJ: The orders of the Court will be as I have proposed.