

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
PRACTICE COURT

Not Restricted

No. SCI 2009 9964
List C

PANACHE GLOBAL HOLDINGS PTY LTD (ACN 110 933 858)

Plaintiff

v

E-FULFILLMENT.COM PTY LTD (ACN 077 709 687)

First Defendant

and

GAVAN STEWART

Second Defendant

and

BOUTIQUE MOTORS PTY LTD (ACN 134 546 491)

Third Defendant

JUDGE: HABERSBERGER J
WHERE HELD: MELBOURNE
DATE OF HEARING: 16 NOVEMBER 2009
DATE REASONS PUBLISHED: 16 APRIL 2010
CASE MAY BE CITED AS: PANACHE GLOBAL HOLDINGS PTY LTD v E-FULFILLMENT.COM PTY LTD
MEDIUM NEUTRAL CITATION: [2010] VSC 137

PRACTICE AND PROCEDURE – Seizure of valuable motor vehicle – Purportedly under security interest – No such document produced – Motor vehicle said to be sold interstate – Whether order should be made requiring delivery up of the motor vehicle – Alternative order for securing amount of money representing value of the motor vehicle.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J. Manetta	Mills Oakley Lawyers
For the First and Second Defendants	Mr D.F. Hyde	Peter Zablud & Co

HIS HONOUR:

1 Part of the order I made on 16 November 2009 was that:

1. By 4 pm on Monday 23 November 2009:
 - (a) the first defendant and second defendant shall cause the Bentley motor vehicle model GTC, registration number VGT 444, Vin SCBDE23W98CO57227 and engine number BWR017480 (the Bentley) to be delivered into the custody of the plaintiff by delivering it to Lance Dixon Prestige Bentley, 565 Doncaster Road, Doncaster, Victoria; or, if those defendants so elect:
 - (b) the first defendant shall in the alternative pay into an interest bearing bank account in the joint names of and jointly administered by the solicitors for the plaintiff (Mills Oakley) and the solicitors for the first and second defendant (Peter Zablud & Co) the sum of \$260,000 to be held in that account, along with any interest accruing thereon, until the hearing and determination of this proceeding or further order.
2. If delivery of the Bentley is made into the custody of the plaintiff pursuant to paragraph 1(a) of this order, the plaintiff shall:
 - (a) not dispose of the Bentley;
 - (b) ensure that the Bentley is comprehensively insured; and
 - (c) maintain the Bentley in good working order and condition (fair wear and tear excepted),

until the hearing and determination of this proceeding or further order.

2 At the conclusion of the hearing in the Practice Court on 16 November 2009 I indicated to the parties that, if they wished, I would give written reasons for making the above order. Subsequently, the solicitors for the plaintiff made such a request. Accordingly, what follows are my reasons for making the order in question.

3 On 6 November 2009 the plaintiff, Panache Global Holdings Pty Ltd (“Panache”), issued an originating motion and summons seeking:

- (a) an order restraining the First Defendant from taking any further steps in reliance on its purported loan document and charge, both dated 4 September 2009; and

- (b) an order that the First Defendant and the Second Defendant deliver up the vehicle seized on 4 November 2009, being a [the] Bentley ... to the plaintiff forthwith.

4 By an affidavit affirmed on 8 November 2009, Richard Rubin, a director and sole shareholder of Panache, the trustee of a trust in favour of Mr Rubin's family, set out the background to the dispute. Panache is involved in three businesses. It and the first defendant, E-fulfillment.Com Pty Ltd ("E-fulfillment"), each hold 47.5% of the issued shares in the principal operating company for two of those businesses. E-fulfillment is a company controlled by the second defendant, Mr Gavan Stewart. Proceedings had been commenced by E-fulfillment against Panache and Mr Rubin alleging that they had defrauded Mr Stewart or E-fulfillment of about \$6 million. Panache and Mr Rubin had commenced another proceeding against E-fulfillment and Mr Stewart (among others) alleging wrongful acquisition and use of information from their computer records.

5 The third business is a car dealership, specialising in exotic vehicles. It is carried on by a company, Boutique Motors Pty Ltd ("Boutique"). The issued shares in Boutique are all owned by Triple Auto Group Pty Ltd. The shares in that company are owned by Panache and E-fulfillment in equal proportions. Mr Rubin and Mr Stewart were two of the four directors of Boutique.

6 According to Mr Rubin, when Boutique was first set up Panache and E-fulfillment both made initial working capital contributions of around \$300,000. Panache made its contribution in cash. E-fulfillment bought cars for trading stock and transferred them to Boutique in lieu of cash. Subsequently Panache has lent over \$2 million to Boutique. Mr Rubin deposed that E-fulfillment had contributed only a further \$150,000 and that its loan account with Boutique was about \$401,000.

7 By a fixed and floating charge which was registered on 3 August 2009, Boutique charged all of its assets including the Bentley in favour of Panache.

8 On 4 November 2009 the Bentley was seized from outside the Boutique office/showroom in South Melbourne by two men, one of whom identified himself as John Khoury. This followed a telephone call from a person calling himself Mick Gatto to Mr Rubin some days earlier when Mr Gatto said that he and Mr Rubin needed to meet to sort things out between Mr Stewart and Mr Rubin. Mr Rubin did not meet Mr Gatto.

9 It is not necessary to refer in detail to the circumstances in which Mr Khoury and his colleague purportedly “repossessed” the Bentley by having it driven away on the back of a tow truck. Although the police were called they told Mr Rubin that it was a civil matter after they were shown some documents by Mr Khoury. Mr Rubin had previously been told by Mr Khoury that he wanted Mr Rubin to meet Mr Stewart to sort things out. Lawyers were not to be involved. Mr Rubin said that Mr Stewart later arrived at the premises but he said nothing to Mr Rubin, just stared at him. Another deponent observed Mr Gatto arrive at one stage.

10 The documents produced by Mr Khoury included the following. There was a Loan Agreement between E-fulfillment and Boutique dated 4 September 2009. It purported to record that E-fulfillment had lent Boutique the sum of \$550,000 for 12 months with interest at 1.5% per month payable monthly in arrears. There was a Deed of Charge dated 4 September 2009 whereby Boutique charged in favour of E-fulfillment a Ferrari and the Bentley and “all other property” by way of security for the Loan Agreement. These documents had apparently been executed by Mr Stewart alone on behalf of Boutique and E-fulfillment. There was also an extract from the VicRoads Vehicles Securities Register showing that E-fulfillment’s interest in the Bentley and the Ferrari had been registered on 4 September 2009.

11 On 9 November 2009 I adjourned the matter to the following day. Apart from an interim injunction restraining E-fulfillment and Mr Stewart from taking any steps to enforce the Loan Agreement and Deed of Charge both dated 4 September 2009 between E-fulfillment and Boutique I ordered that:

1. By or before 10 am on 10 November 2009, the second defendant file and serve an affidavit.
 - (a) detailing all transactions entered into by the first and or second defendant which they believe to have created or to have purported to create any proprietary or security interest in the Bentley motor vehicle model GTC, registration number VGT 444, Vin SCBDE23W98CO57227 and engine number BWR017480 (the Bentley), any other motor vehicle or any other property the subject of the documents reproduced as exhibit RR-2 to the affidavit of Richard Harold Rubin affirmed 8 November 2009;
 - (b) exhibiting all documentation relating to the transactions referred to in sub paragraph (a) above including but not limited to any notices of default and or intention to enforce, and any documents evidencing payment of the loan of \$550,000 referred to in exhibit RR-2 to the affidavit of Richard Harold Rubin affirmed 8 November 2009; and
 - (c) stating to the best of his knowledge and belief why the Bentley was seized on 4 November 2009 and what was done with it after its seizure including but not limited to who removed it; where it was taken; and where and in whose possession and in whose control it is.

12 In his affidavit sworn on 10 November 2009, Mr Stewart explained the basis of his claim that Mr Rubin had defrauded him out of approximately \$6 million invested in the two companies involved in the other two businesses.

13 Mr Stewart also deposed that at Mr Rubin's suggestion at about the time the business of Boutique was established, he transferred the registration of three prestige vehicles, a Ferrari, an Aston Martin and a VE Commodore, from E-fulfillment to Boutique, in order to make substantial savings in insurance for these vehicles. In about August 2009 he arranged for the registration to be transferred back to E-fulfillment because of his concerns about Mr Rubin's conduct.

14 Mr Stewart deposed that later in August 2009 he became aware that Mr Rubin was attempting to sell the Ferrari into the wholesale market, presumably on the basis that he believed it was still registered in Boutique's name. Mr Stewart therefore hid the three vehicles.

15 In early September 2009, Mr Stewart was referred to State Securities Pty Ltd (“State Securities”) to assist him with his problems with Mr Rubin. At a meeting at the offices of State Securities on 4 September 2009 he met two managers named Tom and Paul, its solicitor Mario Merlo and Mr Khoury. Mr Stewart said that he explained his predicament and that he was told that he would need to “secure” his ownership of the vehicles. Documents were prepared by Mr Merlo which Mr Stewart executed later that day. He said that he did not read the documents in detail at the time as he was very concerned to move quickly.

16 Mr Stewart said that while E-fulfillment had not made a specific loan of \$550,000 to Boutique in a single transaction, it had advanced a total of approximately \$619,000 between 17 December 2008 and 12 January 2009 to enable Boutique to meet its ordinary operating expenses.

17 Documents produced by Mr Stewart which he said he had only just obtained from State Securities included the following. There was a Loan Agreement between State Securities and E-fulfillment dated 4 September 2009 relating to a loan amount referred to as a “\$600,000 Line of Credit” upon the security of a Charge Agreement in favour of State Securities. The commencement date was said to be 4 September 2009. There was also a Deed of Charge dated 4 September 2009 whereby E-fulfillment and Mr Stewart charged in favour of State Securities the Ferrari, the Aston Martin and the VE Commodore and “all other property” by way of security for the \$600,000 Line of Credit.

18 Mr Stewart deposed that:

- (a) I believe that the Bentley was seized by State Securities because they had a legal right to do so by the security interests created by the documents I signed;
- (b) I believe that the Bentley was taken interstate by officers of State Securities;
- (c) I believe that the Bentley was delivered to a motor car wholesaler in Queensland.

Mr Stewart said that he did “not have possession of or power over the Bentley”. However, Mr Stewart also said in his affidavit that:

It transpires that the arrangements I believed were completed by State Securities had not in fact been completed. These arrangements were those which I believed gave State Securities a security interest or charge over the Bentley.

- 19 Panache put into evidence VicRoads records which revealed that on 5 November 2009 Boutique’s registration of the Bentley was cancelled and registration was transferred to a company with a postcode address of 3067 (Abbotsford). VicRoads would not give the name of the company for privacy reasons, but did indicate that it was neither E-fulfillment nor State Securities. The records also revealed that on the same day a South Australian company, Capital & Equity Group Pty Ltd (“Capital & Equity”), registered a security interest over the Bentley.
- 20 On 10 November 2009 I made a number of orders including an order restraining E-fulfillment and Mr Stewart from taking any steps to enforce the Loan Agreement and Deed of Charge between E-fulfillment and Boutique both dated 4 September 2009, and from causing Mick Gatto, John Khoury, State Securities, Capital & Equity or any servant or agent of them, or any other person acting on instructions from any of them, to have any dealings whatever with Panache or Mr Rubin. I also ordered that Mr Stewart file another affidavit by 4 pm on 12 September 2009:
- (a) Detailing what amount or amounts were advanced, and when, under the line of credit identified in exhibit GPS-9 to the affidavit of Gavan Stewart sworn on 10 November 2009;
 - (b) Detailing what amount or amounts were due and owing pursuant to that line of credit as at 4 November 2009; and
 - (c) Exhibiting all documentation evidencing the matters detailed pursuant to paragraphs (a) and (b) above, including but not limited to any documents evidencing advances made under the line of credit and any notices of default and/or intention to enforce.

21 In his further affidavit sworn on 12 September 2009 Mr Stewart stated that no amounts had been advanced under the \$600,000 Line of Credit. He said that the \$600,000 Line of Credit was entered into to provide registered security charges over the Ferrari, the Aston Martin and the VE Commodore to prevent anybody stealing them or attempting to sell them. It had nothing to do with the Bentley.

22 Mr Stewart further deposed that what was intended was that the benefit of the \$550,000 Loan Agreement between E-fulfillment and Boutique would be assigned by E-fulfillment to State Securities. He said that he believed this would allow State Securities to exercise rights with respect to the money advanced to Boutique. He said that he had since been advised that State Securities had neglected to prepare the required assignment documentation.

23 The matter came back before me because in the light of what Mr Stewart had said in his further affidavit, Panache sought an order that E-fulfillment and Mr Stewart deliver the Bentley into the custody of Panache, or pay an amount in cash representing the value of the Bentley. Mr Manetta of counsel, who appeared on behalf of Panache, submitted that I should infer and act on the basis that the Bentley was still in Mr Stewart's control. He pointed out that Mr Stewart's first explanation that the Bentley was seized pursuant to the charge given in respect of the \$600,000 Line of Credit had been abandoned. Instead, it was now said by Mr Stewart that what had been intended was that the debt of \$550,000 and the associated charge would be assigned by E-fulfillment to State Securities so that it would have the power to seize the Bentley. Mr Manetta then asked why E-fulfillment would assign this debt to State Securities when, on Mr Stewart's own evidence, nothing was owed to State Securities? It would be a gift because State Securities would be able to sell the Bentley and keep the proceeds in reduction of the \$550,000 debt. Mr Manetta submitted that Mr Stewart's evidence was simply not credible because rather than protecting his assets from Mr Rubin, he was giving them away. The inescapable inference, counsel submitted, was that State Securities had seized the Bentley on

behalf of E-fulfillment or Mr Stewart and would account to it or him for the proceeds (less no doubt a hefty fee).

24 Mr Hyde of counsel, who appeared for the first and second defendants, said that in addition to what Mr Stewart had said in his further affidavit, he had confirmed his instructions that morning that he did not control the Bentley and would not be in a position to deliver it up. Mr Hyde submitted that I should not act on the basis of the plaintiff's submission which really was that Mr Stewart should not be believed on his oath.

25 I formed the view that there were a number of unanswered questions about what had happened to the Bentley and why it had happened. Further, even on Mr Stewart's own account it appeared that the seizure may have had no legal basis because the assignment to State Securities had not been executed. On an interlocutory application such as this, it was not possible to resolve all of the uncertainties, let alone the merits of the broader dispute between Panache and E-fulfillment.

26 Although queries had been raised about the validity of Panache's charge, prima facie it had the prior security interest over the Bentley. Possession had changed as a result of E-fulfillment's unusual dealings with State Securities, which had led to the Bentley being seized. In my opinion, it was appropriate in these circumstances that the status quo existing prior to the seizure be restored as far as possible pending the hearing and determination of this proceeding. If no order such as Panache sought was made, it ran the risk that even if successful at trial its security interest over the Bentley would have rendered nugatory and it would be unable to recover the lost value of the Bentley. On the other hand, if such an order was made and it turned out to have been unjustified then E-fulfillment or Mr Stewart would have been forced to deliver up control of the Bentley for a period or been put to the expense of securing a sum of money and possibly losing some interest. They would be able to look to Panache's undertaking as to damages to cover any losses.

27 I considered that it was appropriate to include an order for the delivery up of the Bentley even though Mr Stewart had sworn that he did not have control of it. By including the alternative of securing a sum of money, there was no unfairness in ordering E-fulfillment and Mr Stewart to perform an act when they were not in a position to comply.

28 This left the question of what sum of money should be included in the order. Panache relied on an affidavit of David Edwin Jackson affirmed in Sydney on 13 November 2009. Mr Jackson was the general manager of Bentley Sydney, a Bentley motor car dealership. He said that he had been associated with Bentley motor vehicles since 2002 and with prestige brand motor cars in the United Kingdom between 1993 and 1997 and in Australia since then. Mr Jackson deposed that Bentley Sydney had sold the Bentley to Mr Rubin in about April 2009. He described various unique features of this new car. He said that he believed that by early November 2009 it had only approximately 4,000 kilometres on the odometer. Mr Jackson said that he estimated the retail price of the Bentley as at November 2009 to be \$390,000 including GST and transfer fees, with a wholesale value of approximately \$330,000 including GST.

29 Mr Manetta therefore sought an order that \$390,000 be ordered to be secured. Mr Hyde submitted that as this involved wholesalers, the luxury car tax of over \$100,000 which had not yet been paid, needed to be taken off Mr Jackson's figure. He worked on a figure of \$200,000 which he submitted should be halved because the Bentley was owned by Boutique which was half owned by Panache and half by E-fulfillment. In response, Mr Manetta agreed that about \$100,000 for the luxury car tax and about \$30,000 for GST should be deducted, leaving a figure of \$260,000.

30 I decided to include the amount of \$260,000 in the order. This seemed to be a rough but fair estimate of what the Bentley was worth to Panache. I rejected the submission that this amount should be halved. Whilst it was true that Boutique was half owned by each of Panache and E-fulfillment, Panache's right to bring this

proceeding was based on the charge over the assets of Boutique, including the Bentley, securing its \$2 million loan to Boutique. Either it was entitled to make the claim for the full value of the Bentley or it was not. E-fulfillment's half ownership of Boutique was not relevant to that claim.

31 Accordingly, I made the orders referred to in the first paragraph of these reasons.
