

FAMILY COURT OF AUSTRALIA

ILIOPOULOS & ILIOPOULOS

[2010] FamCA <Number>

Evidence Act 1995 (Cth)
Family Law Act 1975 (Cth)

Parker v Comptroller-General of Customs (2007) 243 ALR 574

APPLICANT: EMMA ILIOPOULOS

RESPONDENT: STEVE ILIOPOULOS

2ND RESPONDENT: PETER ILIOPOULOS

3RD RESPONDENT: JIMMY ILIOPOULOS

FILE NUMBER: MLC 8731 of 2009

DATE DELIVERED: 13 DECEMBER 2010

PLACE DELIVERED: Melbourne

PLACE HEARD: Melbourne

JUDGMENT OF: THE HONOURABLE
JUSTICE CRONIN

HEARING DATE: 13 DECEMBER 2010

REPRESENTATION

COUNSEL FOR THE APPLICANT: MR BURNSIDE QC
WITH MR
THOMPSON

SOLICITOR FOR THE APPLICANT:	HALLETT WEST
COUNSEL FOR THE RESPONDENT:	MR NORTH SC WITH MR WOOD
SOLICITOR FOR THE RESPONDENT:	BELLELI KING & ASSOC
COUNSEL FOR THE 2ND AND 3RD RESPONDENTS:	MR DENTON SC WITH MS DJOHAN
SOLICITORS FOR THE RESPONDENTS:	DAVIES MOLONEY; NATALIE ROMPOTIS
COUNSEL FOR MS ASLANDIS:	MR CAMPBELL- HORSFALL
COUNSEL FOR BELLELI KING & ASSOCIATES:	MR MANLEY

ORDERS

- (1) That pursuant to s 138 of the *Evidence Act 1995 (Cth)*, the affidavits of the witnesses Park and Hallett are admitted into evidence for the purposes of this interlocutory hearing.

IT IS NOTED that publication of this judgment under the pseudonym <pseudonym> is approved pursuant to s 121(9)(g) of the *Family Law Act 1975 (Cth)*.

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: MLC 8731 of 2009

EMMA ILIOPOULOS

Applicant

And

STEVE ILIOPOULOS

Respondent

And

PETER ILIOPOULOS

Respondent

And

JIMMY ILIOPOULOS

Respondent

REASONS FOR JUDGMENT

1. These proceedings involve not only the husband and wife but also two of their children, a variety of entities and some entity shareholders. All agreed that the financial proceedings are complex.
2. For the purposes of the wife's interlocutory application for litigation funding orders, she desired to rely upon an affidavits of her forensic accountant and her solicitor. Objection was taken by the husband to some of the evidence in those affidavits because the information upon which each witness was commenting was illegally obtained.
3. The wife sought a ruling under s 138 *Evidence Act 1995 (Cth)* that the evidence should be admitted notwithstanding the illegality.

4. On 13 December 2010, after hearing submissions, I ruled the evidence was admissible and said I would later give reasons. These are those reasons.
5. The facts giving rise to the need for the order are not controversial.
6. In early 2010, the parties' then 16 year old daughter was at an apartment used by her father and invited her mother who was then separated from her father, to call in and see her. The wife noticed suitcases and was told by the daughter that they belonged to an employee of the business which is at the very centre of the dispute between all of the parties.
7. The wife's evidence was as follows:

Concerned to gain information for these proceedings I opened the suitcases and found...
8. The wife then set out in some detail that she observed personal papers of the employee, a tape recorder and papers relating to an accounting firm. The wife took copies of the papers and took "possession" of the tape recorder.
9. The wife then asked her 16 year old daughter to make copies of "any files on the office computer" for her. The daughter subsequently copied "certain files" onto a USB stick which was then given to the wife's accountant. The information on the USB stick then gave rise to the evidence of the accountant and the solicitor.
10. The accountant's evidence was that the USB stick contained over 900 documents. They were described as an "incomplete picture" of the structure and financial position of the business enterprise between 2008 and 2009.
11. The solicitor's evidence refers to the same sort of information.

12. The husband's general response to this material was contained in his affidavit filed on the morning of the hearing. He said that he was not the author of the documents nor was any document prepared at his request, direction or instruction. He went on to say that no such document was ever in his possession or power nor did he know who made the documents. He said that none of the matters in the documents were ratified or confirmed by him.
13. The wife's case is that the husband is the owner of the business but had divested himself of the interests to defeat her claim. The husband's case is that he and the wife separated many years ago and in the intervening years, a variety of transactions have occurred which establish that he has no interest in the business.
14. Without the business interests belonging to the husband, there is only a limited equity in the former matrimonial home to divide.
15. Thus, the information obtained by the wife might be of some significance in establishing the position contrary to that put by of the husband.
16. There was no dispute that the parties' 16 year old daughter was a willing participant in the taking of what must now be seen as a very large amount of information.
17. Should the evidence be admitted?
18. The relevant provision governing the discretion to admit this sort of evidence is s 138 of the *Evidence Act 1995*. It reads:
 - (1) Evidence that was obtained:
 - (a) improperly or in contravention of an Australian law;
or
 - (b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

...

- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
 - (a) the probative value of the evidence; and
 - (b) the importance of the evidence in the proceeding; and
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
 - (d) the gravity of the impropriety or contravention; and
 - (e) whether the impropriety or contravention was deliberate or reckless; and
 - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
 - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
 - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

The starting point is that because the wife concedes the evidence was improperly obtained, it is not to be admitted. That concession overcomes the onus on the husband to prove the illegality. The onus then reverts to

the wife to establish that the desirability of admitting the evidence outweighs the undesirability of admitting evidence.

19. The matters for consideration by the Court are not limited to those set out in s 138(3). That provision however gives a clear guide as to the basis for the exercise of the judicial discretion.
20. Senior Counsel for the husband strongly argued that by admitting the evidence, the Court was turning a blind eye to an appalling situation in which a parent encouraged a child to commit a crime thereby potentially damaging the relationship with the other parent.
21. Senior Counsel for the wife referred to the impecunious position of the wife and sought that I infer that the 16 year old child would be conscious of that.
22. It is a serious concern to this Court when parents act inappropriately to damage the relationship of their children with the other parent. In this case however, I consider it not that simple. The evidence sought to be admitted related to 900 documents. I conclude that it is a large amount of information. I do not know whether there was a specific targeted purpose in the mother's mind or that of the child but having regard to what the wife said about the suitcases, I have inferred that this was very much a targeted operation. That must have meant that the teenager was not only a willing participant knowing the actions might offend her father but also willing to seek out information that she discerned would be helpful to her mother. That must be seen as a factor that would cause a court to refuse to admit the evidence.
23. One reason to refuse to admit tainted or illegally obtained evidence is because it is contrary to the public interest to allow litigious matters to be conducted by a vigilante or improper method. However, if that same

evidence can be obtained properly for admission at a trial, the public interest consideration might be seen as less significant. In this case, the wife complained that the husband had refused to comply with disclosure obligations but the husband countered that with an assertion that he could not obtain access to the documents because they were not within his possession or power.

24. What enables me to be less concerned in this case about the public interest is that I have previously made orders joining the various entities; thus, this controversial evidence may be available anyway. That is a basis to admit the evidence.
25. Senior Counsel for the husband urged me not to adopt a course of turning a blind eye just because the joined parties would have to disgorge documents. He said the wife gained nothing by that. In this case and in respect of the public interest point, I do not consider it a strong argument. The evil that should be condemned would have been overcome anyway by the proper use of the judicial process presupposing the documents now in the possession of the wife would have been so disgorged. The documents would therefore be admissible by another method.
26. It is this last point that the wife argues justifies her actions. She says that the husband set up and ran the business which is a multi-million dollar enterprise but now denies any connection with it. The probative value of the evidence cannot be known until it is seen as establishing that the husband took steps to defeat the claim of the wife. Some of the documents which I was asked to read would appear on their face to be part of an elaborate conspiracy against the wife. Alternatively, as Senior Counsel for the husband suggested, it might be a “stuff-up” on the part of whoever completed the ASIC forms.

27. Another document showed the corporate structure with the husband as the central controlling figure but Senior Counsel for the husband pointed to the husband's sworn evidence that he knew nothing about the document and was not its author.
28. To determine the probative value of the evidence at an interlocutory stage of the proceedings is not much short of crystal-ball gazing. To have any probative value, I would have to consider ss 55 and 56 of the *Evidence Act*. On the wife's position which is denied by the husband, it would be impossible to make any findings without testing the evidence. In this case however, I consider its probative value to be important only to the extent that it may lead to a trail of inquiry.
29. The tainted evidence suggests the VikingGroup had somehow acquired the interests of a company known as Perth Freightliners which had a very large annual turnover and significant capital value. The official company record shows no such ownership. There may be a plausible explanation for all of that which may not be apparent from disgorged records or public record documents.
30. The same two documents that is, the tainted document and the one produced by the husband, prove or refute, depending on which is accepted, that the business owes the husband millions of dollars. It is these conflicts that make me find that it is important evidence. That importance is a basis to admit the evidence.
31. On the question of the gravity of the impropriety, Senior Counsel for the wife urged me to find that this was at the lower end of the scale. That in turn depends upon who owns the documents. The wife urges the Court to find that this was always the husband's business and that therefore, she would be entitled to see the documents because of his obligation to disclose. The complicating factor about ownership here is that the picture

painted by the wife is not that simple. She deposed to having signed bankruptcy documents unknowingly until later but also to receiving Commonwealth Government pension entitlements for a number of years. At that same time, the wife said that she and the husband carried on family life as normal including going on regular holidays together. All of that evidence blurs the truth but also tends to suggest that neither party may have clean hands. I am therefore not convinced that the gravity of the impropriety in this case is at the high end.

32. Section 138 also encourages the Court to consider the distinction between deliberate and reckless contraventions. Normally, a deliberate disregard of another's legal rights would be seen as a strong factor against admitting the evidence (see *Parker v Comptroller-General of Customs* (2007) 243 ALR 574). In a case such as this, the vexed question of ownership of the business and hence the documents makes the deliberateness less serious. As I understand the wife's point, the husband's refusal to disclose the documents under the guise of lack of control put her in a position where this illegal behaviour proved her point. In an interlocutory application, that is very hard to judge.
33. Senior Counsel for the wife urged me to find that there was a difficulty for the wife in obtaining the evidence without the impropriety. That too is a vexed question. Discovery including in relation to third parties is available and the subpoena process is accessible. The Court should start from the position of presuming that third parties would comply and do so honestly. The wife's position however is that if the husband would take the various steps to keep her away from the business, there would be little prospect of her obtaining the information without taking the law into her own hands.

34. The ALRC proposal (ALRC 26 Vol 1 para 964) that gave rise to the legislation noted that a deliberate “cutting of corners” would normally support exclusion of the evidence. Legal practitioners involved in family law proceedings would be expected to advise their clients against self-help after which, any illegally obtained evidence would normally be excluded because of the deliberate cutting of corners. Here, the evidence does not assist me to determine whether the wife knew that what she was doing was seriously legally wrong. Her evidence seems to be that she thought this action was appropriate having regard to the actions and position adopted by the husband.
35. The determination is a balancing act. Having excluded the public interest issue, I consider this is an unusual case in which the evidence should be admitted because the desirability of admitting it outweighs the undesirability.

I certify that the preceding Thirty Five (35) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin delivered on 13 December 2010.

Associate: Elizabeth Hore
Date: 23 December 2010