

SUPREME COURT OF QUEENSLAND

CITATION: *Robertson v Vlahos* [2010] QSC 424

PARTIES: **GERALDINE FOOI-FONG ROBERTSON**
(**plaintiff/ respondent**)

v

LESLEY JOY VLAHOS
AND
ANASTASI VLAHOS
(**defendants/ applicants**)

FILE NO/S: BS12451/08

DIVISION: Trial

PROCEEDING: Application for summary judgment

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 12 November 2010

DELIVERED AT: Brisbane

HEARING DATE: 24 August 2010

JUDGE: Margaret Wilson J

ORDER:

CATCHWORDS: ANIMALS – VARIOUS STATUTORY PROVISIONS – PREVENTION OF CRUELTY TO ANIMALS – OFFENCES – where RSPCA inspector executed warrant on plaintiff's premises and seized 104 dogs pursuant to *Animal Care and Protection Act 2001 (Qld)* s144 – where seized dogs were taken to animal shelter – where only 100 dogs arrived at animal shelter – where defendants swore that plaintiff said she had hidden four dogs – where plaintiff then delivered four dogs into the care of the defendants – where defendants consented to RSPCA seizure of those four dogs – whether plaintiff tampered with seized animals pursuant to *Animal Care and Protection Act 2001 (Qld)* s149

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – whether plaintiff has "no real prospect" of succeeding pursuant to *Uniform Civil Procedure Rules 1999 (Qld)* r 293

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – SUMMARY DISMISSAL OF CLAIM – ABUSE OF PROCESS – where Magistrate found in proceeding

challenging forfeiture of 104 dogs that the four dogs were among those seized – whether abuse of process for plaintiff to relitigate factual issue

Animal Care and Protection Act 2001 (Qld), ss 3(b)(i), 10, 122(1)(a), 142, 144, 149, 154(2)(c), 156(2), 193-198, 202, 205, 215

Police Powers and Responsibilities Act 2000 (Qld), s 146(2)(d)

Uniform Civil Procedure Rules 1999 (Qld), rr 292, 293

AON Risk Services Australia Limited v Australian National University (2009) 239 CLR 175 at [33], cited

Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, cited

Hunter v The Chief Constable of the West Midlands Police [1982] AC 529 at 541, cited

Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010] QCA 119, applied

Rogers v The Queen (1994) 181 CLR 251, cited

St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 267 at 283, cited

Reichel v Magrath (1889) 14 App Cas 665, cited

State Bank of New South Wales Ltd v Stenhouse Ltd (1997) Aust Torts Reports 81-423, applied

Walton v Gardiner (1992-1993) 177 CLR 378, cited

Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410 at 413, cited

COUNSEL: DRL Laws for the applicant defendants

The respondent plaintiff appeared on her own behalf

SOLICITORS: McCarthy Durie Ryan Neil for the applicant defendants

- [1] **MARGARET WILSON J:** The plaintiff commenced this proceeding in December 2008, claiming \$664,000 damages for breach of contract. The defendants have applied for summary judgment pursuant to r 293 of the *Uniform Civil Procedure Rules*.

The plaintiff's claim

- [2] The plaintiff carried on the business of breeding Poodles at Buccan in Logan City. She alleges –
- (a) that on 10 January 2008 she and the defendants entered into a contract whereby the defendants would clip, bath and care for four of her Poodles for two days;
 - (b) that she provided consideration for the defendants' services by the provision of flea shampoo, flea and tick rinse concentrate and dog food in quantities in excess of what would be needed to care for the dogs over the two days;

- (c) that pursuant to the agreement the defendants collected the four dogs and the shampoo, rinse concentrate and dog food from her place of business on 10 January 2008;
- (d) that the defendants failed to return the dogs;
- (e) that three of the dogs were pregnant bitches expected to produce litters of at least 12 puppies each;
- (f) that she had export orders for the expected puppies;
- (g) that the dogs would have produced 72 puppies by the time the proceeding was commenced;
- (h) that she has suffered loss and damage of \$664,000 particularised as follows –
 - (i) "a loss of income of 72 puppies at \$6,000 each being \$432,000 for one years [sic] puppies from the three (3) bitches"; and
 - (ii) loss of "four (4)..valuable, irreplaceable breeding poodles each worth over \$58,000 being a total value of \$232,000".

The defendants' case

[3] The defendants –

- (a) admit taking possession of the four dogs on 10 January 2008;
- (b) deny that they did so pursuant to the alleged or any contract;
- (c) deny the quantities of shampoo and dog food alleged by the plaintiff;
- (d) allege that they returned all the shampoo and rinse concentrate to the plaintiff that they had not used on maintenance of the dogs and that the remaining dog food deteriorated soon afterwards;
- (e) allege that they were given the dogs to keep or re-home;
- (f) allege that the four dogs were among 104 dogs seized from the plaintiff's premises by officers of the RSPCA;
- (g) allege that after the seizure the plaintiff retook possession of them and hid them from the RSPCA officers until all of the other seized dogs had been taken away;
- (h) allege that the plaintiff's conduct in retaking possession and hiding the four dogs was in breach of provisions of the *Animal Care and Protection Act* 2001 (Qld) or calculated to defeat the purposes of the Act;
- (i) contend that the alleged contract is unenforceable.

Principles applicable to summary judgment application

[4] Rule 293 of the *UCPR* provides –

"293 Summary judgment for defendant

- (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.

(2) If the court is satisfied—

(a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and

(b) there is no need for a trial of the claim or the part of the claim; the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate." [Emphasis added]

- [5] Rule 293 is to be construed by applying the words used in it, rather than by applying a test under earlier rules.¹ Like r 292, which is concerned with a summary judgment application made by a plaintiff, r 293 uses the criterion of "no real prospect" of success. A real prospect may be contrasted with one that is only fanciful.² Recently, Muir JA with whom Holmes JA agreed, said of r 292³ –

"In *Rich v CGU Insurance Ltd*,⁴ Gleeson CJ, McHugh and Gummow CJ cited with approval the following passage from the reasons of Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde*:⁵

'Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.'

In this case, whilst the primary judge dealt with the matter carefully and skilfully, if I may respectfully say so, the range and complexity of the issues before him and the existence of factual disputes rendered the granting of summary judgment overly bold."

What his Honour said is in principle equally applicable to a defendant's application under r 293.

Seizure and forfeiture of dogs

- [6] On 9 January 2008 a warrant issued pursuant to the *Animal Care and Protection Act* 2001 (Qld) was executed on the plaintiff's premises. Inspector Stageman of the RSPCA seized 104 dogs pursuant to s 144 of the Act, which provides –

"144 Seizure for welfare of animal

- (1) An inspector who has, under this part, entered a place may seize an animal at the place if the inspector reasonably believes –
- (a) the animal –
- (i) is under an imminent risk of death or injury; or
Examples of imminent risk of death or injury—
 - 1 A prohibited event is being conducted at the place.
 - 2 The animal is being beaten or tortured.
 - (ii) requires veterinary treatment; or

¹ *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 236.

² *Deputy Commissioner of Taxation v Salcedo* at 234-235.

³ *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 paras 81-82.

⁴ *Rich v CGU Insurance Ltd* (2005) 75 ALJR 856 at 859 per Gleeson CJ, McHugh and Gummow JJ.

⁵ (2000) 201 CLR 552 at 575-576.

- (iii) is experiencing undue pain; and
 (b) the interests of the welfare of the animal require its immediate seizure.
- (2) The inspector may also seize the animal if the person in charge of the animal has contravened, or is contravening, an animal welfare direction or a court order about the animal."
- [7] Inspector Stageman gave the plaintiff a receipt for 100 Poodles (some Standard Poodles, and some Toy Poodles), two Labradors and two Pomeranians.⁶
- [8] The dogs were taken to the RSPCA's animal shelter at Fairfield. A count was conducted on their arrival at the shelter: there were only 100 dogs.⁷ They were in very poor condition.
- [9] The plaintiff asserts that four dogs (including three pregnant bitches) were not on her premises when the warrant was executed. They had been "out west" for breeding, and were returned to her premises after the RSPCA officers left. Fearful that the RSPCA would return and take these dogs, she entered into the alleged contract with the defendants and delivered them into their care the day after the raid.
- [10] Mr Vlahos has sworn that at about 8.30 pm on 10 January 2008 he took a phone call from the plaintiff. She told him that the RSPCA had raided her and taken her Poodles, but she had hidden some and wanted Mr and Mrs Vlahos to find them somewhere to live. He handed the phone to his wife, who had a conversation with the plaintiff. About 9.30 pm that evening Mr and Mrs Vlahos arrived at the plaintiff's premises and collected the four dogs. While they were there, the plaintiff told him that she had hidden these dogs from the RSPCA while they were fetching more trailers.⁸ Mrs Vlahos has sworn that the plaintiff told her she had hidden the dogs and asked her if she could come and collect them, as she could not look after them and wanted Mr and Mrs Vlahos to find homes for them.⁹
- [11] Mr and Mrs Vlahos have both sworn that the dogs were in very poor condition. On 11 January 2008 Mr Vlahos contacted the RSPCA. Inspector Stageman attended at the defendants' property, and asked the male defendant whether he was prepared to hand over the dogs. Upon Mr Vlahos answering in the affirmative, a form headed "Written Consent to Seizure" was completed. The form was in two parts: in Part A Mr Vlahos consented to the seizure of the four dogs, and in Part B he purported to consent to a transfer of ownership of the four dogs to the RSPCA.
- [12] Another dog was seized from the plaintiff's premises on 22 February 2008.
- [13] On 5 February 2008 and 14 March 2008 an authorised delegate of the chief executive of the Department of Primary Industries and Fisheries purported under s 154(2)(c) of

⁶ See the plaintiff's affidavit filed on 19 March 2010 (court document 18), para 6, the receipt which is exhibit GR 1 to that affidavit, and the plaintiff's affidavit sworn 23 August 2010 (court document 22), exhibit GR7.

⁷ See the affidavit of Nanda Ten-Grotenhuis filed on 21 April 2010 (court document 19) including Ms Ten-Grotenhuis' affidavit of 19 November 2008 which is exhibit NTG 3 to that affidavit.

⁸ See affidavit of defendants filed 14 December 2009 (court document no 7) and paras 6 and 12 of the affidavit of Anastasi Vlahos sworn on 22 September 2008 which is exhibit AV-2 to that affidavit.

⁹ See affidavit of defendants filed 14 December 2009 (court document no 7) and para 8 of the affidavit of Lesley Joy Vlahos filed in the Magistrates Court which is exhibit AV-1 to that affidavit.

the Act to forfeit to the State 104 dogs seized on 9 January 2008 and the dog seized on 22 February 2008 respectively.

Proceedings challenging forfeiture

- [14] An internal review of the chief executive's decisions to forfeit the dogs confirmed the decisions.¹⁰ The plaintiff appealed to the Magistrates Court: the appeal was by way of rehearing, unaffected by the review decision.¹¹ The Magistrate dismissed the appeal on 24 July 2009.
- [15] There was provision for appeal to the District Court, but only on a question of law.¹² The plaintiff appealed, but a Judge of that Court struck out the appeal on the ground it did not raise a question of law or any arguable error of law.
- [16] The plaintiff applied to the Court of Appeal for leave to appeal. On 15 June 2010 her application was dismissed.¹³
- [17] The plaintiff applied to the High Court for special leave to appeal. On 4 November 2010 her application was dismissed.¹⁴

Illegality

- [18] The purposes of the *Animal Care and Protection Act 2001 (Qld)* include the provision of standards for the care and use of animals that achieve a reasonable balance between the welfare of animals and the interests of persons whose livelihood is dependent on animals.¹⁵
- [19] The defendants had charge of the four dogs, but they were not the owners of them.
- [20] Inspector Stageman entered the defendants' property with their consent.¹⁶ Under s 142(2) he was empowered to seize the dogs –

"(b) with the written consent of a person as follows or a person the inspector reasonably believes is a person as follows –
 (i) for an animal—a person in charge of the animal; ..."

He obtained that consent by Mr Vlahos' signing Part A of the form headed "Written consent to Seizure".¹⁷

- [21] Section 142(3) provides –

"(3) A consent under subsection (2)(b) given by an owner may also include the owner's agreement to transfer ownership of the animal or other thing to the State or a prescribed entity."

¹⁰ *Animal Care and Protection Act 2001 (Qld)* Act Reprint No 3 ss 193 – 198.

¹¹ *Animal Care and Protection Act 2001 (Qld)* Act Reprint No 3 s 202.

¹² *Animal Care and Protection Act 2001 (Qld)* Act Reprint No 3 s 205.

¹³ [2010] QCA 147.

¹⁴ [2010] HCASL 242.

¹⁵ s 3(b)(i).

¹⁶ s 122(1)(a).

¹⁷ He might also have seized the dogs under s 144 if he reasonably believed that the interests of the dogs' welfare required their immediate seizure.

The RSPCA was a "prescribed entity" within the meaning of the Act.¹⁸ However, Mr Vlahos' signing Part B of the transfer was ineffective to transfer ownership of the dogs to it. He was not their owner, and was thus incapable of transferring ownership. Even if he had been the owner, the dogs would not have become the property of the RSPCA unless it agreed in writing to the transfer.¹⁹ It did not purport to do so; instead, the chief executive of the Department forfeited the dogs under s 154(2)(c).

[22] Section 149 provides –

"149 Offence to tamper with seized thing

- (1) This section applies in relation to an animal or other thing seized under this part.
- (2) A person, other than an inspector or a person authorised by an inspector for the purpose, must not do, or attempt to do, any of the following unless the person has a reasonable excuse -
 - (a) tamper with -
 - (i) the animal or other thing; or
 - (ii) something done under section 148(1)(b) to restrict access to it;
 - (b) enter, or be at, the place where the animal or other thing is being kept;
 - (c) move the animal or other thing from the place where it is being kept;
 - (d) have the animal or other thing in the person's possession.
 Maximum penalty - 100 penalty units."

[23] Section 215 provides –

"215 Protection from liability

- (1) This section applies to each of the following persons (a *relevant person*) –
 - ...
 - (d) if an authorised officer or inspector has asked someone else to help the officer or inspector to exercise a power under this Act and the other person is giving the help - the other person;
 - (e) a person who, under this Act, is required to comply with a direction, order or requirement as follows and is complying with the direction, order or requirement -
 - ...
 - (vi) a seizure direction.
- (2) A relevant person is not civilly liable to someone for an act done, or omission made, honestly and without negligence under this Act.
- (3) If subsection (2) prevents a civil liability attaching to a relevant person, the liability attaches instead to the State.
- (4) In this section – *civil liability* includes liability for the payment of costs ordered to be paid in a proceeding for an offence against this Act."

[24] The defendants have pleaded that the plaintiff's conduct in retaking possession of the four dogs and hiding them from officers of the RSPCA until all of the other dogs had been taken away was in breach of s 149(2)(c) or (d), or calculated to defeat the purposes of the Act, by reason of which –

¹⁸ *Animal Care and Protection Act 2001* (Qld) Act Reprint No 3 s 10 and schedule (dictionary).
¹⁹ s 156(2).

- "(i) If it be found that any agreement of the kind or in the terms alleged by the Plaintiff's Statement of Claim was entered into between the Plaintiff and the Defendants, such agreement or contract was illegal and alternatively, unenforceable; and
- (ii) Further or alternatively, the Defendants delivery up of the said four dogs to Officers of the RSPCA as pleaded by paragraph 10 of this Defence was:
 - (A) 'Help' given by them honestly and without negligence as 'other persons' to an authorized officer within the meaning of sections 215 (1)(d) and (e) of the said Act; and
 - (B) Conduct otherwise in furtherance of the objects and purposes of the said Act, and in compliance with the said seizure; and
- (j) On the 10 January 2008 and subsequent to the said Information Notice and Receipt:
 - (i) None of the 4 said dogs was property capable of being the subject matter of any lawful and binding agreement between the Plaintiff and the Defendants, or either of them, whether by way of the contract pleaded by the Plaintiff, or by any express or implied bailment, the Defendants jointly and severally deny any liability to the Plaintiff whether as pleaded or at all; and
 - (ii) Further and alternatively, by reason of the facts pleaded by paragraph 20(i)(ii) of this Defence, and pursuant to section 215 (2) of the said Act, the Defendants are protected from and are not liable to the Plaintiff in civil proceedings including this proceeding."

[25] Their counsel also relied on s 149(2)(a) – arguing that the plaintiff's conduct amounted to illegal "tampering" with the four dogs. The word "tamper" is not defined in the Act. Counsel relied on this definition in the *Shorter Oxford Dictionary* –

"1. To work or busy oneself for some end; to machinate, scheme, plot. Const. *in* some practice, *for* something, *to do* something. 2. To try to deal or enter into clandestine dealings *with*; often with connotation of improper interference with a person. 3. To have to do or interference *with* improperly; to meddle *with* (a thing). 4. To meddle or interfere *with* (a thing) so as to misuse, alter, corrupt or pervert it."

[26] If the four dogs were among those seized by the RSPCA in the raid on 9 January 2008, and if the plaintiff hid them from the RSPCA to prevent their being taken away, then she unlawfully had them in her possession, contrary to s 149(2)(d). If she made the contract with the defendants she alleges, it was an underhand dealing improperly interfering with the RSPCA's right to possession of the dogs. In my view it was tampering within the meaning of s 149. The section makes conduct of this kind an offence.

Abuse of process

[27] On this application for summary judgment, the defendants bear the ultimate onus of persuading the Court that the plaintiff has no real prospect of succeeding on all or

part of her claim and that there is no need for a trial. However, as the defendants swore that the plaintiff told them she hid the four dogs from the RSPCA and led evidence that 104 dogs were seized but that only 100 dogs were admitted into the animal shelter, there was an evidentiary onus on the plaintiff to establish that the four dogs were not on her premises and among those seized on 9 January 2008.

- [28] In the Magistrates Court the plaintiff gave evidence that that the four dogs in question were not seized in the raid on 9 January 2008; she said that they had been "out west" for breeding, and that they were returned to her on 10 January 2008. She did not call anyone with whom she said the dogs had been "out west". The Magistrate expressly rejected her evidence on this point, describing it as "intended to deceive the Court".
- [29] The plaintiff makes a similar assertion in this proceeding. Again, she has not led evidence from anyone "out west". Counsel for the defendant submitted that it would be an abuse of process for her to relitigate this question of fact.
- [30] The Court has inherent power to prevent an abuse of process. In *Rogers v The Queen*²⁰ Mason CJ said –

"The concept of abuse of process is not confined to cases in which the purpose of the moving party is to achieve some foreign or ulterior object, in that it is not that party's genuine purpose to obtain the relief sought in the second proceedings. The circumstances in which abuse of process may arise are extremely varied and it would be unwise to limit those circumstances to fixed categories.²¹ Likewise, it would be a mistake to treat the discussion in judgments of particular circumstances as necessarily confining the concept of abuse of process."

And in *Walton v Gardiner*²² Mason CJ, Deane and Dawson JJ said –

"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail.²³ Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them.²⁴ Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings.²⁵ The jurisdiction of a superior court in such a case was correctly described by

²⁰ (1994) 181 CLR 251 at 255.

²¹ *Hunter v The Chief Constable of the West Midlands Police* [1982] AC 529 at 536 per Lord Diplock.
²² (1992-1993) 177 CLR 378 at 392-393.

²³ See, e.g., *Metropolitan Bank v. Pooley* (1885) 10 App Cas 210 at 220-221; *General Steel Industries Inc. v. Commissioner for Railways (N.S.W.)* (1964) 112 CLR 125 at 128-130.

²⁴ See, generally, *Voth v. Manildra Flour Mills Pty. Ltd.* (1990) 171 CLR 538.

²⁵ See, e.g., *Reichel v. Magrath*, (1889) 14 App Cas 665 at p 668; *Connelly v. DPP* [1964] AC 1254 at 1361-1362.

Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*²⁶ as 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'."

- [31] It may be an abuse of process to allow a party to relitigate an issue decided between him and a third party if the subsequent proceeding was initiated to mount a collateral attack on a final decision against him made by another court of competent jurisdiction in which he had a full opportunity of contesting the decision.²⁷ The Court's powers to prevent an abuse of process are to be exercised sparingly and with great caution.²⁸ As Giles CJ explained in *Stenhouse*,²⁹ whether there is an abuse of process depends very much on the circumstances –

"The guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the system of administration of justice, and amongst the matters to which regard may be had are –

- (a) the importance of the issue in and to the earlier proceedings, including whether it is an evidentiary issue or an ultimate issue;
- (b) the opportunity available and taken to fully litigate the issue;
- (c) the terms and finality of the finding as to the issue;
- (d) the identity between the relevant issues in the two proceedings;
- (e) any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceedings; all part of –
- (f) the extent of the oppression and unfairness to the other party if the issue is relitigated and the impact of the relitigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and
- (g) an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process."

- [32] The question was a critical one in the proceedings before the Magistrate on the appeal against the forfeiture decisions. As he correctly analysed the issues before him, he had to be satisfied that the animals were seized under the *Animal Care and Protection Act 2001* (Qld) or s 146(2)(d) of the *Police Powers and Responsibilities Act 2000* (Qld), and that the chief executive (or his delegate) reasonably believed it was necessary to keep the animal to prevent it from being used in committing, or becoming the subject of, an animal welfare offence.³⁰ The plaintiff had the opportunity to call evidence from others as to the whereabouts of the four dogs at the time of the raid, but did not do so. The Magistrate's finding, made after the evidence of the plaintiff, Mr and Mrs Vlahos and RSPCA officers was thoroughly tested by cross-examination, was clear and unequivocal.

²⁶ [1982] AC 529, at 536.

²⁷ *AON Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at [33]; *Hunter v The Chief Constable of the West Midlands Police* [1982] AC 529 at 541; *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports 81-423; *Reichel v Magrath* (1889) 14 App Cas 665.

²⁸ *Clout v Klein* [2001] QSC 401 at para 54; *Spalla v St George Motor Finance Limited (No 6)* [2004] FCA 1699 at para 70.

²⁹ *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports 81-423 at 64, 89.

³⁰ See *Animal Care and Protection Act 2001* (Qld) s 154(2)(c).

- [33] I am satisfied that it would be an abuse of process to allow this issue of fact to be relitigated.
- [34] Accordingly, in the determination of this application, I find that the four dogs were among those seized by the RSPCA on 9 January 2008 and that the plaintiff hid them from the RSPCA officers to prevent their being removed from her property

Enforceability of contract

- [35] Counsel for the defendants submitted that even if the Court found that the plaintiff and the defendants made a contract in the terms alleged by the plaintiff, that contract would be void or enforceable.
- [36] If a contract is deliberately made to do a prohibited act, it is unenforceable.³¹ It is a rule of public policy that a contract which involves the commission of a legal wrong is illegal if entered into with the intent of committing the wrong. If only one party to the contract has the intention of committing a legal wrong, or knows that the contract will be performed in an illegal way, the contract is unenforceable by that party, and to that extent at least, also illegal by reason of public policy.³²
- [37] As the Magistrate found, the four dogs were among those lawfully seized by the RSPCA on 9 January 2008. On the plaintiff's own evidence she entered into the contract with the defendants to prevent the RSPCA from taking the four dogs. In other words, she deliberately made the contract in order to interfere with the RSPCA's right to possession, contrary to s 149. In the circumstances, even if there were a contract in the terms she alleges, it would be unenforceable.

Protection from liability

- [38] Even if there was an enforceable contract as alleged by the plaintiff, it may well be that in handing the dogs to Inspector Stageman the defendants were "helping" him exercise a power under the Act within the meaning of s 215. If they were, they could rely on the immunity from civil liability which that section provides.
- [39] I doubt that I could determine this question on the material before the Court on this application. However, because I am firmly of the view that any such contract would be unenforceable for the reasons I have already advanced, it is not necessary to consider this question further.

Disposition of summary judgment application

- [40] The plaintiff has no reasonable prospects of success on her claim, and there is no need for a trial. Her claim should be dismissed.

³¹ *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 at 283 per Devlin J; approved in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413.

³² J W Carter, Elisabeth Peden, G J Tolhurst, *Contract Law in Australia* (LexisNexis, 5th ed, 2007) paras [25-04], [25-19] – [25-23].