

SUPREME COURT OF QUEENSLAND

CITATION: *Secure Funding Pty Ltd v Engel* [2019] QSC 22

PARTIES: **SECURE FUNDING PTY LTD ACN 081 982 872**
(plaintiff)
v
ANGELA MAREE ENGEL
(defendant)

FILE NO: No 3134 of 2010

DIVISION: Trial Division

PROCEEDING: Application on the papers

DELIVERED ON: 14 February 2019

DELIVERED AT: Brisbane

HEARING DATE: Application on the papers

JUDGE: Davis J

ORDER: **1. The application is adjourned to a date to be fixed.**
2. The plaintiff serve upon the defendant the application and any material in support.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – where the plaintiff sought leave to commence enforcement proceedings – where the application was made ex parte – where more than six years had elapsed since the money order was made – where the enforcement summons was dismissed without a hearing – whether there was a satisfactory explanation for the delay – whether the defendant should be given an opportunity to respond to the material

Uniform Civil Procedure Rules 1999 (Qld) r 799

DalGLISH v Jarvie (1850) Mac & G 231, cited
Meadows v Moyle & Anor [2010] QDC 202, cited
Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd [2012] QSC 143, cited

SOLICITORS: Norton Rose Fulbright for the plaintiff

[1] This is an application by the plaintiff pursuant to rule 799 of the *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR) for leave to commence enforcement proceedings against the defendant. The plaintiff requires leave because the judgment sought to be enforced was made more than six years ago.

Background to the application

- [2] The plaintiff loaned money to a company, Coast Development Realty Pty Ltd, in 2007. The defendant guaranteed that loan. Coast Development Realty defaulted on the loan. The plaintiff commenced proceedings in this Court on 26 March 2010¹ against the defendant.
- [3] Default judgment was entered for the plaintiff against the defendant on 24 September 2010 in the sum of \$2,025,254.30.² For some reason, which is unexplained, the judgement was not served upon the defendant until 1 October 2013.³
- [4] The plaintiff applied for an enforcement hearing on 4 November 2013.⁴ A summons issued on 11 November 2013 for the defendant to attend a hearing on 10 December 2013.⁵ That summons was apparently not able to be served upon the defendant.⁶ A further summons issued on 4 December 2013 for the defendant to attend a hearing on 28 January 2014.⁷ That summons was also apparently unable to be served.⁸
- [5] A third summons issued on 20 January 2014 for the defendant to attend a hearing on 27 February 2014.⁹ That was served upon the defendant on 31 January 2014.¹⁰ The hearing was adjourned by consent to 21 March 2014.¹¹ The defendant had various contact with the plaintiff's solicitors about her financial position and the enforcement summons was dismissed without a hearing taking place.¹²
- [6] It is unclear from the evidence what occurred from that time until 2016. From September 2016, it appears that the plaintiff's solicitors and officers had contact with the defendant and her representatives in pursuit of a resolution of the debt.¹³

The present application

- [7] The plaintiff has filed an affidavit of Rupert Hugh-Jones, an officer of the plaintiff's parent company, in support of the present application. He deposes that since 3 September 2017, the defendant has failed to reply to correspondence.¹⁴ The bundle of material exhibited to his affidavit does not include any of this correspondence.
- [8] Rule 799(4) sets out the matters that an applicant in the position of the plaintiff must establish to be successful:

“799 Enforcement period

¹ Claim, filed 26 March 2010, CFI 1.

² Default judgment, 24 September 2010, CFI 5.

³ Affidavit of Rupert Hugh-Jones filed 8 January 2019, CKI 16 at [8] (Hugh-Jones affidavit).

⁴ Application, filed 4 November 2013, CFI 6.

⁵ Enforcement hearing summons, 11 November 2013, CFI 9.

⁶ Hugh-Jones affidavit, filed 8 January 2019, CFI 16 at [11], exhibit RJH-1 at 25 (Hugh-Jones affidavit).

⁷ Enforcement hearing summons, 4 December 2013, CFI 10.

⁸ Hugh-Jones affidavit at [13], exhibit RJH-1 at 28.

⁹ Enforcement hearing summons, 20 January 2014, CFI 11.

¹⁰ Affidavit of service of Ian Cuffe Quin, filed 3 March 2014, CFI 12.

¹¹ Hugh-Jones affidavit at [16]–[18], exhibit RJH-1 at 50–52.

¹² At [20]–[21], exhibit RJH-1 at 56–63.

¹³ At [22]–[33], exhibit RJH-1 at 64–103.

¹⁴ At [34].

...

- (4) On an application for leave to start enforcement proceedings, the applicant must satisfy the court—
- (a) as to the amount, including interest, owing at the date of the application; and
 - (b) if it is more than 6 years since the money order was made—as to the reasons for the delay; and
 - (c) if there has been a change in an enforcement creditor or enforcement debtor—as to the change that has happened; and
 - (d) that the applicant is entitled to enforce the order; and
 - (e) that the enforcement debtor against whom enforcement is sought is liable to satisfy the order.”

- [9] I am satisfied that the amount owing to the plaintiff was, at the date of the application, \$2,600,177.71. The calculation is substantiated in the affidavit of Mr Hugh-Jones.¹⁵
- [10] I am also satisfied that there has been no change in creditor or debtor, that the plaintiff is entitled to enforce the judgment, and that the defendant remains liable to satisfy the judgment. Mr Hugh-Jones deposes that the plaintiff has not abandoned the judgment, nor has it entered into any arrangement or understanding to the contrary.¹⁶
- [11] As to the delay, I do not accept that the delay is, on the evidence before me, satisfactorily explained. The plaintiff says this in its submissions:
- “8. The reasons for the plaintiff’s delay are set out in the affidavit of Rupert Hugh-Jones affirmed on 7 January 2019. In summary, the plaintiff took various steps between 24 September 2010 and 24 September 2016 (being the six year period from the date of the Judgment) to enforce or settle the Judgment. As at 24 September 2016, the plaintiff and defendant were involved in ongoing negotiations in respect of the Judgment. Those negotiations continued in late 2017 and, ultimately, were not fruitful.”
- [12] On the evidence before me, namely Mr Hugh-Jones’ affidavit, there are substantial periods where it is unclear as to what, if any action was taken to enforce the judgment. The first is from the time judgment was entered for the plaintiff on 24 September 2010 to the service of the judgment¹⁷ on 1 October 2013. More than half of the enforcement period apparently elapsed before the defendant served the judgment.
- [13] The second period is between the dismissal of the enforcement hearing on 20 March 2014 and April 2016, when the plaintiff offered to compromise the debt.¹⁸ The body of Mr Hugh-Jones’ affidavit contains the following:

¹⁵ Hugh-Jones affidavit at [5]–[6].

¹⁶ At [35]–[36].

¹⁷ At [8].

¹⁸ Hugh-Jones affidavit, exhibit RJH-1 at 66.

- “21. On 20 March 2014, the enforcement summons hearing was dismissed. Contained at page 63 of Exhibit RJH-1 is a copy of the court’s order to that effect.
22. During the period of 2016 and 2017, I had regular and ongoing contact with the defendant for the purpose of obtaining information in respect of her financial position and discussing settlement options in respect of her judgment debt.”

- [14] There is no correspondence exhibited to the affidavit demonstrating negotiations in the period between 20 March 2014 and September 2016. An offer of compromise is alluded to in an email of 6 September 2016.¹⁹
- [15] Mr Hugh-Jones deposes that the defendant has failed to respond to correspondence since a reply was received from her on 3 September 2017. No correspondence from the plaintiff after this time is exhibited to his affidavit.
- [16] I am not prepared to find that the delay is satisfactorily explained in an ex parte application where there are such gaps in the evidence.

Disposition

- [17] Rule 799(3) provides that service of the application upon the defendant is unnecessary, unless service is ordered by the Court.²⁰ It is an uncontroversial statement that a party making an ex parte application must meet a high standard of candour to assist the Court.²¹ Andrews DCJ in *Meadows v Moyle & Anor*²² applied this same standard to applications under r 799 and I respectfully follow his Honour in doing so. As I have already observed there are deficiencies in the applicant’s explanation of the delay.
- [18] From the plaintiff’s material, it is clear that the defendant gave the plaintiff information about her financial position in 2014 without the need for her to be examined on an enforcement hearing, though it seems likely that the summons encouraged the defendant to be more forthcoming. I have reservations about a blanket order that the plaintiff could recommence any enforcement proceedings, including further enforcement hearings, without giving the defendant an opportunity to respond to that application. There may be various discretionary factors which might be raised by the defendant.
- [19] Accordingly, I will order that the plaintiff serve the defendant with the application, and any material in support of the application to give the defendant an opportunity to respond to that material.
- [20] The orders of the court are that:
1. The application is adjourned to a date to be fixed.
 2. The plaintiff serve upon the defendant the application and any material in support.

¹⁹ At 66.

²⁰ *Uniform Civil Procedure Rules 1999* (Qld) r 799(3).

²¹ *Dalglish v Jarvie* (1850) Mac & G 231; and see the discussion of the principles by Dalton J in *Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd* [2012] QSC 143.

²² [2010] QDC 202.