SUPREME COURT OF QUEENSLAND

CITATION:	*QLine Interiors P/L v Jezer Construction Group P/L & Ors* [2003] QSC 160
PARTIES:	**Enforcement Creditor: QLINE INTERIORS PTY LTD** ACN 076 840 518 (respondent) **Enforcement Debtor: JEZER CONSTRUCTION GROUP PTY LTD** ACN 054 548 319 (applicant) **Third Person: KLAUS LILISCHKIES AND LEIGH PHUONG LILISCHKIES** **QLINE INTERIORS PTY LTD** ACN 076 840 518 (plaintiff) **v** **JEZER CONSTRUCTION GROUP PTY LTD** ACN 054 548 319 (first defendant) **MAGNAMAIN INVESTMENTS PTY LTD** ACN 074 822 521 (second defendant) **PETER GRAHAM SCHMITH** (third defendant) **DORIS NGIE-LIK TING** (fourth defendant) **MICHAEL WAI-MAN CHOI** (fifth defendant)
FILE NO:	S 8251 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	27 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2003
JUDGE:	B W Ambrose J
ORDER:	**I dismiss the application by Jezer Constructions Group Pty Ltd to set aside the enforcement warrant – redirection of debt issued to QLine Interiors Pty Ltd on 17 April 2003 as judgment creditor of Jezer Constructions Group Pty Ltd under a judgment given by this court on 26 March 2002.** **I declare that the obligation of Klaus Lilischkies and Leigh Phuong Lilischkies to pay to Jezer Constructions**

Group Pty Ltd the sum of $500,000 pursuant to cl 2(b) of the deed of settlement executed by them on 19 March 2003 was discharged to the extent of $459,182.72 which they paid to QLine Interiors Pty Ltd as enforcement creditor under the enforcement warrant – redirection of debt issued to it on 17 April 2003.

CATCHWORDS: PRACTICE – Enforcement – application by an enforcement debtor to set aside an enforcement warrant directing that a debt owed by a third person to the enforcement debtor be paid to the enforcement creditor – where applicant alleges error in warrant – whether misdescription in warrant – where applicant alleges money payable subject to a registered charge of another party – whether floating charge crystallised – where third party seeks declaration that satisfaction of the enforcement warrant discharged their indebtedness to the applicant – whether indebtedness discharged by satisfaction of enforcement warrant

Supreme Court of Queensland Act 1991 (Qld), s 93

M G Charley Pty Ltd v F H Wells Pty Ltd [1963] NSWR 22, cited
Relwood Pty Ltd v Manning Homes Pty Ltd (No 2) [1991] 2 QdR 197, followed

COUNSEL: W K F Seeto (sol) for the applicant
I R Perkins for the respondent
J B Sweeney for the third party

SOLICITORS: Conomos Lawyers for the applicant
Tucker & Cowan for the respondent
HW Litigation for the third party

[1] **AMBROSE J:** This is an application by an enforcement debtor "Jezer" to set aside an enforcement warrant directing that a debt owed by a third person ("the Lilischkies") to the enforcement debtor be paid to the enforcement creditor ("QLine").

[2] On 26 March 2002 QLine obtained judgment against Jezer which remained unsatisfied to the extent of $459,182.72. On 17 April 2003 QLine obtained an enforcement warrant from this court redirecting payment of part of a debt owed by the Lilischkies to Jezer under the terms of a deed of 23 March 2003 settling a dispute between them then pending in the Queensland Building Tribunal. The description of the debt in the enforcement warrant – redirection of debt was "the first instalment due by the third person to the enforcement debtor pursuant to "the settlement agreement".

[3] QLine opposes Jezer's application and the Lilischkies, as the third person to the enforcement warrant being indebted to Jezer at the material time to the extent of $500,000, supports QLine's opposition to Jezer's application and as well seek in effect a declaration that satisfaction of the enforcement warrant by QLine on or

about 24 April 2003 discharged their indebtedness to Jezer under the terms of the settlement deed to which I referred in para 2.

[4] There is a good deal of affidavit evidence filed upon the applications argued on 14 May 2003. It is unnecessary in my view to analyse in detail all that material.

[5] The essence of Jezer's case to set aside the enforcement warrant is that the sum of $.5M which undoubtedly was owing by Lilischkies to Jezer when the enforcement warrant was executed, misdescribed the details of debt contained in the warrant as "the first instalment" due under the settlement deed to which I have referred. It is the contention of Jezer that in fact that sum of $.5M was "the second instalment" due by the Lilischkies to Jezer under that deed and that consequently the warrant must be set aside.

[6] A great deal of correspondence has passed between the solicitors for QLine, Jezer and the Lilischkies. It is unnecessary to analyse this correspondence much of which seems to me to be quite repetitious and argumentative and it will suffice to record briefly the contentions of all three parties as they developed over a week or so prior to the making of these applications.

[7] On Wednesday 19 March 2003 the Lilischkies and Jezer were parties to a deed of settlement. Their claims and counterclaims were then proceeding before the Queensland Building Tribunal. It was agreed between the parties to it that the terms of the deed should remain strictly confidential. It is conceded however that it is necessary for me to examine some of the terms of the deed which I have done. I will refrain from revealing the matters regarded as confidential to any greater extent than necessary.

[8] Under clause 2 of the deed the Lilischkies are obliged to pay or cause to be paid various sums of money into the trust account of Jezer's solicitors including –

> "(a) within 5 days of the execution of this deed by all parties the retention amounts held in the trust account of Messrs McLaughlins Lawyers (including accretions);
> (b) On 19 April 2003 a sum of $500,000;
> (c) On 19 May 2003 the balance amount…
> (d) Jezers costs…to be agreed…or assessed"

[9] Clause 4 of the deed provides *inter alia* –

> "If the Lilischkies fail to make:
> (a) Payment referred to in 2(a) on the due date; or
> (b) Payment referred to in 2(b) on the due date; then
>
> Jezer will be at liberty 7 days after the due date or dates to enter judgement in the QBT…and the Lilischkies hereby consent to such order being made upon the filing of an affidavit in the proceedings by George Conomos deposing to such default."

[10] Under clause 7 of the deed Jezer and some of the other parties to the Tribunal proceedings acknowledge that they have represented to the Lilischkies their intention to compromise certain claims unpaid sub contractors have made against Jezer and the Lilischkies jointly.

[11] I observe merely that QLine was not a party to that deed of settlement.

[12] It is clear however that QLine became aware that under the terms of the deed the Lilischkies were obliged to pay Jezer a sum of money on 19 April 2003 under clause 2(b) of the deed of settlement and this led to the issue of the enforcement warrant by a deputy registrar of this court on 17 April 2003 at the instance of QLine.

[13] It is and has at all material times been the contention of Jezer that –

(a) By reason of the misdescription of the $500,000 payable by the Lilischkies to Jezer on 19 April 2003 as the "first instalment" of monies payable by Lilischkies to Jezer under the terms of the deed, the warrant was ineffective and must be set aside. It is the contention of Jezer that upon its proper construction the payment of $500,000 was not the first instalment of monies payable under the deed but was in fact the second instalment of monies so payable. The "first instalment" so it is contended is "the retention amounts" payable under cl 2(a) which was paid on 24 March 2002.

(b) A second contention of Jezer is that pursuant to cl 3.9 of a deed of settlement between QLine and Jezer of 21 May 2002 the sum of $500,000 was to be held in trust and paid pro rata to QLine and various subcontractors in priority to those to which reference is made in clauses 8 and 9 of the settlement agreement between the Lilischkies and Jezer in their deed of 19 March 2003.

(c) It is also contended that the $.5M payable by the Lilischkies to Jezer on 19 April 2003 under the deed of settlement of 19 March 2003 was subject to a registered charge of another party.

[14] Based upon these contentions Jezer also seeks a declaration that the enforcement warrant does not apply to the sum of $459,182.72 which the Lilischkies paid to the solicitors for QLine on 23 April 2003 in satisfaction of the execution warrant.

[15] Jezer also seeks an order that that sum currently held in the trust account of the solicitors for QLine be paid into the trust account of the solicitors for Jezer.

[16] QLine opposes all the relief sought by Jezer. The Lilischkies support QLine's opposition to the relief claimed by Jezer and also seek a declaration to the effect that their satisfaction of the enforcement warrant issued in favour of QLine by paying to QLine the sum of $459,182.72 into the trust account of its solicitors on 23 April 2003 discharged pro rata their obligation to Jezer under the deed of settlement of 19 March 2003. In fact at the same time as they paid $459,182.72 to QLine the Lilischkies paid the balance of the sum of $.5m into the trust account of the solicitors for Jezer pursuant to their obligation under cl 2(b) of the deed of 19 March 2003.

[17] On 24 March 2003 the Lilischkies had caused to be paid to Jezer retention amounts then held in trust for both the Lilischkies and Jezer as security for the cost of rectification work for which Jezer might be liable under their building contract and thus met their obligation under cl 2(a) of the deed.

[18] In my judgement the Lilischkies' consent or direction conveyed to the trustee solicitors to release that retention sum held upon trust for both the Lilischkies and Jezer to meet the cost of rectification works (if any) cannot be described as their

"first instalment payment" to Jezer under cl 2 of the deed. The only payments to be made "by instalments" were those to be made under cl 2(b) on 19 April 2003 and 19 May 2003 and of those two, that to be made on 19 April 2003 was the first.

[19] On 26 March 2002 QLine recovered judgment against Jezer.

[20] On 21 May 2002 QLine, Jezer and other parties to the action entered into a deed of settlement. It was agreed that the judgment sum together with costs at date of deed was to be fixed in the sum of $600,000. The costs component was agreed in the sum of $150,000.

[21] Under the deed of 21 May 2002 Jezer was obliged to pay to QLine proceeds from the action which it was then pursuing against the Lilischkies in the Queensland Building Tribunal. It was agreed that QLine had a charge over $200,000 of any such proceeds. It was agreed that that part of the proceeds would not be otherwise charged by Jezer. After Jezer and the Lilischkies had entered into their deed of settlement on 19 March 2003 to which I have already referred Jezer's solicitor and an officer of Jezer informed QLine's solicitor that the terms of the deed of settlement were confidential but that under it the Lilischkies were obliged to pay to Jezer an amount in excess of $1.1m plus costs to be assessed and that it had been agreed that the payment would be made by instalments due on 19 April 2003 and 19 May 2003. No reference was made to the release of retention moneys.

[22] It was on the basis of what Jezer's solicitor and an officer of Jezer had informed the solicitors for QLine whose request for a copy of the "highly confidential" deed of settlement between Jezer and the Lilischkies of 19 March 2003 was refused, that the details or description of the debt payable on 19 April 2003 appearing on the warrant of execution was formulated by the draftsman of that enforcement warrant – redirection of debt, which issued on 17 April 2003.

[23] I am satisfied that in the discussion which the solicitors for QLine had with the solicitors for and officer of Jezer, no reference was made to the obligation of the Lilischkies to take what steps were necessary to permit retention money held on trust for both Jezer and the Lilischkies to be released to Jezer by relinquishing to Jezer any beneficial entitlement that they might have in it. I infer from the evidence of Mr Tucker that no reference was made to this aspect of the confidential deed of settlement and that the only information provided to QLine by Jezer was the fact that it had been agreed that an amount in excess of $1.1M would be paid by instalments due on 19 April 2003 and 19 May 2003.

[24] I infer that the amount of retention monies received by Jezer on 24 March 2003 was the difference between the total amount payable (disregarding costs) under cl 2 of the Deed of Settlement of 19 March 2003 and the "amount in excess of $1.1M" to be paid by the instalments of 19 April and 19 May 2003.

[25] I am satisfied that upon a proper construction of the settlement deed of 24 March 2003, there was no misdescription in the enforcement warrant – redirection of debt executed by QLine on 23 April 2002. I am satisfied that when Jezer by its officer and solicitor informed the solicitors for QLine prior to the issue of that warrant that the Lilischkies were then obliged to pay to Jezer something in excess of $1.1M by two instalments, the first being on 19 April 2003 they accurately described the date by which the first instalment due under the deed of settlement was to be paid. I am satisfied that at that time they perceived no ambiguity in the wording of cl 2 of the

deed. Indeed in my view there is no doubt that the information they gave to the solicitors for QLine was perfectly accurate and that at the time they had this conversation shortly prior to the issue, of the warrant of execution they believed that the payment of monies then outstanding which the Lilischkies were obliged to make under the deed of settlement was something in excess of $1.1M and was payable by two instalments, the first on 19 April 2003 and the second on 19 May 2003.

[26] In my view Jezer's first contention advanced with a view to setting aside the warrant in question while ingenious has no substance.

[27] With respect to the second ground upon which the validity of the warrant is challenged, although advised of the exercise of the warrant of execution by QLine, persons said to represent the beneficial interest of various subcontractors with respect to the sum of $500,000 payable by the Lilischkies to Jezer on 19 April 2003 – whether those interests arose under the deed of settlement between QLine and Jezer of 21 May 2002 or under that between the Lilischkies and Jezer of 19 March 2003 – have not appeared on this application although it appears that such persons were or ought to have been aware that it was being made. To the extent that there was any substance in this contention, then clearly QLine now holding the bigger part of that payment and Jezer holding the balance of it, would each hold that sum subject to any equities of which they were aware in subcontractors arising out of the execution of the deed or deeds. In my view these considerations provide no basis for setting aside a duly executed warrant of execution – redirection of debt.

[28] With respect to Jezer's third contention that the sum payable by the Lilischkies to Jezer on 19 April 2003 under the deed of settlement of 19 March 2003 was subject to a registered charge of another party, on the material that registered charge was one held by LPD Holdings (Aust) Pty Ltd under a deed executed on 2 April 2002. Under cl 5.1 of that deed it was a floating charge and there is no suggestion in the material that that charge ever crystallised. The chargee has not appeared on this application to advance any argument with respect to the validity of the execution of the warrant of execution – redirection of debt. In this respect I refer to the observations of McPherson SPJ (as he then was) in *Relwood Pty Ltd v Manning Homes Pty Ltd (No 2)* [1991] 2 QdR 197 at 202 where he adopted the observations of Jacobs J in *M G Charley Pty Ltd v F H Wells Pty Ltd* [1963] NSWR 22 at 28 in the following terms –

> "It is established that if prior to the crystallizing of the floating charge a judgment creditor receives judgment from the garnishee, then the mere existence of the floating charge is not sufficient to give the mortgagee a right to the debt. The debt must be an actual security under the charge by its crystallization before payment to the judgement creditor…"

[29] In my view there is no substance in the third contention raised by Jezer upon this application.

[30] I propose therefore to dismiss the applications by Jezer.

[31] Section 93 of the *Supreme Court of Queensland Act* 1991 provides –

> "A payment under an enforcement warrant discharges the person making the payment to the extent of the payment."

[32] It is clear from the correspondence between the solicitors for Jezer and the solicitors for the Lilischkies exhibited to the affidavit of Mr Hamilton filed by leave on 14 May 2003 that Jezer maintains that the Lilischkies are still obliged to pay to it pursuant to their obligations under the deed of settlement of 23 March 2003, the sum received by QLine upon the execution of their warrant of execution – redirection of debt on 23 April 2002. In my judgment this contention is quite unsustainable.

[33] I propose therefore to make the declaration sought by the Lilischkies.

[34] I dismiss the application by Jezer Constructions Group Pty Ltd to set aside the enforcement warrant – redirection of debt issued to QLine Interiors Pty Ltd on 17 April 2003 as judgment creditor of Jezer Constructions Group Pty Ltd under a judgment given by this court on 26 March 2002.

[35] I declare that the obligation of Klaus Lilischkies and Leigh Phuong Lilischkies to pay to Jezer Constructions Group Pty Ltd the sum of $500,000 pursuant to cl 2(b) of the deed of settlement executed by them on 19 March 2003 was discharged to the extent of $459,182.72 which they paid to QLine Interiors Pty Ltd as enforcement creditor under the enforcement warrant – redirection of debt issued to it on 17 April 2003.