SUPREME COURT OF QUEENSLAND

CITATION:	*Burnitt Investments Pty Ltd & Ors v GSS Power Generation Pty Ltd & Ors* [2003] QSC 175
PARTIES:	**BURNITT INVESTMENTS PTY LTD** **ACN 075 728 120** (first plaintiff) **HESHDEEN PTY LTD** **ACN 010 631 133** (second plaintiff) **PETER RAYMOND BURNITT and TRACEY MAREE BURNITT** (third plaintiffs) **BURNBAR PTY LTD** **ACN 010 764 762** (fourth plaintiff) **LOGAN CITY ELECTRICAL – PROJECTS DIVISION PTY LTD** **ACN 069 778 034** (fifth plaintiff) **WILLIAM FREDERICK BARTLEY** (sixth plaintiff) v **GSS POWER GENERATION PTY LTD** **ACB 088 235 161** (first defendant) **ROSEWOOD FARMS AND MANAGEMENT PTY LTD** **ACN 088 201 665** (second defendant) **GSS POWER PTY LTD** **ACN 088 235 134** (third defendant) **GENERATOR SALES AND SERVICE PTY LTD** **ACN 010 833 851** (fourth defendant) **STEVEN ALEXANDER CLEMENTS** (fifth defendant) **GROWTHPAC LIMITED** **ACN 009 220 071** (sixth defendant) **GEOFFFREY STUART JAMIESON** (seventh defendant)
FILE NO/S:	SC No 6464 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application

DELIVERED ON: 13 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 6, 11 June 2003

JUDGE: McMurdo J

ORDER:

1. **Pursuant to s 500(2) *Corporations Act* 2001 the plaintiffs have leave to proceed against the first and fourth defendants in relation to the claims within paragraphs 2 and 3 of the prayer for relief in the Further Amended Statement of Claim.**
2. **The application filed 23 April 2003 as amended pursuant to the order made 20 May 2003 be otherwise dismissed.**

CATCHWORDS: CORPORATIONS LAW – RECIEVERS AND MANAGERS - where first and second plaintiffs claim a fixed charge over equipment subject of application – where fixed charge said to result from registered mortgage debenture given over equipment – where application by first and second plaintiffs for appointment of a receiver to all or some of the equipment – where sixth respondent claims it subsequently acquired equipment - where some of the equipment has subsequently been replaced – where conflicting evidence as to whether chargor owned equipment – whether court should exercise its discretion to grant application

Sale of Goods Act 1923 (NSW), s 26(1)
Corporations Act 2001 (Cth) , s 500(2)
Sale of Goods Act 1896 (Qld), s 24(1)
Supreme Court Act 1995 (Qld), s 246
Uniform Civil Procedure Rules 1999, r 272

Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited [1991] 1 Qd R 301, considered
Re Casalin Pty Ltd (unreported, Queensland Supreme Court 22 December 1986), distinguished
Owen v Carrington Confirmers Pty Limited (*in liquidation*) (unreported, Federal Court, 25 March 1995), distinguished

COUNSEL: M Amerena for the first and second plaintiffs
I Perkins for the first and fourth defendants
R Traves, with A Simpson, for the first respondent Australia Texas Energy Pty Ltd
C Wilkins for the sixth respondent G E Commercial Pty Ltd

SOLICITORS: Hyland Lawyers for the first and second plaintiffs
Tucker & Cowen for the first and fourth defendants
Boulton, Cleary & Kern for the first respondent
Thynne and Macartney for the sixth respondent

[1] **McMURDO J:** In northwest Queensland there is a copper mine called the Eloise Mine. It is operated by Breakaway Resources Ltd ("Breakaway"), formerly known as AMALG Resources N. L.. There is a power station at the mine. It contains seven generators and other equipment. Breakaway does not claim to own any of this equipment. It pays approximately $100,000 per month for the power station facility. Since 12 May last, it has done so pursuant to an agreement with Australian Texas Energy Pty Ltd ("ATE"). For some time prior to that, the relevant agreement or arrangement was between Breakaway and Australian Energy & Electrical Holdings Pty Ltd ("AEEH"), which was placed into voluntary administration on 12 May, and which is now a company in liquidation.

[2] The first and second plaintiffs claim to have a fixed charge over the equipment of the power station, or at least some of it. That charge is said to come from a mortgage debenture given to three parties, being those plaintiffs and the second defendant, Rosewood Farms and Management Pty Ltd ("Rosewood") a company controlled by Mr Clements. The first and second plaintiffs have applied for the appointment of a receiver, or a receiver and manager, to all or some of the equipment comprising the power station. Their intention is to have Breakaway's monthly payment directed towards the debts secured by their charge, which is said to be approximately $1.2M. The mortgage debenture was given by the first defendant, GSS Power Generation Pty Ltd ("Generation"). It is in liquidation, as is a related company, the fourth defendant, Generator Sales and Service Pty Ltd ("Sales and Service"). Each of those companies opposes this application. The other opposition came from two parties who are not defendants but who have been made respondents to this application. One is ATE. The other is G E Commercial Pty Ltd, which claims to be the owner of some of the generators at the mine, being the subject of a hiring agreement between it as owner and Generation as hirer, under which payments of approximately $24,000 per month are required. Those payments have been duly made, save for the payment for the most recent month (May). G E Commercial Pty Ltd says that the plaintiffs' rights as chargees are to no more than a charge over the interest of Generation as hirer.

The Applicants' Case

[3] The mortgage debenture was given on 29 November 1999, and was duly lodged at the office of the Australian Securities and Investments Commission and registered on 6 January 2000. It was then the only charge registered against Generation. It was given as collateral security to secure the payment of an amount $1.8M by the company which is the sixth defendant. That amount was payable within 60 days of 1 November 1999. There seems to be no issue, at least upon this application, as to there being a default entitling the chargees to enforce their security. In November 2000, the second plaintiff, Heshdeen Pty Ltd, wrote to Generation threatening the appointment of a receiver. The response was a letter from Generation, signed on its behalf by Mr Clements, to the effect that Generation had no assets, and saying that although "it was once envisaged that the company might acquire the assets and operations of the Eloise power plant … this never occurred either formally or informally." To the same effect, in April 2000 solicitors then acting for Generation as well as for AEEH and other companies including Sales and Service, wrote to the applicants' solicitors to the effect that the mortgage debenture had been executed

"by the wrong company, and by mistake". At that stage AEEH seems to have been giving instructions through Mr Clements.

[4] The mortgage debenture provides for a fixed charge over assets as identified or described in Schedule 8. Item 15 of that Schedule identifies seven generators. For present purposes, the evidence sufficiently demonstrates that at least three of them are still in use at the Eloise Mine power station. A fourth is also in use although its alternator has been replaced. The three other generators identified in the mortgage debenture, the applicants appear to concede, have been replaced or "cannibalised". For these items the applicants rely upon cl 19.5 of their mortgage debenture which provides that the security extends, by way of a further fixed charge, to all assets acquired in substitution for or in replacement of assets subject to a fixed charge. They contend that to the extent that there is equipment which has replaced any of the seven generators described in the schedule in the mortgage debenture, that equipment is also subject to a fixed charge. Their alternative case comes from the claim by G E Commercial Pty Ltd to own at least some of the generators. They claim that in that event, the chargor has an interest as hirer under its agreement with G E Commercial Pty Ltd, and that interest is in turn subject to their charge.

[5] The cases put against them are of two kinds. First, it is said that none of these items has ever been owned by Generation. Secondly, it is said that those items which are presently at the mine, and which were acquired subsequent to the mortgage debenture, were not acquired by Generation, so that it is not charged in favour of the applicants. On the first point, there is some evidence to support each side. The main evidence against the applicants is a document described as a "Sale and Purchase Agreement" dated 19 September 2000. The purchaser is G E Capital Australia, which is associated with the respondent G E Commercial Pty Ltd. The vendor is not shown as Generation, but instead as Sales and Service. The subject matter comprises the seven generators shown in the mortgage debenture and other associated equipment. The case against the applicants is that this evidences an ownership of the items by Sales and Service, and not by the chargor. This sale and purchase coincided with the hiring by G E Commercial Pty Ltd to Generation. Against this evidence, however, there is a substantial amount of documentary evidence which does support the applicants' case. That evidence is exhibited to and explained by affidavits sworn by Mr Bartley. Considered with the mortgage debenture itself, the evidence does demonstrate at least that the applicants have a serious question to be tried, to the effect that their chargor did indeed own the generators and other relevant equipment when the mortgage debenture was given. At present, however, it is impossible to conclude that matter in the applicants' favour.

[6] If Generation was the owner of the original generators, that provides a basis for claiming that replacement parts, or a replacement generator, were also the property of Generation. It is inherently likely that the replacement was under the same ownership as the original. Against the applicants, however, it is said that it was not Generation which dealt with the mine operator, but (until very recently) it was AEEH, which was receiving a large monthly payment for the mine operator and was paying G E Commercial Pty Ltd under the hiring agreement. That in itself would not effect a transfer from Generation to AEEH. But it would make it likely that it was AEEH which acquired a new generator or other equipment. It supports the evidence in the affidavits of Mr Isbell and Mr Kindt to the effect that these replacement generators were acquired by AEEH and in the case of a fourth

generator, a replacement alternator was acquired by lease to AEEH from Bank of New Zealand Australia. Two of those replacement generators are said to have been acquired by lease, the lessor being Orix Limited. The evidence that it was AEEH which acquired these items is far from complete. As to one generator, there is no documentary evidence relied upon. The evidence in relation to the two generators said to be leased from Orix is stronger, although it does not include any documents showing the dealings between AEEH and the alleged vendor. On the whole, however, it seems to me that ATE has raised a relatively strong case to the effect that three generators, and part of a fourth generator, amongst the seven presently in use at the mine, are not the property of the chargor, and in turn not subject to the applicants' charge. Nevertheless, because there is a serious case to the effect that the original generators were owned by the chargor, I think there is enough in the inherent likelihood that the replacement of some of items was effected by the owner of them, as to make for a serious case for the applicants that their chargor was the owner of the new equipment as well. On the present material that is not as apparently strong as ATE's case, but it is sufficient to raise a serious question to be tried.

[7] G E Commercial Pty Ltd contends that it is the owner of at least some of the generators still at the mine, regardless of whether Generation was the owner of relevant items at the time G E Commercial Pty Ltd thought it was acquiring them. In reliance upon s 26(1) of the *Sale of Goods Act* 1923 (NSW),[1] it says that Generation is precluded by its conduct from denying the authority of Sales and Service to sell to G E Commercial Pty Ltd. That is another issue to be tried.

[8] In summary, the applicants might ultimately prove at a trial that the mortgage debenture gives a fixed charge over all of the assets presently at the mine, or at least a charge over three of the seven generators, part of a fourth generator, and other equipment in the power plant. However it presently appears likely that the applicants did not enjoy a charge over more than three generators, part of a fourth and some other equipment.

Applicants' Right to Apply absent their Co-Chargee

[9] The third chargee does not join the first and second plaintiffs in this application. It is the second defendant in the proceedings. It has at all times been under the control of Mr Clements, who, as I have mentioned, instructed solicitors in 2001 to assert that the mortgage debenture was a mistake, and that it should not have been given by Generation. The various respondents have submitted that, in effect, there is no power to grant any of the orders sought upon this application because it is one made by but two of the three chargees. Two cases are cited for this proposition. The first is a judgment of Dowsett J sitting in this court in *Re Casalin Pty Ltd* (unreported, 22 December 1986). The other is the decision of Kiefel J in *Owen v Carrington Confirmers Pty Limited* (*in liquidation*) (unreported, Federal Court, 25 March 1995). Each case concerned the proper construction of a mortgage to assess whether its express power given to the mortgagees was exercisable by only some of them. Neither of those cases, or cases cited within them, concern the present context of an application for the appointment by the court of a receiver. Absent authority in this particular context, it is far from clear to me that the long held equitable jurisdiction to appoint a receiver, now expressed in s 246 of the *Supreme*

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1 Identical to s 24(1) of the *Sale of Goods Act* 1896 (Qld)

Court Act 1995 and r 272 *UCPR*, is never exercisable where the application is not made by each and every person entitled to the charge.

Discretionary Considerations

[10] There was some debate as to the strength of the case required for orders of the kind sought. There were submissions to the effect that this context was analogous to that of an application for a mandatory injunction, such that something more than merely a serious question to be tried had to be established.[2] In the view I have reached as to the appropriate outcome, it is unnecessary to decide that point, and whether the applicants' case enjoys this "high degree of assurance". But the relative strength of the applicants' alternative cases is plainly relevant to the exercise of the discretion here. In particular, the apparent difficulty in establishing an entitlement to the items acquired since the mortgage debenture is a factor against the exercise of the discretion in the applicants' favour.

[11] This is not a case where the applicants apprehend that the pieces of equipment themselves will be lost before trial if they are not preserved by the appointment of a receiver. Instead, the applicants' particular concern is that the items have a short term profit potential, which is likely to have passed by the time this case is tried, and the value of which will be lost if a receiver is not appointed. It is then necessary to consider the nature and extent of that potential. It comes from the use made of the equipment under what seems to be a profitable arrangement with Breakaway. But the chargees do not enjoy a charge over the contractual entitlements of ATE under its contract of 12 May 2003. A receiver, when appointed, would have no right to the payments which would otherwise be due under ATE's contract. The receiver would have to negotiate with Breakaway. His bargaining position would, of course, be enhanced by having control of all or some of the power plant. Thus the particular profit potential from the exploitation of any charged assets exists from the prospect that the contract of 12 May 2003 will be interfered with, Breakaway will be denied the benefit of the performance of that contract and it will have to come to terms with the court's appointed receiver.

[12] Breakaway has not been made a respondent to this application. An appointment of a receiver is bound to interfere with its contract and has the real potential to cause some significant disruption to its mining operations. That seems to me to be a particularly important discretionary consideration against this application. In addition, although the applicants have some case to be tried to the effect that they enjoy a charge over all of the equipment, there is a substantial prospect that they would establish no more than a charge over three generators, some of a fourth generator, and some other equipment. It is no light matter to appoint receivers to all of the equipment when there is a substantial prospect that about half of it is not something in which the applicants have any interest. Nor is any problem overcome simply by appointing a receiver to those items which were identified in the mortgage debenture and are still at the mine. Mr Amerena submitted that a receiver could be appointed to part of the generator in the sense that he could be authorised to cause a generator to be dismantled. I accept that there is a power to make such an order but it seems to me to be quite undesirable in the present case, especially

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2 *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited* [1991] 1 Qd R 301

having regard to the interests of Breakaway, which would have to watch with some concern whilst the power plant was in part dismantled. Even if a receiver were appointed to the three original generators, the consequence would still be an interference with the contract with Breakaway and a potential disruption of the mining operation.

[13] No doubt prompted by the current application, ATE is taking steps to replace the existing generators with new equipment. Mr Kindt gave evidence to the effect that this is likely to occur in late July. That would not offend any entitlement of the applicants, and they are in no position to prevent it. Given that likelihood, the earning potential of what is presently in the power plant is limited to another month or so. The appointment of a receiver could still significantly disrupt the mining operations within that time, but it is unlikely to have such a substantial benefit for the applicants as they might have anticipated when they filed this application and before they knew of the likely replacement of the generators.

[14] The application has been made a very long time after the relevant default under the mortgage debenture, and after it became known that there was a dispute as to the applicants' entitlement. The applicants have been prepared to wait until May 2003 before looking to protect their interest in the equipment used at this mine. They may have had some justification for this, and they have certainly had their difficulties with Mr Clements. However, whilst they were taking no action to appoint a receiver or otherwise obtain possession of the items, others, most importantly the mine operator, have conducted their affairs on the basis of having the use of this equipment.

[15] Despite the discord between Mr Clements and his co-venturer, presently represented by ATE, and the financial difficulties which have been experienced by the Clements companies and AEEH, the required monthly payment to G E Commercial Pty Ltd of about $24,000 has been made until last month. Counsel for ATE have said that they hold instructions to undertake to make that outstanding payment, and in turn to meet the monthly payments through to the end of the hiring agreement later this year. That is a matter which is of some significance in the respondents' favour.

[16] For these reasons I think that the appointment of a receiver to all or some of this equipment would be likely to cause significant disruption and probably damage, although at the same time, it is not very likely to substantially advance the position of the chargees, especially as the equipment will probably be replaced at the mine next month. I am especially reluctant to appoint receivers where the applicants' rights might be to no more than a charge over the interest of a hirer in some of the equipment, where the hirer is in default and the receiver's means of remedying that default would come only from the expectation of a substantial income stream from the mine, which is relatively unlikely. It is also far from clear to me that the appointment of a receiver to part of the power plant, with the remainder under the control of ATE, would be a workable regime for the day to day supply of necessary power for a mining operation, including the maintenance of the plant.

[17] For these reasons the application for the appointment of receivers should be refused.

Leave to Proceed

[18] The application also seeks leave to proceed against Generation and Sales and Service, the first and fourth defendants, pursuant to s 500(2) of the *Corporations Act* 2001. But it is conceded that leave should be given only in relation to what is described as non-monetary claims, being those referred to in para 2 and 3 of the prayer for relief in the further amended statement of claim. There will be orders for leave to proceed to that effect. Otherwise the application filed 23 April 2003, as amended pursuant to the order made 20 May 2003, will be dismissed.

[19] I will hear the parties as to costs.