

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 5277 of 2003

STATE OF QUEENSLAND

Applicant

and

MATTHEW FERGUSON SHAW

Respondent

BRISBANE

..DATE 25/07/2003

JUDGMENT

[2003] QSC 228

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for a restraining order,
pursuant to section 28 of the Criminal Proceeds Confiscation
Act 2002.

The order seeks to restrain dealings in the property of the
respondent, Matthew Shaw, upon whom the application has been
served.

Shaw was legally represented on the last occasion, when the
matter was before the Court and gave undertakings not to deal
with the property on that occasion.

The application was then adjourned until today. Today he has
not appeared. The relevant factual matters set out in the
section and in section 31 have been proved by the affidavit
material, as have the matters necessary to support orders
under section 38, in respect of oral examination and a sworn
statement of particulars of property.

However, one collateral point has arisen in the course of the
helpful submissions made by Mr Hinson SC on behalf of the
applicant. The material discloses that among the respondent's
property is an interest in a block of land located at 66
Korumburra Road, Ashmore. That interest is an interest as co-
owner of that property, the other co-owner being Melissa
Mortlock. I apprehend Ms Mortlock is Mr Shaw's partner. The
land is mortgaged to Suncorp Metway Limited and by reason of
the terms of the proposed order, it is clear that that company
is a person which would be affected by the order. It would

not be affected in its capacity to deal with its mortgage. The way in which it would be affected is in its capacity to deal with the land. That capacity would fall for exercise, if there were a default in the mortgage repayments. Suncorp Metway might then wish to exercise a power of sale. The evidence before me discloses that at the present time, there has been no such default, but one might expect that the risk of a default in the future is increased if the whole burden of making the payments of \$800 per month is transferred to Ms Mortlock.

Suncorp might, therefore, wish to exercise a power of sale of the land, which would of course include the respondent's interest in it. That caused me to question whether the application ought to be served on it. On behalf of the applicant Mr Hinson submitted that it was unnecessary to effect such service. He submitted that the scheme of the legislation is to permit the State to bring the application without giving notice to persons affected (as opposed to persons whose property is affected) and to allow such persons, particularly mortgagees or other encumbrancees as defined, to make an exclusion application under section 49 of the Act.

I was referred also to sections 45 and 47 and to sections 63 and 64 in further support of the proposition regarding the scheme provided in the Act.

In the alternative Mr Hinson submitted that if it is held that the scheme of the Act does not envisage the course for which

he contended, the Court had a discretion to allow the matter to proceed without service on persons affected and that this was a case for the exercise of the discretion. He referred me in this regard to section 28(2)(b) of the Act.

The applicability of that section is not immediately obvious. One might have thought that the person to whom the application relates is the respondent. However I am satisfied that the order which is sought does more than simply affect Suncorp. Its effect is to restrain Suncorp from dealing with its own property as defined. That result comes about because the proposed order will prevent Suncorp from exercising the statutory power of sale conferred by the Property Law Act.

At first sight one would not think that such a power of sale was property. However, as Mr Hinson pointed out, "property" is defined in section 36 of the Acts Interpretation Act to mean "any legal interest whether present or future vested or contingent or tangible or intangible in real property" and "interest" is there defined to mean in relation to land "a right over or in relation to the land".

It follows therefore that the power of sale is property as defined in the Act and that the effect of the order which prevents the exercise of the power of sale, by reason of its impact on the property of the respondent, also makes it relate to the property of Suncorp.

In the course of his helpful submissions, Mr Hinson's attention was drawn to the possibility that section 28(2)(b) might be interpreted to confer an entitlement upon the State of Queensland, rather than to describe the process which would take place in this Court when an application was made. If the former interpretation were correct, that is if the State had an entitlement to proceed without notice to any person to whom it relates, the Court would have no discretion to require notice to be given.

Mr Hinson, rightly in my view, disclaimed any reliance upon such a submission. He submitted that if his first submission failed, the matter was one within the discretion of the Court. In this regard he was, I think, supported by a passage in the judgment of Williams JA in *S v. M* [2003] QCA 249 in paragraph 9. There, his Honour referred to section 28 and said that it would permit an application to be brought on notice to affected parties or to be brought *ex parte* in the first instance as that expression is generally understood if the circumstances justified that course. The condition to which his Honour referred would be inconsistent with the existence of an unqualified right in the applicant to proceed *ex parte*.

I therefore approach the two questions which are raised in the order in which I have referred to them. In my judgment, the Act does not disclose a scheme whereby the State has a right to proceed without notice to anyone who is affected by the order, particularly to anyone whose property is the subject of

the order, either expressly or by the effect of the operation
of the order.

It is true that the Act requires the order to be served on any
person who is affected by the order: see section 45. And it
is also true that provision is made for such a person to apply
for an exclusion order. It does not seem to me, however, that
these sections and the others to which I was referred
necessarily indicate a right to proceed without notice. They
indicate the course to be followed in all cases and they make
sense when one realises that in most cases one would expect
what has happened today to occur. That is, one would expect
mortgagees not to be interested in engaging lawyers to attend
applications such as this. To make them bound by the order or
at least to make the order enforceable against them it is
necessary that it be served upon them.

Those sections do not, in my view, indicate a statutory scheme
which dispenses with the requirement for service. The right
to be heard is a fundamental right and it is recognised in the
requirement for service. The right has been discussed
recently in the decision of the Court of Appeal in Greig and
Duff v. Stramit Corporation Pty Limited [2003] QCA 298. It
would take more than the collection of sections to which Mr
Hinson referred to persuade me that the statutory scheme
envisages proceeding in that way.

As far as the discretionary point is concerned, during the
course of an adjournment granted for the purpose, the

applicant has procured evidence from Suncorp Metway Limited
that it does not wish to be heard in respect of the
application.

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That being so, it seems to me it would be futile to require
the application to be served upon it. There is no other
person demonstrated as having an interest. In particular,
there is no reason to think that the co-owner is such a person
as the restraint does not, as far as I can see or as far as
been drawn to my attention, in any way impact upon her rights
as a co-owner.

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It might, of course, be different if the property were held
jointly rather than as tenant in common and about that
situation I say nothing.

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I therefore am content to proceed in this case without service
of the application on Suncorp Metway Limited. The elements of
the section having been demonstrated by the affidavit
material, there will be an order in accordance with the draft
initialled by me and placed with the papers.

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