SUPREME COURT OF QUEENSLAND

CITATION:	*Dwyer v Derek & Anor* [2003] QSC 274
PARTIES:	**JEFFERY SEAN DWYER** (applicant) v **RITA MARIA-ANGELA DEREK** (first respondent) **JOHN ALEXANDER DEREK** (second respondent) **JEFFERY SEAN DWYER** (applicant) v **WARPAN PTY LTD (ABN 36 372 064 933) trading as ELDERS REAL ESTATE** (first respondent) **RITA MARIA-ANGELA DEREK** (second respondent) **JOHN ALEXANDER DEREK** (third respondent)
FILE NO/S:	SC No 4984 and 2733 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	21 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 June and 16 July 2003
JUDGE:	McMurdo J
ORDER:	1. **The application in SC No 4984 of 2003 is adjourned to a date to be fixed.** 2. **The application in SC No 2733 of 2003 is dismissed.**
CATCHWORDS:	MORTGAGES – REMEDIES OF EQUITABLE CHARGEE - where application to enforce mortgages held by unregistered mortgagee – where unregistered mortgagee purported to appoint applicant as receiver prior to registration of transfer of the mortgages to him – whether unregistered transferee of mortgage is entitled to enforce mortgage absent agreement by the mortgagor – whether purported appointment of applicant invalid *Land Title Act* 1994 (Qld), s 62

Property Law Act 1994 (Qld), s 83(1)(c), s 92

Equus Financial Services Limited v Glengallan Investments Pty Ltd (Appeal No 262 of 1993 19 May 1994), cited
Long Leys Co Pty Ltd v Silkdale Pty Ltd (1991) 5 BPR 11, 512; [1992] ANZ ConvR 223; (1992) NSW ConvR, considered
Norman v Federal Commissioner of Taxation (1963) 109 CLR 9, cited
Showa Shoji Australia Pty Ltd v Oceanic Life Ltd (1994) 34 NSWLR 548, considered
Silkdale Pty Ltd v Long Leys Co Pty Ltd (1995) 7 BPR 14, 414, considered
Stone v Ace-IRM Insurance Broking Pty Ltd [2003] QCA 218, cited
Thomas v National Australia Bank Limited [2000] 2 Qd R 448, cited
Warner Bros Records Inc v Rollgreen Ltd [1976] QB 430, considered
William Brandt's Sons & Co v Dunlop Rubber Company [1905] AC 454 at 462, considered

COUNSEL:	A J Moon for the applicant on 24 June 2003 D A Savage SC for the applicant on 16 July 2003 The second respondent in SC No 4984 of 2003 and the third respondent in SC No 2733 of 2003 appeared on his own behalf
SOLICITORS:	McInnes Wilson for the applicant The second respondent in SC No 4984 of 2003 and the third respondent in SC No 2733 of 2003 appeared on his own behalf

[1] **McMURDO J:** These applications involve the attempted enforcement of mortgages granted to or now held by Mr M E Pope. In each case the mortgagors are the respondents, Ms Derek and Mr Derek. The applicant has been appointed, or purportedly appointed, a receiver and manager under each mortgage. One of the mortgages was dated 1 March 2001 and registered as No 704797383 ("the Pope mortgage"). It was expressed to secure a loan by Mr Pope to the Dereks of $75,000. The properties mortgaged were a lot at Hideaway Bay in North Queensland and the Dereks' then matrimonial home at Nerang. The other mortgages were originally granted by the Dereks to Provident Capital Limited ("Provident") but were assigned to Mr Pope earlier this year. They are the first registered mortgages are over respectively the two parcels of land constituting the Nerang house property.

[2] On 10 October 2002 Mr Pope purported to appoint the applicant, Mr Dwyer, as receiver and manager of the Hideaway Bay and Nerang properties under the Pope mortgage. On 19 February 2003, he purported to appoint Mr Dwyer as a receiver and manager of the Nerang house pursuant to the Provident mortgages.

[3] Mr Dwyer has sold the Hideaway Bay land and accounted to Mr Pope for the proceeds of sale, save for the amount of $6,755 which is the amount of the deposit after deduction of the selling agent's commission. The sale has left an amount of approximately $20,000 still owing under the Pope mortgage.

[4] In December 2002, Mr Pope paid to Provident $495,000 for an assignment of its mortgages. There was some delay in obtaining a registrable transfer of that mortgage, and the relevant transfer was executed by Provident on 10 February and by Mr Pope on 20 February 2003. The transfer was registered on 9 July. The receiver's appointment pursuant to the Provident mortgages was dated 19 February 2003.

[5] Having sold the Hideaway Bay land, Mr Dwyer wishes to sell the Nerang house. But Mr Derek denies that any of the purported appointments of Mr Dwyer was valid. As to appointments under the Pope mortgage, Mr Derek has sworn that his signature was forged on the mortgage instrument, and upon the associated Deed of Loan. As for the Provident mortgages, he asserts that there has been no default which would entitle the mortgagee to appoint a receiver. Accordingly, Mr Derek has disputed Mr Dwyer's entitlement to what remains of the proceeds of sale of Hideaway Bay and his claim for possession of the Nerang house.

[6] Mr Dwyer brought proceedings in the District Court seeking a declaration that he was entitled to $6,755. Judge McGill SC transferred the matter to this court. The respondents to the application as filed were Mr Derek, Ms Derek and the agents. Ms Derek does not oppose these applications, and says that Mr Derek did indeed execute the mortgage. But Mr Derek having sworn that his apparent signature on the Pope mortgage is a forgery, there is an issue which will have to be tried before Mr Dwyer can establish his entitlement to these funds.

[7] His other application is for possession of the Nerang house. Ms Derek has not lived there since October 2001, when she and Mr Derek separated. He has continued to live there. Insofar as Mr Dwyer's appointment depends upon the Pope mortgage, again there is a need for a trial before Mr Dwyer could establish his entitlement to possession. For the present, Mr Dwyer has to rely upon his appointment under the Provident mortgages.

[8] These applications were first before me on 24 June, where neither side was fully prepared to argue the issues arising in relation to the Provident mortgages. Mr Dwyer wished to put on evidence going to alleged defaults under those mortgages, and Mr Derek was given an opportunity to substantiate his assertions that he was not in default, or alternatively that he was ready willing and able to redeem. The matter came back before me on 16 July with each side relying upon further evidence which included, in Mr Dwyer's case, evidence of the registration of the transfer of mortgages on 9 July. Mr Derek's evidence included reference to his attempts to obtain further finance from Provident, showing that Provident was prepared to make a fresh loan to pay out what had become the debt owing to Mr Pope, but because the registered owners remained both Mr Derek and Ms Derek, he had been unable to redeem. The Dereks are litigating in the Family Court and Ms Derek wants the former matrimonial home to be sold, so that there is no prospect of her agreeing to grant some new mortgage, especially in the circumstance that she and Mr Pope now reside together. Nevertheless Mr Derek, who is self represented, continued to assert that he was not in default under the Provident mortgages that Provident had wrongly

refused his attempts to redeem. At the conclusion of the hearing on 16 July, I reserved the matter and indicated to Mr Derek that if there was further evidence which he wished me to consider, he should prepare an affidavit as soon as possible and file and serve it. A further affidavit was forthcoming but it took the matter no further. His own evidence clearly establishes that the due date for repayment of the principal under the Provident mortgages has long past, and that Provident in no way promised or represented that the date for repayment would be postponed.

[9] Accordingly, I am satisfied that there are defaults under the Provident mortgages, of which Mr Pope is now the registered mortgagee. But Mr Derek appears also to contend that Mr Pope is not entitled to enforce the Provident mortgages because, he asserts, they were purchased in part with the proceeds of sale of the Hideaway Bay land. However, the evidence does not show that Mr Pope used any of those proceeds for that purpose. In any case, the amount involved would have constituted a small proportion of what Mr Pope paid for the Provident mortgages, so that it does not appear that Mr Pope would be enjoined from in any way enforcing the mortgages.

[10] Mr Derek further submits that Mr Dwyer's appointment was defective, because of errors in the Deed of Appointment dated 19 February 2003. As I have mentioned, there were two mortgages to Provident as there were two parcels of land making up the Nerang house property, being Lots 41 and 42 on RP 130655. The mortgage over Lot 41 is registered No 703643277. The mortgage over Lot 42 is registered No 703643287. It is only the former which is shown on the deed of appointment of 19 February as "the security". From this Mr Derek submits that there was not an effective appointment over the Nerang house. However, the Deed of Appointment identified the "appointed property" as both Lots 41 and 42. The ambiguity should be resolved by interpreting the appointment as one in relation to both lots, that is under both mortgages. There is no sensible reason why Mr Pope would have been wanting to make an appointment over part of what was enjoyed as effectively one parcel. Accordingly, this basis for the challenge to Mr Dwyer's appointment fails.

[11] As I have mentioned, the purported appointment was made some months prior to the registration of the transfer of these mortgages to Mr Pope. They were made at a time when Mr Pope had paid the agreed consideration to Provident, and when, it may be accepted, Provident held the mortgages as trustee for him. The issue which arises is whether Mr Pope was then entitled to appoint a receiver under those mortgages. They entitled "the Mortgagee" to appoint a receiver, or receiver and manager, upon a relevant default. The term "the Mortgagee" was unhelpfully defined in cl 1.01 as meaning (again) "the Mortgagee". By cl 1.02 however, it was provided that "a reference to any person shall include a reference to the executor, administrator, successor or permitted assign of that person". The question is whether a person entitled to be registered as the transferee of the mortgage is the successor or permitted assign of the (original) Mortgagee so as to be able to exercise the powers of "the Mortgagee". The issue is potentially affected by s 62 of the *Land Title Act* 1994 (Qld) which provides as follows:

> "SECTION 62 EFFECT OF REGISTRATION OF TRANSFER
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> 62(1) [Effect of registration of transfer] On registration of an instrument of transfer for a lot or an interest in a lot, all the rights,

> powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.
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> 62(2) [Transferee bound by and liable under mortgage] Without limiting subsection (1), the registered transferee of a registered mortgage is bound by and liable under the mortgage to the same extent as the original mortgagee.
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> 62(3) [Transferee bound by and liable under lease] Without limiting subsection (1), the registered transferee of a registered lease is bound by and liable under the lease to the same extent as the original lessee.
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> 62(4) ["rights"] In this section –
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> "rights", in relation to a mortgage or lease, includes the right to sue on the terms of the mortgage or lease and to recover a debt or enforce a liability under the mortgage or lease.

According to s 62 it is upon registration of the transfer of the mortgage that the transferee becomes entitled to the rights, powers, and privileges of the mortgagee's interest under a registered mortgage. This in itself might not preclude an agreement between parties to a mortgage instrument which is to the effect that certain powers, including the power of appointment of a receiver, might be exercised by an unregistered assignee of the mortgage. The section does, however, favour an interpretation of these mortgages to the effect that "the Mortgagee" means an assignee only when registered.

[12] An equitable assignee of a debt is usually required to make the assignor a party to any proceedings to recover the debt, because otherwise the debtor might have to resist two sets of proceedings, one by the equitable assignee and another by the legal owner of the debt, or perhaps by other persons claiming to be assignees.[1] It is well established, however, that proceedings commenced by the equitable assignee will not be struck out as a nullity, although the assignor is not joined,[2] and that in a particular case the court has power to dispense with the requirement for joinder of the legal owner.[3] Accordingly, prior to registration of his transfer, Mr Pope could have commenced proceedings to recover the mortgage debt, and possibly he might have been excused from the requirement to join Provident. It would therefore seem arguable that, in the same way, he was able to exercise one or more of the mortgagee's other remedies prior to registration.

[13] However, a number of decisions suggest otherwise. In *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1991) 5 BPR 11, 512; a mortgagee claiming possession had been given summary judgment where relevant default notices had been given prior to registration of the transfer to it of the mortgage. Between the execution of the transfer and its registration the respondent had purported pursuant to s 57(2)(b) of the *Real Property Act* 1900 (NSW) to give to the appellant a notice requiring payment of a certain sum within one month failing which it would exercise its

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1 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 29-30

2 *Equus Financial Services Limited v Glengallan Investments Pty Ltd* (Appeal No 262 of 1993, 19 May 1994); *Thomas v National Australia Bank Limited* [2000] 2 Qd R 448; *Stone v Ace-IRM Insurance Broking Pty Ltd* [2003] QCA 218

3 *William Brandt's Sons & Co v Dunlop Rubber Company* [1905] AC 454 at 462

power of sale. The appellant failed to comply with the notice and the respondent was initially given an order for summary judgment for possession. In the Court of Appeal, a point arose which had not been considered below, to the effect that the respondent as an equitable assignee could not give an effective notice. After noting the rules in relation to proceedings by an equitable assignee of a legal chose in action, Sheller JA (with whom Priestley and Meagher JJA agreed) said:

> "This rule of procedure says nothing as to the validity of a demand for payment by the equitable assignee of a debt. More to the point is the decision of the English Court of Appeal in the Warner Bros Records case in which it was held that the equitable assignee of a contractual option was not entitled to exercise that option in this own name so as to bind the grantor. At first instance Willis J at 434 held that the assignee's failure to give notice of the assignment to the third party resulted in an inherent and an incurable defect in the title of the assignee to maintain the proceedings which could not be validated by the purely procedural step of joining the assignor. The reason for this was stated in the judgment of Roskill LJ at 443-4 to be that the only rights that an equitable assignment can create in the equitable assignee are rights against his assignor who thenceforth becomes the trustee of the benefit of the option for the assignee. The assignor could of course be compelled in equity to exercise rights for the benefit of the assignee. Sir John Pennycuick at 445 put it in the following way: "Where there is a contract between A and B, and A makes an equitable but not a legal assignment of the benefit of that contract to C, this equitable assignment does not put C into a contractual relation with B, and, consequently, C is not in a position to exercise directly against B any right conferred by the contract on A."
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> There emerge from these cases two separate propositlons. One is procedural spawned on the need to protect the defendant from repeated claims. The second is more fundamental. The right of an equitable assignee of a chose in action being one against the assignor rather than the debtor, the equitable assignee cannot exercise a contractual right against the debtor.
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> The demand in the present case having been made by the respondent at a time when it was no more than an equitable assignee, the reasoning in the Warner Bros Records case suggests it was ineffective. That being so, at the very least there is a triable issue and accordingly an order should not have been made for summary judgment."

[14] *Long Leys* was considered by Giles J in *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548, in the context of a purported exercise of an option given to a building owner to require a former lessee to take a new lease. The plaintiff had purported to exercise the option as the assignee in equity from the original owner. Giles J did not consider himself bound by *Long* Leys, on the basis that it decided no more than that there was a triable issue. After setting out passages

from the judgment in *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430*,* Giles J said (at p 561):

> "The equitable assignee could not exercise the option because, absent a legal assignment, it was not in a contractual relationship with the grantor of the option and could not exercise a right given by the contract – all it could do was require the assignor to exercise the right. But there is a possible difficulty with the reasoning of Roskill LJ and Sir John Pennycuick. The equitable assignee of a debt may undoubtedly sue to recover it although not in a direct contractual relationship with the debtor (eg, *William Brandt's Sons & Co v Dunlop Co* [1905] AC 454) and may sue for infringement of the assignor's rights although otherwise in no legal relationship with the infringing party: eg, *Performing Right Society, Ltd v London Theatre of Varieties, Ltd* [1924] AC 1. As a rule of practice the assignor must be joined as plaintiff or defendant, but in some circumstances that rule of practice may be dispensed with: *William Brandt's Sons & Co v Dunlop Co; Performing Right Society, Ltd v London Theatre of Varieties, Ltd; Long Leys Co Pty Ltd v Silkdale Pty Ltd.* If this be so, why should the absence of a contractual relationship between the equitable assignee and the grantor of the option, at least where the option is expressly assignable, mean that the equitable assignee can not give the notice exercising the option?
> …
> It seems to me that, notwithstanding what I have referred to as a difficulty, the reasoning of Roskill LJ and Sir John Pennycuick is correct in principle, and the differing reasoning of Lord Denning MR is not compelling. While an assignment at law substitutes the assignee for the assignor as contracting party with the opposite party, an equitable assignment operates between the assignor and assignee. In the absence of notice of an assignment, the opposite party looks only to the assignor; with notice of an assignment, the opposite party may be unable safely to deal with the assignor (see *William Brandt's Sons & Co v Dunlop Co* (at 462), but his agreement is still with the assignor and it is the assignor rather than the assignee who has the contractual right to exercise the option. To the extent to which in exceptional circumstances departures from the dictates of this reasoning have been permitted, they do not extend to the situation in *Warner Bros Records Inc v Rollgreen Ltd*, the proposition found in that case in *Long Leys Co Pty Ltd v Silkdale Pty Ltd*, should be acted upon, and Showa was not entitled to give the lessor's notices as equitable assignee."

[15] In a later chapter of the *Long Leys* case,[4] Young J adopted this analysis in *Showa* adding that:

> "It has been accepted for virtually the whole history of the Torrens System, that an unregistered transfer can have no effect on a registered interest in land under the Real Property Act until registered, but may have effect as an equitable assignment or may

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[4] *Silkdale Pty Ltd v Long Leys Co Pty Ltd* (1995) 7 BPR 14, 414

have effect because of an estoppel; see *Barry v Heider* (1914) 19 CLR 197."

[16] These cases do not resolve the present question, but they strongly indicate that an unregistered transferee of a registered mortgage is not entitled to exercise the mortgagee's default remedies, where those remedies derive from a contract, absent some clear agreement by the mortgagor that the mortgagee's equitable assignee could do so. Being unable to reply upon s 62 to enforce the Provident mortgages before becoming the registered mortgagee, Mr Pope would have to rely upon the assignment of the benefit of the contract contained in the mortgage instrument. As the relevant right is a contractual one, rather than an equitable interest, a legal assignment was required before the assignee could enforce the contract. Reverting then to the terms of this mortgage, in my view the expression "successor or permitted assign of that person" within cl 1.02, where that person is the mortgagee, is not a reference to an unregistered transferee of the mortgage with the consequence that the instrument of mortgage is in harmony with the operation of s 62. The result is not at all surprising, for it makes the mortgagors' registered interest susceptible to the enforcement of a registered mortgage only by the registered mortgagee. It is unnecessary to explore whether the expression "successors or permitted assigns" could in any event apply to Mr Pope as an assignee of the mortgage, or whether it must refer only to some successor to the *business* of Provident Capital, although the discussion by Young J in *Silkdale Pty Ltd v Long Leys Co Pty Ltd* suggests that the latter is correct.

[17] Accordingly, Mr Pope's purported appointment under the Provident mortgage was invalid. It has only been since 9 July that he has been entitled to appoint a receiver and manager. I should add that the purported appointment goes further than an appointment to receive the income of the Nerang house, and accordingly Mr Pope must rely upon the terms of the mortgage instrument rather than upon sections 83(1)(c) and 92 of the *Property Law Act* 1994 (Qld). There is no evidence of any appointment since 9 July. It follows that the basis for Mr Dwyer's claim for possession must be the Pope mortgage about which there is an issue to be tried. At present then, Mr Dwyer has not demonstrated an entitlement to the orders he seeks. However, consistently with these reasons, Mr Pope could now appointment Mr Dwyer under the Provident mortgages. The appropriate course is not to dismiss these proceedings in their entirety but to adjourn Mr Dwyer's application which seeks possession of the Nerang house for a short period so as to allow Mr Pope to consider his position.

[18] I shall hear the parties as to the period of that adjournment and as to costs.