

SUPREME COURT OF QUEENSLAND

CITATION: *Jedhar Pty Ltd v Grosse* [2003] QSC 330

PARTIES: **JEDHAR PTY LTD**
(applicant)
v
ALISON R GROSSE
(respondent)

FILE NO/S: SC No 7361 of 2003

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 1 October 2003

DELIVERED AT: Brisbane

HEARING DATE: 22 September 2003

JUDGE: McMurdo J

ORDER: **1. The Caveat number 706784059 be removed.**
2. The application filed by Ms Grosse on 10 September 2003 be dismissed.

CATCHWORDS: TORRENS SYSTEM – CAVEAT – APPLICATION FOR REMOVAL OF - where application by Jedhar to remove caveat over house owned by it – where caveat lodged by respondent judgment creditor – where respondent claims applicant’s director alienated property in favour of applicant with an intent to defraud creditors – where respondent claims equitable interest in and resulting constructive trust over house – whether respondent has a caveatable interest in house – whether respondent’s interest, if any, prevails against registered interest of mortgagee – whether caveat should be removed

INJUNCTIONS – MAREVA - where application by respondent for an interlocutory injunction restraining Jedhar from dealing with house and mareva order in relation to other assets held by it – whether respondent has a serious case payments directed by Jedhar’s director to Jedhar were alienations of property and for the purpose of defeating creditors –whether respondent should be granted

interlocutory relief

Property Law Act 1974 (Qld), s 228

Bathurst City Council v BWC Properties Pty Ltd (1998-1999)
195 CLR 566, cited

Blenkinsopp v Blenkinsopp (1852) 1 DE G M & G495; 42 ER
644, cited

Giumelli v Giumelli (1998) 196 CLR 101, cited

Noakes v J Harvy Holmes & Son (1979) 37 FLR 5,
considered

In re Mouat; Kingston Cotton Mills Company v Mouat [1899]
1 Ch 831, considered

Re Trautwein (1944) 14 ABC 61, cited

Sanwa Home Pty Ltd v Sanwa Home Inc & Anor (unreported,
No 92 of 1994, 14 September 1995), considered

COUNSEL: F Dawson for the applicant
P Dunning for the respondent

SOLICITORS: Greenhalgh Pickcard for the applicant
Klooger Phillips Scott for the respondent

- [1] **McMURDO J:** Jedhar Pty Ltd is the trustee of what is described as the Purvis Family Trust. It is a discretionary trust created by a trust deed executed in 1986. The potential beneficiaries identified within the trust deed are members of the family of Robert James Purvis and his wife Heather Joy Purvis. The original trustee was Mrs Nancy Guiver, the mother of Mrs Purvis. In about 1992, she was replaced as trustee by Jedhar, whose directors until 1995 were Mr and Mrs Purvis, and were from 1995 to 2000 Mr Purvis and a Mr Barry McDonald. Since February 2000, Mr Purvis has been the sole director of Jedhar.
- [2] In November 1986, Ms Guiver as the trustee purchased a house at 11 Essex Court, Buderim. It then became the Purvis family home. Jedhar is the registered owner as the current trustee. Mr and Mrs Purvis are estranged but not divorced. Mrs Purvis has not lived in the house from about November 1995. Over the years the Purvis children have moved elsewhere as they have grown up, although Mr Purvis says that some of them stay in the house from time to time especially on weekends and during holidays. The house is mortgaged to Suncorp to secure a loan of \$334,000 made to one of the family, Adam Purvis. For the purposes of that mortgage, a valuation was undertaken in January 2003 for the benefit of Suncorp, according to which the house was then worth \$450,000.
- [3] The other party to this case is Ms Grosse. In June this year, she was given judgment for \$178,000 plus interest and costs in her suit against Mr Purvis, in

relation to his conduct dating back to about 1994. The judgment debt remains entirely unpaid. Ms Grosse is attempting to recover that judgement, at least in part, from the house owned by Jedhar. She has lodged a caveat against the property, which Jedhar now applies to remove denying that Ms Grosse has any caveatable interest. She has also commenced proceedings¹ by which she claims against Jedhar that she has an equitable interest in this house, or an equitable charge or lien over it. She applies for an interlocutory injunction to restrain Jedhar from dealing with the house property, and for a Mareva order in relation to other assets of Jedhar.

- [4] Her case against Jedhar is founded upon an allegation that Mr Purvis alienated property in favour of Jedhar with intent to defraud his creditors so as to engage s 228 of the *Property Law Act 1974* (Qld). As an unpaid judgment creditor, Ms Grosse alleges that she is prejudiced by those alienations of property, and that she is entitled to avoid them. She maintains that their avoidance has the consequence of giving her some equitable interest or entitlement in Jedhar's property and in particular in the house.
- [5] Assuming for the moment that there were alienations of property by Mr Purvis to Jedhar which Ms Grosse has avoided pursuant to s 228, it is far from clear that the avoidance would give her a caveatable interest in the house. The alienated property is said to have been Mr Purvis' right to payments from his employer or, alternatively, money held by Mr Purvis, which, in either case, was alienated in favour of Jedhar. The monies thereby received by Jedhar are said to have been used to make improvements to the house. Ms Grosse contends that she is entitled to follow those monies into the house property. As a general proposition, where property comprised in fraudulent alienation has been converted, the creditors may follow it; *Re Trautwein* (1944) 14 ABC 61 at 75 (Clyne J); Halsbury's Laws of England, 4th ed vol 18 para 387. But it is another thing to say that the avoidance of the alienation and the right to follow the alienated property into other property gives the creditor some equitable interest in the property concerned. Where the alienated property is still held by the transferee, the avoidance results in the property being available to satisfy the transferor's creditors in a way described in *In re Mouat: Kingston Cotton Mills Company v Mouat* [1899] 1 Ch 831, by Stirling J at pp 834-835:

“According to the law which has been laid down in the cases I have just cited, the assignments became void the moment the creditors claimed to treat them as such; and thereupon the property which was comprised in those assignments ceased, as against the creditors, to be the property of the assignee, and became assets for the payment of the creditors in such a way that they had a legal right to be paid out of those assets.”

¹ Numbered B8352 of 2003

The assistance provided by equity for this legal right was explained at p 833-834:

“But the rights of creditors, though they are legal, can be made available in courts of equity. There are many cases in which the Court of Chancery, prior to the *Judicature Act*, assisted the creditors by giving equitable remedies which are not available in courts of law. For example, there are many instances in which the Court has, after the death of the debtor, set aside deeds which were void under the statute, and proceeded to administer, for the benefit of creditors, the property which was the subject-matter of those deeds. ... In truth, the Court appears to have pursued the same course with reference to property which constitutes assets of this description as it has with regard to other legal assets, as, for example, lands or real estate descended or devised in cases where specialty creditors had a right, either at law or under the statute, to payment out of such assets. In those cases the court has proceeded, although the rights were legal, to administer the assets by directing a sale of so much of the land as was necessary to satisfy the debts.”

The assistance thus provided by equitable remedies does not make the holder of the property in every case a trustee for the creditor or creditors of the transferor. For Ms Grosse, Mr Dunning heavily relied upon the judgement of Moynihan J in *Sanwa Home Australia Pty Ltd v Sanwa Home Inc & Anor* (unreported, No 92 of 1994, 14 September 1995). Sanwa Australia was a judgment creditor of Sanwa Inc, which had transferred its interests as a mortgagee of certain land to the other defendant, ReEsta Corporation Limited. That transfer was alleged to have been made with intent to defraud Sanwa Inc’s creditors, notably Sanwa Australia, which lodged a caveat and also sought an interlocutory injunction to restrain the registration of the transfer of mortgage. The passage relied upon is where his Honour said:

“Once the requirements of s 228 are satisfied so as to render the transaction void the mortgage may arguably be held on a constructive trust and made directly available to discharge Sanwa Inc’s indebtedness to Sanwa Australia.”

The imposition of such a trust is a potential remedy to the creditor against the debtor’s transferee in an appropriate case: see *Blenkinsopp v Blenkinsopp* (1852) 1 DE GM & G495; 42 ER 644. But the remedy is discretionary, affected by such considerations as the potential impact upon the interests of innocent parties from the imposition of the trust, and whether there is another remedy which is adequate: *Bathurst City Council v BWC Properties Pty Ltd* (1998-1999) 195 CLR 566 at 584-585; *Giumelli v Giumelli* (1998) 196 CLR 101 at 111-114. As Brennan J, sitting in the Full Court of the Federal Court, said in *Noakes v J Harvy Holmes & Son* (1979) 37 FLR 5 at 11:

“The court will make such orders consequential upon the avoidance of a transfer of property as are necessary to give effect to the superior title of the creditors claiming the benefit of the statute against the party whose title was acquired under the impeached transfer.”

The discretionary nature of the potential equitable remedies makes it somewhat more difficult for Ms Grosse to assert that she holds an interest in the house which is capable of supporting her caveat. Ultimately, however, it is unnecessary to decide whether she has a caveatable interest. Assuming for the moment that she has a good case under s 228, that does not give her an interest which prevails against the registered interest of Suncorp as mortgagee, and it should not be put in a position where, if and when its default powers became exercisable, it would have to apply to have the caveat removed, if Ms Grosse’s interest can be effectively protected by the interlocutory orders she seeks against Jedhar. And if she can show a serious case under s 228, then the court has power to give her the protection of interlocutory orders pending the determination of her claim: *re Mouat* is an example.

- [6] I turn now to the case that Jedhar was the recipient of fraudulent alienations of property by Mr Purvis. It is important to note what is not part of Ms Grosse’s case. She does not plead or submit that the Purvis Family Trust is a sham. The basis for her claim that its property is subject to some interest of hers is that Mr Purvis has made certain alienations of property in its favour. Her pleaded case is that from about 1994, Mr Purvis engaged in misconduct towards her from which he “knew, or is reasonable (*sic*) to expect he ought to have known, that he would be likely to become indebted to the plaintiff in a significant sum”. Her statement of claim then pleads the following as the fraudulent alienations of property:

- “5. At the same time as Purvis engaged in the conduct pleaded in para 3 and had the knowledge pleaded in para 4 he caused his employer, SCRGAL, make part of his remuneration payments to Jedhar instead of himself.
6. The payments to Jedhar were solely for personal exertion work performed by Purvis for SCRGAL.
7. Jedhar did not, and was not able to, do anything else by way of the provision of services to SCRGAL for such remuneration.
8. Purvis caused Jedhar to apply that part of his remuneration that had been directed to it to improvements to the house.

9. Purvis made statements over this period to the plaintiff to the effect that he had taken steps to put his assets out of the reach of his creditors.
10. By causing the monies payable for his own work to be paid to Jedhar Purvis made, on each occasion, an alienation of his property for the purpose of s 228 of the *Property Law Act* (“the alienations”).
11. The alienations were with the intention to defeat creditors, including a prospective creditor such as the plaintiff.
- ...
15. In the alternative, that the registered proprietor used monies to improve the value of the land, which monies were alienations of property in contravention of Section 228 of the *Property Law Act* and are voidable at the instance of the caveator. Consequently, the caveator is entitled to follow such alienations into the land as the holder of an equitable interest in the fee simple, or a charge or lien over it.”

- [7] There is indeed evidence that Mr Purvis’ employer paid for his services by making some payments to him and some payments to Jedhar. For present purposes it can be accepted that Mr Purvis caused that to occur and that Jedhar would have received no such payments without the personal exertions of Mr Purvis. One possibility is that this came from an agreement between his employer and Jedhar to the effect that it would provide some of the benefits of Mr Purvis’ services. On this basis, there was no relevant payment of money by him to Jedhar and nor was there an assignment of the right to payment. In that situation the right to payment for monies which Jedhar did then receive from the employer was Jedhar’s pursuant to its agreement with the employer. Accepting that Mr Purvis caused Jedhar to make such an agreement with the employer, that would not involve some alienation of property by him. The relevant property could be constituted only by a debt owing by the employer or the monies after they had been paid by the employer. Under this regime, in neither case was such property alienated by Mr Purvis, for it was never his.
- [8] An alternative is that the right to any payment for his services remained in Mr Purvis, and there was no right which Jedhar enjoyed against the employer. On this view, payments if and when made to Jedhar were payments to which, as against the employer, Mr Purvis was entitled but which he simply directed to be paid in favour of Jedhar. Under this alternative, there would have been alienations of property. As I understand the pleaded case, it is this alternative which is relied upon by Ms Grosse.

- [9] The question then arising is whether Ms Grosse has a serious case to the effect that the second of these alternatives was what in fact occurred. At that point her case encounters a number of factors which all indicate that, in truth, it was a case of the first kind. Many of those matters were relevant to a judgment by the Chief Justice in striking out parts of a counterclaim by Mr Purvis against his (former) employer in *Sunshine Coast Regional Group Apprentices Ltd v Purvis* (unreported No 2558 of 2002, 21 February 2003). Mr Purvis was then claiming damages for wrongful termination of his employment, which he quantified by reference not only to amounts paid to him but also amounts paid to Jedhar. The Chief Justice said that:

“There would be no difficulty about that, and about a computation of damages based on that, if the arrangement were truly that the defendant, as the contracting party bound to the plaintiff, having carried out the requisite work was, by arrangement with the plaintiff, simply diverting some of the consequent remuneration to a third party, in this case, Jedhar. In such a situation the defendant would remain the contracting party in all respects and, of course, taxable upon the total gross salary, the diversion of funds occurring simply in that sort of situation as a matter of convenience.”

His Honour then considered certain documentary evidence such as tax invoices under the name of Jedhar addressed to the employer for Mr Purvis’ services, pay advices issued by the employer in favour of Jedhar which refer to Jedhar as the plaintiff’s employee and to monies paid to Jedhar on a taxable basis, group certificates and PAYG payment summaries consistent with the salary level referable to Mr Purvis personally and excluding the Jedhar payments, and a payroll monthly report, again showing that Mr Purvis was himself entitled only to the payments he received. The case seemed so clear to his Honour that he struck out parts of the pleading insofar as they claimed as part of Mr Purvis’ salary entitlement monies paid to Jedhar. The outcome in that case, which of course is not binding upon Ms Grosse, was that Mr Purvis had no serious case to the effect that he was entitled as against his employer, to the payments made to Jedhar.

- [10] In addition, it is inherently likely that the right of payment as against the employer was that of Jedhar, because it was only by that means that Mr Purvis could avoid a liability to be taxed upon all of the payments made for his services. It is much more likely that he caused Jedhar to derive as income the payments it received thereby diverting what would otherwise have been his income to his family trust. Further, assuming that he was concerned about his own creditors, it is inherently more likely that he would cause the arrangement to be that which the Chief Justice saw was compellingly demonstrated by the contemporaneous documents. Importantly, they are documents emanating not only from his side of the employment relationship: many of them were issued by the employer.

- [11] Against all of these matters, there is no evidence that the case was of the second kind I have described. Mr Purvis was apparently unable to produce that evidence to support his counterclaim and, as I see it, Ms Grosse has been no more successful in this matter. The result is that she has not demonstrated a serious case that there were alienations of property in Jedhar's favour in the amounts it received from the employer. As to the alternative case that Mr Purvis simply made payments to improve Jedhar's property, there is no direct evidence of such payments and there is no clear basis for inferring that they were made, when it is considered that Jedhar was for some years in receipt of its own income.
- [12] Nor is there any serious case that the purpose of any such payments to or for the benefit of Jedhar was to defeat Mr Purvis' creditors. There is nothing in the circumstances of his financial position from 1994 onwards which demonstrates that he had some particular reason to defeat creditors. Apart from Ms Grosse herself, there is no actual or potential creditor identified by her pleading. Mr Purvis had been bankrupt in earlier years but his finances seem to have been healthy from 1994 until at least fairly recently. He did not cause *all* of the payments for his services to be paid to Jedhar. The reasons for judgment of the Chief Justice indicate that he was still receiving his own income from the employer of the order of \$60,000 per year. There is also some evidence that he acquired other property in his own name. According to Ms Grosse, at the time when they had some personal relationship, Mr Purvis claimed that the house had been acquired by the family trust as some protection against financial misfortune and, she says, he also claimed, when they were involved in the proceedings that gave rise to her judgment, that she would be unable to recover any judgment because he had caused assets to be held by others. Neither of those matters provides any strong indication in relation to the present question, which is whether the payments made by his employer or any payments by him to Jedhar were made with the intention of defeating his creditors. As I have said, there was an obvious tax advantage in having Jedhar derive and be paid income. Ms Grosse strongly relies upon what she says were substantial improvements made to this home. It may be possible that a person in Mr Purvis' position would seek to defeat his creditors in this way, although the more likely explanation is that he spent money on house improvements because he wanted a better house. Ms Grosse's pleading heavily relies upon an alleged apprehension by Mr Purvis that he would ultimately become indebted to her, from the conduct for which she was awarded damages. Having regard to the nature of that conduct, it seems to me that that attributes an excessive degree of foresight and rationality to Mr Purvis in the circumstances of the events involving Ms Grosse. Further, the allegation is that Mr Purvis knew or *ought to have known* that he was likely to become indebted to the plaintiff. It is not sufficient to allege that he ought to have known that matter to contend that he was acting fraudulently. The facts from which the alleged actual knowledge should be inferred are not identified within this pleading. It seems to me that if Mr Purvis did know that he was likely to become indebted for a substantial sum to Ms Grosse, he is likely to have done more than he did to have payments for his services made to someone else. In my view, the evidence does not show a serious case that, in causing Jedhar to be in a position

where it was paid by the employer or in making payments to improve the house in which he lived, Mr Purvis had the intention of defeating his creditors.

- [13] For these reasons I conclude that Ms Grosse has not shown a serious case against Jedhar and accordingly, her caveat should be removed and her application for interlocutory relief refused. Should it matter, however, I should summarise what I see as the relevant considerations as to the balance of convenience. One of those is the likely extent of the interest she could claim in the house. Understandably Ms Grosse is unable to quantify the amounts paid to Jedhar. But she must identify the property, albeit in another form, still in the hands of Jedhar. It is very likely that much of that money paid to Jedhar has been spent, but not by way of improvements to the house. In particular, it is likely that much of it was distributed pursuant to the terms of the trust. Ms Grosse's alleged remedy against Jedhar is not a personal one: it is a claim to such of the alienated property as is still held. Jedhar would not be liable for monies paid away prior to Ms Grosse's avoidance under s 228: *Brady v Stapleton* (1952) 88 CLR 322, 334. Apparently with that difficulty in mind, Ms Grosse relies upon the payments made to improve the house. She says that when she was "first introduced to the Essex Court property in 1994" its condition was "extremely poor", but that "in the late 1990's/early 2000", Mr Purvis undertook a "complete renovation internally and externally of his home", about which Mr Purvis consulted her "because I had previously renovated houses myself and have an artistic flair". From this she swears that "I had an intimate knowledge of his renovations and the value of such renovations" some of which she then describes. According to her affidavit there were clearly substantial sums spent. His evidence is that the improvements were relatively modest and in that he is supported by the evidence of Mrs Purvis who says that in 1994 the house was in good condition and that since her departure she has made frequent visits to the property witnessing renovations only to the kitchen and a downstairs bathroom. At present it is not clearly demonstrated that the house underwent such substantial renovations and improvements as Ms Grosse recalls and that the value of any entitlement of hers in the house is substantial.
- [14] There is also an issue as to the likely value of the house. As I mentioned, it was valued for Suncorp earlier this year at a value of \$450,000. Ms Grosse, as the Mayor of Maroochydore, would have some knowledge of movements in values within in her Shire, but there is no demonstrated expertise behind her purported valuation of \$800,000 to \$1,000,000. If the property is worth about \$450,000, then having regard to the Suncorp mortgage, the value of her claim against the property would be relatively small.
- [15] It is also relevant that Mr Purvis has shown no intention to cause Jedhar to sell the house. The substantial mortgage to Suncorp provides a reason why he would not do so. Ms Grosse does not claim that he has said that he will have the house sold, nor is there evidence that it is listed for sale. This trust is not

said to be a sham, and at present there is no reason to believe that Mr Purvis would follow a course designed to defeat the interests of his adult children as beneficiaries, or that he would be allowed by them and Mrs Purvis to do so. Ms Grosse does swear that she received a phone call from a person she believes to be a friend of Mr Purvis in which it was suggested that a compromise might be reached with the use of Jedhar's assets. That does not provide a substantial basis for fearing that Mr Purvis would cause the house to be sold and would misappropriate the assets of the trust to the disadvantage of the beneficiaries and Mrs Purvis. There is also some evidence that Mr Purvis intends to declare himself bankrupt. If so, that makes it no more likely that he would cause to be sold the house, which has been owned by a trust since 1986 and which is his only residence. Accordingly, as to the claim for Mareva orders, it does not presently appear that there is a real risk that Jedhar will dispose of its assets.

- [16] For these reasons Ms Grosse does not demonstrate a substantial risk that the property against which she claims will not be available to her if she is not protected by a caveat or by interlocutory orders.
- [17] Upon Jedhar's application, her caveat will be ordered to be removed, and her application for interlocutory relief must be dismissed.