

SUPREME COURT OF QUEENSLAND

CITATION: *Borg & Ors v Northern Rivers Finance P/L & Ors* [2005]
QCA 250

PARTIES: **ANDREW JAMES BORG**
(first plaintiff/appellant/applicant)
JASON MARK BYRNE
(second plaintiff)
ROBERT STUART CHRISTENSEN
(third plaintiff)
GLEN ANGELLO COPPO
(fourth plaintiff)
LAURENCE ROY DIXON
(fifth plaintiff)
IAN ANTHONY GLAZEBROOK
(sixth plaintiff)
MICHAEL CHARLES GOTTKE
(seventh plaintiff)
BRIAN KENNETH HINCHEY
(eight plaintiff)
ROBERT MICHAEL McCLOY
(ninth plaintiff)
NANCY MARY MONTGOMERY
(tenth plaintiff)
HENRY ALEXANDER MONTGOMERY
(eleventh plaintiff)
GORDON EDWARD PARISH
(twelfth plaintiff)
GORDON JOHN REID
(thirteenth plaintiff)
JAMES MICHAEL ROACH
(fourteenth plaintiff)
GLEN ALAN SCOTT
(fifteenth plaintiff)
GASPAR SICH
(sixteenth plaintiff)
NEIL GREGORY CAMERON
(seventeenth plaintiff)
COLIN SCOTT PURDIE
(eighteenth plaintiff)
GEOFFREY DAVID RAPSON
(nineteenth plaintiff)
DREW KINGSLEY WOODMAN
(twentieth plaintiff)
NIKO JOZINOVIC
(twenty-first plaintiff)

v

NORTHERN RIVERS FINANCE PTY LTD
ACN 069 279 134
(first defendant)
INVESTMENT LICENCING PTY LTD
ACN 072 428 794
(second defendant)
NORTHERN RIVERS PLANTATION MANAGEMENT LTD
ACN 069 059 132
(third defendant)
DARREN PAWSKI and RALPH MARCEL NUNIS
trading as SECURINVEST ACCOUNTING SERVICES
(fourth defendant/first respondent)
DREW GRAHAM FRANCIS
(fifth defendant)
BASE METALS EXPLORATION NL
ACN 081 009 181
(sixth defendant)
EXPLORERS AND PROSPECTORS FINANCE LTD
ACN 081 392 841
(seventh defendant)
DARREN CHARLES HORNER
(eighth defendant/second respondent)
JOHN MEARES
(ninth defendant)
BANALASTA OIL PLANTATION LTD
ACN 078 104 711
(tenth defendant/third respondent)
SAFEINVEST PTY LTD
ACN 081 664 315
(eleventh defendant)
KAREN EVANS
(twelfth defendant)
PLANTATION EQUITY PTY LTD
ACN 078 104 579
(thirteenth defendant/fourth respondent)

FILE NO/S: Appeal No 5587 of 2004
SC No 191 of 2000

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: Supreme Court at Mackay

DELIVERED EX TEMPORE ON: 21 July 2005

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: McMurdo P, Williams and Jerrard JJA
Judgment of the Court

ORDER: **The fourth respondent/thirteenth defendant repay to the applicant/appellant the sum of \$32,195.79 paid to it in satisfaction of the learned primary judge's order number 5**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – primary judge entered judgment in favour of applicant against first respondent and judgment in favour of fourth respondent against applicant – fourth respondent obtained enforcement warrant redirecting debt owed to applicant by first respondent – by oversight applicant did not seek order for return of monies paid to fourth respondent in notice of appeal – applicant obtained order setting aside primary judge's order in favour of fourth respondent against applicant in Court of Appeal – applicant subsequently applied for variation of order to include repayment by fourth respondent of monies paid to it in satisfaction of primary judge's order – application not opposed by fourth respondent – whether order consistent with reasons of the Court in the appeal – whether the Court has power to make further order sought

Uniform Civil Procedure Rules 1999 (Qld), r 388, r 667(2)(d)

The Commonwealth v McCormack (1984) 155 CLR 273, applied

Queensland Pork Pty Ltd v Lott [2003] QCA 271; Appeal No 204 of 2003, 4 July 2003, applied

SOLICITORS: McKays Solicitors for the applicant
Mullins Lawyers for the respondents

THE PRESIDENT: The parties have indicated that they wish this matter to be heard on the papers and that there is no appearance today. The Court has reviewed all the relevant material and I am authorised by the other members of the Court to deliver the following reasons of the Court in this application for a further order.

This Court delivered its reasons and pronounced orders in this appeal on 8 April 2005: see *Borg v Pawski and Ors* [2005] QCA

96, Appeal No 5587 of 2004, 8 April 2005. On 8 June 2005 the applicant/appellant, Mr Borg, applied to the Court for orders varying those made by this Court on 8 April 2005 to include an order that the fourth respondent/thirteenth defendant, Plantation Equity Pty Ltd ("Plantation Equity"), repay Mr Borg the sum of \$32,195.79 paid to it in satisfaction of the learned primary judge's order number 5.

As I have noted the relevant parties have requested that this application be dealt with on the filed papers without the parties appearing in Court. Plantation Equity has informed the Court through the Registry in writing that it does not intend to file any material nor make any submissions in response to Mr Borg's application and submissions.

Mr Borg did not ask this Court to make the order he now seeks in his notice of appeal. Through his lawyers, he concedes that this was an oversight and states that it was attributable to his legal representatives.

The orders made by the learned primary judge, the subject of the appeal, included an order that Mr Borg pay Plantation Equity \$116,236.69 (order 5). His Honour also ordered that the first respondent/fourth defendant, Darren Pawski and Ralph Nunis trading as "SecurInvest Accounting Services" ("SecurInvest"), pay Mr Borg a total of \$32,195.79 (orders 2 and 3).

SecurInvest paid the amount of \$32,195.79 to Plantation Equity on 21 June 2004 under an enforcement warrant authorising the redirection of the debt of \$32,195.79 owed to Mr Borg from SecurInvest.

When this Court made the orders in the appeal on 8 April 2005 it was unaware of those facts. In the circumstances now established it is consistent with the reasons of this Court in the appeal that Plantation Equity should repay the amount of \$32,195.79 to Mr Borg. There are no submissions to the contrary. Had this Court been possessed of all the relevant facts when it pronounced the orders in the appeal on 8 April 2005 it would have made the order now sought.

This Court has power to make the further order sought: see *Uniform Civil Procedure Rules 1999 (Qld) r 388 and r 667(2)(d)*, *Queensland Pork Pty Ltd v Lott* [2003] QCA 271 Appeal No 204 of 2003, 4 July 2003, paras [1]-[2], [19] and [40], and *The Commonwealth v McCormack* (1984) 155 CLR 273 at 277.

This Court should now make that further order. The further order of the Court is that the fourth respondent/thirteenth defendant repay to the applicant/appellant the sum of \$32,195.79 paid to it in satisfaction of the learned primary judge's order number 5.
