SUPREME COURT OF QUEENSLAND

CITATION:	*Jefferson and Joiner v Shirlaw & Ors* [2006] QSC 153
PARTIES:	**PHILLIP GREGORY JEFFERSON and MATTHEW LESLIE JOINER (in their capacity as Court Appointed Receivers)** (applicant) **v** **KEVIN RICHARD SHIRLAW** (first respondent) **OSTABRIDGE PTY LTD ACN 003 611 194 (Receiver and Manager Appointed)** (second respondent) **AMMBAR PTY LTD ACN 080 616 191** (third respondent) **BUSINESS BRIDGING FINANCE PTY LTD ACN 115 876 741** (fourth respondent) **MARY DEWAR** (fifth respondent) **MACGILLIVRAYS SOLICITORS (a firm) (the partners of which hold registered mortgage No 707 949 495)** (sixth respondent) **THE COMMISSIONER OF LAND TAX** (seventh respondent) **GALLUS PROPERTIES PTY LTD, PETER WILLIAM GALLUS AND BROADBEACH VISTA PTY LTD** (eighth respondent) **KERRIE SUZANNE RICHARDSON** (ninth respondent)
FILE NO/S:	BS No 336 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	23 June 2006
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2006
JUDGE:	Holmes J
ORDER:	**1. The amended originating application filed on 12 January 2006 is dismissed as against the first and second respondents.** **2. Any lien to which the applicants are entitled as receivers under the order of this Court made on 16**

November 2004 in BS 8484 of 2004 ranks subsequent in priority to the first and second respondents' registered mortgages numbered 703570735, 703494840, 704544382, 707227959 and 709100851

CATCHWORDS: CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – REMUNERATION AND EXPENSES – PRIORITY OF DEBTS – where receivers appointed by court to two companies – where asset of receivership was real property – where existing registered mortgages over the land were transferred to first and second respondents after appointment of receivers – whether registered mortgages take priority over receivers' indemnity and lien for remuneration, costs and expenses – whether first and second respondents took their interest free from receivers' equitable interest by virtue of section 184 of the *Land Title Act* 1994 (Qld) – whether any equity affecting first and second respondents' title

Land Title Act 1994 (Qld), s 184, s 185, Schedule 2

Choudhri v Palta [1994] 1 BCLC 184
Cobb and Co Holdings Pty Ltd v Daydream Island Tourist Resort Pty Ltd and Anor (1982) 7 ACLR 463
Dean-Willcocks & Anor v Nothintoohard Pty Ltd (In Liq) (2005) 53 ACSR 587
In Re Universal Distributing Company Ltd (In Liquidation) (1933) 48 CLR 171
Moodemere Pty Ltd (In Liq) v Waters [1988] VR 215
Nicobar Pty Ltd v Abrokiss Pty Ltd (2003) 48 ACSR 259
Re Application of Central Commodity Services Pty Ltd & Ors [1984] 1 NSWLR 25
Re Berkeley Applegate (Investment Consultants) Ltd (In Liq); Harris v Conway [1989] Ch 32
Re Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd) [2001] WASC 230
Re Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd) v Registrar of Titles (2001) 24 WAR 299
Re Lawrenson Light Metal Die Casting Pty Ltd; Australian Securities and Investments Commission v Lawrenson Light Metal Die Casting Pty Ltd (1999) 33 ACSR 288
Shawyer v Amberday Pty Ltd (In Liq) (2001) NSWSC 399
S*hirlaw v Taylor* (1991) 31 FCR 222
Westpac Banking Corporation v ITS Taxation Services Pty Ltd [2004] NSWSC 50

COUNSEL: A M Daubney SC with R I Cameron for the applicant
M M Stewart SC with S Monks for the first and second respondents
C J Conley for the fourth respondent
P J Marrinan for the fifth respondent
G R Woodman for the sixth respondent

SOLICITORS: Bain Gasteen Lawyers for the applicant
John M O'Connor & Co for the first and second respondents
Morgan Conley Solicitors for the fourth respondent
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MacGillivrays Solicitors for the sixth respondent

[1] **HOLMES J**: The issue on this application for summary judgment can be shortly stated: whether court-appointed receivers are entitled to have their remuneration and expenses paid from the sale proceeds of real property in the receivership ahead of creditors who, after the receivers' appointment, acquired existing registered mortgages over the land.

Background

[2] On 16 November 2004, receivers (the respondents to the application for summary judgment) were appointed to two companies, Broadbeach Vista Pty Ltd and Ammbar Pty Ltd, to receive the assets of a joint venture, the parties to which had fallen out. The application for their appointment was made by Gallus Properties Pty Ltd, Peter William Gallus and Broadbeach Vista Pty Ltd (collectively the eighth respondent on this application). The respondents to it were Ms Richardson (the ninth respondent here), Ammbar Pty Ltd (the third respondent) and JV Property Syndicates Pty Ltd. The order appointing the receivers gave them "the powers to protect and preserve the assets of the joint venture" and stipulated that their remuneration was to be as agreed between them, Ms Richardson and Ammbar.

[3] As it proved, the only real asset in the receivership was certain land registered in the name of Ammbar Pty Ltd. When the receivers were appointed, seven different entities held registered mortgages over the land. On 14 November 2005, the first and second mortgages were transferred to the first and second respondents. Next, the first respondent, in his own capacity and as receiver and manager of the second respondent, sought an order permitting him, in the exercise of their rights as mortgagees, to enter into possession of and sell the land. By consent of the parties, (who included all the parties to the current application) the order was made on 28 November 2005, on the first respondent's undertaking to pay the proceeds of sale into a joint account. On different dates in December 2005 and March 2006, all the remaining mortgages apart from the sixth and seventh mortgages were transferred to the first and second respondents. The land was sold pursuant to the first respondent's exercise of power of sale under the first registered mortgage and the net proceeds of sale, in the amount of $500,000 were duly placed in a joint account.

The applications

[4] By an originating application, the receivers sought a declaration as to their entitlements to have their remuneration, costs and expenses as receivers paid from the proceeds of sale of the mortgaged land in priority to the registered mortgagees; alternatively, a declaration as to the extent to which they were entitled to have the same paid; and any necessary orders for the assessment of the quantum of their remuneration costs and expenses. As the existence of this litigation suggests, that quantum is likely to exceed the sale proceeds.

[5] The application for summary judgment is brought by the first and second respondents to the originating application. (For convenience sake I will refer to

them as "the mortgagees by transfer" and the applicants in the originating proceedings as "the receivers".) They seek to have the receivers' claims dismissed and a declaration made that in effect postpones the priority of the receivers' claims to their rights under the third to sixth registered mortgages; they have abandoned any claim under the first and second mortgages. None of the parties concerned with the joint venture chose to appear on the application for summary judgment, nor did the Commissioner of Land Tax, whose debt had been satisfied. The fourth, fifth and sixth respondents, (the remaining mortgagees) did appear and supported the application.

The competing claims

[6] The receivers claim that they have a lien over the property over which they were appointed receivers which takes priority over the claims of secured creditors. In a statement of issues, they allege that in the course of the receivership they undertook work and incurred expense in order to preserve and maintain the land and to carry out their duties as receivers. The mortgagees by transfer knew, from at least March 2005, of their status as receivers, and from April 2005, that they intended to recover their remuneration from the proceeds of the sale of land in priority to any payment to the mortgagees. There had been no indication that that course of action was disputed until the first respondent had sought the order entitling him to enter into possession and sell the land in November 2005. In the alternative, the receivers claim that the registered mortgagees by their conduct in not disputing their claims consented to the receivers paying their remuneration in priority. Finally it is said that all of those circumstances either are so special as to warrant them, as court-appointed receivers, being given priority for their remuneration or make it unconscionable that they should not.

[7] The mortgagees by transfer admit that they knew the receivers had been appointed on 16 November 2004 and the terms of the order by which they were appointed, but, argue that, when the last four of their mortgages were registered in December 2005 and March 2006, they took their interest as registered mortgagees free from the receivers' equitable interest by virtue of s 184 of the *Land Title Act* 1994. By that time the receivership was, for all practical purposes, complete, because the only asset, the land, had passed from the receivers' control.

The receivers' lien

[8] There is no doubt that a court-appointed receiver has a right to indemnity against the assets over which his receivership extends for his remuneration, expenses and costs and has a lien which exists independent of actual possession.[1] In *Shirlaw v Taylor* that entitlement was described as in the nature of "salvage": where a receiver as an officer of the court had incurred cost and expense in bringing a fund into court, those who sought the benefit of his efforts would not escape the costs of them.[2] It is to be noted, however, that the Full Federal Court cited for that proposition *Re Berkeley Applegate (Investment Consultants) Ltd (In Liq); Harris v Conway*[3], which describes the principle as applying where reliance is placed on an equitable interest.

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1 *Re Application of Central Commodity Services Pty Ltd & Ors* [1984] 1 NSWLR 25; S*hirlaw v Taylor* (1991) 31 FCR 222.

2 *Shirlaw v Taylor* at p 230.

3 [1989] Ch 32 at 51.

[9] Extrapolating to the position of a provisional liquidator, the court in *Shirlaw v Taylor* reached these conclusions:

> "(i) a provisional liquidator appointed by the court has *(in the absence of any inconsistent statutory provision)* an equitable lien for expenses and remuneration over the assets under his administration analogous to that held by a court-appointed receiver; and
>
> (ii) the lien arises upon and survives the termination of the appointment."[4] (Italics added)

The question here is whether such a lien takes priority over the interests of a creditor holding the security of a Torrens title mortgage.

The priority of the receivers' lien

[10] The receivers relied on a series of cases, commencing with *Moodemere Pty Ltd (In Liq) v Waters*[5]. That case concerned the entitlement of receivers, appointed by a debenture holder, to deduct their charges from the proceeds of realisation of the company's assets, where their appointment occurred after the making of a winding up order and the appointment of liquidators. In the Victorian Full Court, Murphy J said that it was not a matter of whether the receivers could look to the debenture holder for their reimbursement; rather, as a general principle, the person who was appointed to, and did, realise assets the subject of a charge was entitled to retain his costs and remuneration from the fund realised, in priority to the charge holder. Tadgell J reached a similar conclusion, observing that although the interest of the holder of a floating charge extended to the whole of the company's assets, in practical terms the value of his security lay in a realised fund of assets, not an unrealised fund:

> "It follows that he is entitled as an incident of his security to be paid principal and interest out of the proceeds of realisation of the assets encumbered by his debt (so far as they will allow) after deduction of the costs, charges and expenses incidental to the realisation of those assets".[6]

[11] Next, the receivers adverted to Gillard J's examination of the nature of a receiver's lien in *Re Lawrenson Light Metal Die Casting Pty Ltd; Australian Securities and Investments Commission v Lawrenson Light Metal Die Casting Pty Ltd*[7]. His Honour cited *Moodemere*, per Murphy J, for this proposition:

> "It is well established law that once a lien is established then a receiver who is appointed by the court has in respect of that lien priority over the claims of secured creditors."[8]

But that statement by Gillard J was simply dicta; he was concerned not with matters of priority but rather with identifying whether the receiver in the case before him was, by virtue of his right to remuneration, a "creditor", bound by a deed of company arrangement.

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4 *Shirlaw v Taylor* at p 231.
5 [1988] VR 215.
6 At p 230.
7 (1999) 33 ACSR 288.
8 At p 293.

[12] And the receivers placed heavy reliance on the decision of Owen J in *Re Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd)*[9]. That case concerned the entitlement to remuneration of the liquidators of a company, Sandgate Corporation Pty Ltd, which was the mortgagor of property under a "pooled mortgage" involving one hundred mortgagees. It is useful to consider it in conjunction with an earlier judgment of Owen J in a related matter, *Re Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd) v Registrar of Titles*[10]. In the latter case, his Honour had considered Mr Conlan's entitlement to remuneration as liquidator of Oakleigh Acquisitions Pty Ltd, which held the major interest in the registered mortgage over Sandgate's property. He concluded that there was no power to give Conlan priority for his remuneration over the remaining registered mortgagees, for two reasons. Firstly, it would be inconsistent with the *Transfer of Land Act* 1893 (WA), which gave the remaining registered mortgagees indefeasible title to their interests under the mortgage, to allow the liquidator's lien to prevail. And, secondly, the priority given by the *Corporations Law* to the liquidator's costs did not assist, because those mortgagees' interests in the mortgage were not the property of the company.

[13] On the other hand, when it came to the position of the liquidators of Sandgate, the mortgagor company, who had carried out the sale of the property in the context of the winding-up, a different result was reached. Owen J concluded, in *Re Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd)*[11], that the liquidators' costs of realising the property ought to be deducted before the balance of the fund was distributed to the registered mortgagees. In reaching that conclusion he adverted to the decision of Dixon J in *In Re Universal Distributing Company Ltd (In Liquidation)*.[12] In that case, a liquidator who had realised the assets of a company subject to a debenture was held entitled to take his remuneration before payment of the debenture debt:

> "The security is paramount to the general costs and expenses of the liquidation, but the expenses attended upon the realisation of the fund affected by the security must be borne by it … The debenture holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realised in the winding up, a proceeding to which they are thus parties, the proceeds must bear the cost of the realisation just as if they had begun a suit for its realisation or had themselves realised it without suit ..."[13]

[14] Owen J considered that the same principle should apply in the case before him, notwithstanding that the security was a registered mortgage of Torrens system land. Although the registered mortgagees had not willingly had their rights decided in the winding up, they had been involved in a dispute (presumably a reference to the competing claims to the funds) occurring in the context of the winding up, and the liquidator had succeeded in obtaining an order of the court directing the sale of the property. The indefeasibility principle did not preclude the conclusion that the costs, charges and expenses incidental to the realisation of the mortgaged property should be deducted before the balance of the fund was distributed to the registered mortgagees. As to why that was, his Honour said simply this:

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9 [2001] WASC 230.
10 (2001) 24 WAR 299.
11 [2001] WASC 230.
12 (1933) 48 CLR 171.
13 At p 174.

> "Whether the proper explanation for this is that there is a right *in personam* in support of the equitable lien (which would therefore be an exception to the indefeasibility principle) is problematic. It may simply be the existence of statutory regimes which require the assistance of the general law in order to sit comfortably together."[14]

[15] It was suggested for the receivers that to permit their lien to be defeated by the operation of indefeasibility would enable a mortgagee of property the subject of a receivership to avoid the receiver's priority by simply transferring the mortgage to another entity. But leaving aside for the moment the issue of indefeasibility, there must, I think, be an initial question as to the extent to which the land fell within the receivership: was the relevant asset the land, or the land subject to the registered mortgages existing when the receivers were appointed? The second alternative is consistent with a view expressed obiter by Williams J in *Cobb and Co Holdings Pty Ltd v Daydream Island Tourist Resort Pty Ltd and Anor*[15]. The parties there were in dispute as to the transfer of shares in a company; in the ensuing action a receiver was appointed to the company's assets, which included Daydream Island. The island was subject to a mortgage and the mortgagee was not a party to the proceedings, although it had agreed that the receiver should be advanced $5,000 in order to carry out his responsibilities. There was an unsuccessful challenge to an order of the court allowing the receiver to recover his costs in that amount in priority to the mortgagee's security. Williams J observed that, absent the order, he would not have given the receiver

> "… substantial priority over the secured creditors. Though the court has a wide power to protect the court appointed receiver and ensure he recovers his proper remuneration (cf the judgment of Connolly J in *Hill v Venning* (1979) 4 ACLR 555) the Court's power is limited to the "assets under its control". Here the mortgagee was not a party to the action in which the appointment was made nor was it a party to the actual application for such appointment. Bearing in mind the nature of the action brought by the plaintiff it could be hardly be said that the assets of the first defendant over which it had created valid securities were "before the court" to the extent that the court could regulate, postpone or defer the rights of the mortgagee without the mortgagee being heard. "

He went on to note that orders affecting mortgagees had been made in instances where the mortgagee was a party to the order by which the receiver was appointed.

[16] In *Choudhri v Palta*[16], the English Court of Appeal was considering a receivership of partnership assets. Certain of the real property involved was subject to registered bank charges, and the banks in question had not been parties to the partnership action or the orders appointing a receiver. The court held that the asset of the receivership consisted, not of the unencumbered property, but the property subject to the bank charges. If, by way of analogy, the property had been subject to a lease, it was the property subject to the lease which would have been the asset in the receivership. There was no power to order the receiver's costs, expenses and remuneration be paid in priority to amounts secured by prior fixed charge.

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14 At para 14.
15 (1982) 7 ACLR 463.
16 [1994] 1 BCLC 184.

[17] In *Shawyer v Amberday Pty Ltd (In Liq)*[17] Bryson J alluded to the approach of the Court of Appeal in *Choudhri v Palta* as exemplifying an illustration of the limits of the receiver's protection where a property subject to the receivership was already subject to a registered charge:

> "[i]n effect the debt secured by registered charges was defined out of the assets to which the receivership and the indemnity extended".[18]

Thus his Honour accepted as correct the proposition that a competing legal interest in existence when the receivership began would exclude the receiver's claim; but different considerations applied where, as in the case before him, the competing interests were equitable interests.

[18] That distinction was similarly recognised by Austin J in *Westpac Banking Corporation v ITS Taxation Services Pty Ltd*[19]. In that case, the company to whose assets the receiver was appointed held money in a bank account. That fund was subject to competing claims by, on the one hand, charge holders over the company's assets, and, on the other, the receiver, relying on his lien. The situation was to be contrasted, Austin J said, with that in *Choudhri v Palta,* in which the charges were, as statutory charges analogous to registered mortgages under the Torrens system,

> "statutory legal interests carved out of the chargor's estate."[20]

The case before him involved, instead, competing equitable interests in a fund to which, in its entirety, the receivership extended. In resolving those equitable claims, the salvage principle applied.

[19] Those cases lead me to doubt that the real property in this case was the asset subject to the receivership, as opposed to the real property subject to the registered mortgages, or to put it as Austin J did, the estate out of which the mortgagees' interests had been carved. If, indeed, the existing mortgagees' interests were, as in *Choudhri v Palta,* to be regarded as outside the receivership, they passed to the mortgagees by transfer similarly unaffected by the receivership and the receiver's lien. And the salvage principle referred to in *Shirlaw v Taylor* has no obvious application here, where the interest of the mortgagees is a legal, not an equitable, one. There is the further complication that, unlike the situations in *Shirlaw v Taylor*, *Moodemere Pty Ltd v Waters* and *In Re Universal Distributing Company Ltd*, the receivers did not, in the event, realise the asset.

Indefeasibility

[20] But the argument of the mortgagees turns, in any event, on the effect of Section 184 of the *Land Titles Act.* It is in the following terms:

> "(1) A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.
>
> (2) In particular, the registered proprietor –

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17 (2001) NSWSC 399.
18 At para 13.
19 [2004] NSWSC 50.
20 At para 23.

(a) is not affected by actual or constructive notice of an unregistered interest affecting the lot; and

(b) is liable to a proceeding for possession of the lot or an interest in the lot only if the proceeding is brought by the registered proprietor of an interest affecting the lot.

(3) However, subsections (1) and (2) do not apply –

(a) to an interest mentioned in section 185; or

(b) if there has been fraud by the registered proprietor, whether or not there has been fraud by a person from or through whom the registered proprietor has derived the registered interest."

Section 185 sets out the interests in respect of which a registered proprietor does not obtain the benefit of s 184, including

"…(a) an equity arising from the act of the registered proprietor…"

In the dictionary contained in Schedule 2 to the *Land Title Act*, a "**proprietor** of a lot" is defined as meaning

"a person entitled to an interest in a lot, whether or not the person is in possession."

An example is given: a mortgagee of a lot is a "proprietor of the lot".

[21] The receivers placed considerable emphasis on public policy considerations: that a court-appointed receiver carrying out the order of the court ought to have the payment of his remuneration and costs protected; but it is difficult to see how that policy consideration can survive the express words of s 184. That section would certainly appear to amount to an "inconsistent statutory provision", recognised in *Shirlaw v Taylor* as qualifying any entitlement to a lien. There may of course arise an exception within s 185(1)(a), in the form of "an equity arising from the act of the registered proprietor": the statutory equivalent of the *in personam* right referred to by Owen J in *Re Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd).*

[22] But it is difficult to identify any unconscientious act on the part of any of the registered mortgagees in this case: either the mortgagees by transfer or their predecessors. They were not parties to the making of the order appointing the receivers; nor do they appear to have sought the receivers' involvement in the management or realisation of the land or agreed to pay for their efforts. The mortgagees by transfer relied on the decision of Barrett J in *Dean-Willcocks & Anor v Nothintoohard Pty Ltd (In Liq)*[21], which concerned a similar set of circumstances. The receivers in that case had been appointed by holders of a mortgage debenture over company assets, which included land subject to a registered mortgage. The mortgagee, exercising its power of sale, had entered into a contract for the land's sale and asserted that its legal estate took priority over the receiver's equitable interest. Barrett J specifically indicated that he proceeded on the basis that a

21 (2005) 53 ACSR 587.

receiver appointed out of court was entitled to an equitable lien for remuneration costs and expenses. (The receivers sought to distinguish *Dean-Willcocks* on the basis that it did not concern a court-appointed receiver. But given Barrett J's expressly-stated assumption, if indeed a receiver appointed out of court has no lien (a view taken by Young CJ in *Nicobar Pty Ltd v Abrokiss Pty Ltd*[22]) his reasoning is unaffected.)

[23] Barrett J took the view that in the ordinary course, the mortgagee's legal interest would take priority over the receiver's equitable interest, unless there was some special factor causing it to be postponed. He suggested a broader notion of salvage: one in which an equitable lien could over-ride legal rights, so as to prevent the mortgagee from unconscionably taking an "incontrovertible benefit" produced by the receivers' outlays. But in the case before him none of the receivers' outlays had produced anything which could be described as incontrovertible benefit. There was nothing, therefore, which would warrant affording priority to the equitable lien.

[24] Assuming, for the sake of argument, that the taking of an "incontrovertible benefit" could give rise to an equity, there might be a question in this case as to whether the preservation and maintenance of the property by the receivers conferred such a benefit. But an exception under s 185(1)(a) can arise only from an equity created by the act of the registered proprietor, not another; and as the mortgagees by transfer pointed out, any work done by the receivers occurred before they took the relevant interests. And if any equity had arisen in relation to the existing mortgagees, their interests would nonetheless have been taken by the mortgagees by transfer unaffected by notice of it, by virtue of s 184(2)(a) of the *Land Title Act*. The mere desirability of court-appointed receivers having their position protected cannot prevail against the indefeasible title of the mortgagees by transfer.

Conclusion

[25] As a matter of law, then, I do not consider that the receivers have any prospect of succeeding in their claim for priority against the mortgagees by transfer, and there is no need for a trial. I dismiss, as against the first and second respondents, the amended originating application filed on 12 January 2006. I declare that any lien to which the applicants are entitled as receivers under the order of this Court made on 16 November 2004 in proceedings BS 8484 of 2004 ranks subsequent in priority to the first and second respondents' registered mortgages numbered 703570735, 703494840, 704544382, 707227959 and 709100851.

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

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22 (2003) 48 ACSR 259 at p 264.