SUPREME COURT OF QUEENSLAND

CITATION:	*Warapar Resources Pty Ltd v Deen and Others* QSC [2009] 162
PARTIES:	**WARAPAR RESOURCES PTY LTD (ACN 118 886 392) (applicant)** **AND** **SULTAN MOHAMMED (GEORGE) DEEN (first respondent)** **AND** **DEEN BROTHERS GROUP (ABN 1776 1463) (second respondent)** **AND** **DEEN BROS PTY LTD (ACN 109 428 927) (third respondent)** **AND** **DEEN BROS TRANSPORT PTY LTLD (ACN 109 428 873) (fourth respondent)** **AND** **DEEN BROS HOLDINGS PTY LTD (ACN 109 428 828) (fifth respondent)**
FILE NO/S:	62 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 June 2009
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2009
JUDGE:	Atkinson J
ORDER:	**Upon the usual undertaking as to damages given by Warapar Resources Pty Ltd and Abdul Rahmen Deen, until trial in these proceedings or further earlier order:** **1) The respondents are restrained from placing clean fill, including soil, on the land situated at 59A Colebard Street, Acacia Ridge and described as**

Lot 3 on RP 130715;

2) The costs are reserved.

CATCHWORDS: EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – JURISDICTION AND GENERALLY – where applicant sought by way of interlocutory orders that the respondents be restrained from undertaking or continuing further construction or development work on the land and from placing soil, construction or demolition waste or any other material on the land – where respondents carrying out unlawful activities on the land – whether there was a serious question to be tried – whether granting an injunction favoured the balance of convenience – whether the applicant would suffer irreparable injury if the relief was not granted

Environmental Protection Act 1994 (Qld), s 73F
Integrated Planning Act 1997 (Qld), ss 3.5.33, 4.3.1, 4.3.11, 4.3.15
Penalties and Sentences Act 1992 (Qld) ss 5, 183, 185

ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, cited
Attorney-General v Harris [1961] 1 QB 74 , cited
Attorney-General (ex rel Kerr) v T [1983] 1 Qd R 404, cited
Australian Broadcasting Corporation v O'Neill [2006] HCA 46
Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd [2007] FCA 1868, cited
Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148, applied
Fejo v Northern Territory (1998) 195 CLR 96, cited
K v T [1983] 1 Qd R 396, cited
Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1, cited
Rich v BDO Kendalls [2007] QCA 147, cited

COUNSEL: S Shearer for the applicant
P A Hastie for the respondents

SOLICITORS: Frank Carroll Solicitor for the applicant
John M O'Connor & Company for the respondents

[1] The parties in this matter are opponents in two pieces of litigation commenced in this court in 2008, which have been consolidated. The first matter filed was an originating application No. 62 of 2008 in which the applicant is Warapar Resources Pty Ltd ("Warapar Resources") and the respondents are Sultan Mohammed Deen, Deen Brothers Group, Deen Bros Pty Ltd, Deen Bros Transport Pty Ltd and Deen Bros Holdings Pty Ltd. Only the first, second and fifth of the respondents were represented. I was informed by their counsel that the third and fourth respondents are in liquidation. The other matter is matter No. 1820 of 2008 in which the plaintiffs are Sultan Mohammed Deen and Kamrun Nisha Deen as trustees of the

SMD Family Trust and the defendants are Warapar Resources, Abdul Rahman Deen and Warapar Pty Ltd. The disputes in both pieces of litigation concern land situated at 59A Colebard Street, Acacia Ridge of which the registered owner is Warapar Resources and which is occupied by Mr Sultan Deen and various companies associated with him.

[2] In the originating application (No. 62/08) the applicant, Warapar Resources, sought the following final orders:

(1) that the occupation by the first and or second and or third and or fourth and or fifth respondents ("the respondents") of the land situated at 59A Colebard Street, Acacia Ridge and described as Lot 3 on RP 130715 ("the land") and owned by the applicant be declared unlawful; and further

(2) that the respondents vacate the land;

(3) that the respondents remove all goods, chattels, machinery, buildings, building and construction waste, construction materials, demolition waste and soil that the respondents have placed on the land;

[3] The applicant, Warapar Resources, sought by way of interlocutory orders:

(1) that the respondents be restrained from undertaking or continuing with any further construction or development works on the land; and

(2) that the respondents be restrained from placing soil, construction or demolition waste or any other material on the land.

[4] In matter No. 1820 of 2008 the plaintiffs Sultan and Kamrun Deen, as trustees of the SMD Family Trust, have claimed a declaration that Warapar Resources and Warapar Pty Ltd are bound to recognise that they are beneficial owners of a part of the land consisting of seven acres (3.5 hectares) identified in the plan prepared in March 1997; a declaration that in 1997 Warapar Pty Ltd agreed to transfer that area of land to Sultan Deen, Habib Deen and Haneef Deen; and an order for specific performance of the agreement to transfer that area of land to Sultan and Kamrun Deen as trustees of the SMD Family Trust.

[5] As previously mentioned the two pieces of litigation have been consolidated and directions have been given so the matters proceed expeditiously first to mediation and then to trial.

[6] In the meantime, Warapar Resources sought interlocutory relief until the trial of the matter as set out in the interlocutory orders referred to earlier. At the hearing of the application for interlocutory relief the first, second and fifth respondents, Mr Sultan Deen, Deen Brothers Group and Deen Bros Holdings Pty Ltd, gave the following undertaking:

> "Until the trial or further order the first, second and fifth respondents undertake by their counsel not to:
> (a) Construct any further building on land at 59A Colebard Street, West, Acacia Ridge ("the land");
> (b) Perform any sand mining on the land;
> (c) Place construction, demolition rubble or other waste on the land.

> This undertaking not to place waste material on the land does not prevent the first, second, fifth respondents placing:
> (a) Clean fill (including soil) on the land;
> (b) Building material salvaged from any demolition works for the purposes of recycling or re-use."

[7] It can be seen that the undertaking would not fully satisfy the interlocutory orders sought in that it did not prevent the respondents from engaging in development work other than building or sand mining and specifically did not prevent the respondents placing clean fill, including soil, on the land, as well as building materials salvaged from any demolition works for the purposes of recycling or re-use. The applicant only pressed the question of an injunction to prevent the respondents placing clean fill, including soil, on the land. Accordingly this application is to determine whether or not the respondent should be allowed to undertake or to continue to undertake that activity until the trial of this matter.

[8] The application for an interlocutory injunction was brought pursuant to s 246 of the *Supreme Court Act* 1995 (Qld). The test to be applied was set out by Mason A-CJ in *Castlemaine Tooheys Ltd v South Australia*:[1]

> "In order to secure such an injunction the plaintiff must show (1) that there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (2) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (3) that the balance of convenience favours the granting of an injunction."

Serious question to be tried

[9] There is undoubtedly a serious question to be tried. There is a dispute in both actions between Warapar Resources and Sultan Deen as to which entity or person is entitled to ownership of the 3.5 hectare portion of Lot 3. Warapar Resources is the registered proprietor of the whole of the land including that portion. The first respondent in these proceedings is the plaintiff in the proceedings seeking specific performance of an agreement which is alleged between himself and Warapar Resources or Warapar Pty Ltd to transfer ownership of that portion of the land to him and/or a trust associated with him. The portion the first respondent seeks ownership of is the portion upon which he is conducting the activities the subject of this application. There is a serious question to be tried as to the beneficial ownership of the land. It appears that if the plaintiff in 1820/08 is not the beneficial owner of the land then the defendants in this matter have no right to conduct the impugned activity on the land.

[10] There is also a serious question to be tried as to whether the activities undertaken by the respondents are not being lawfully undertaken and should not be allowed to

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[1] (1986) 161 CLR 148 at 153. *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [21]; *Fejo v Northern Territory* (1998) 195 CLR 96 at [26]-[27]; *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [13]; *Rich v BDO Kendalls* [2007] QCA 147 at [2].

continue on land owned by the applicant. The court does not have all the relevant evidence before it, but what evidence it does have suggests that the case against the respondents as to the unlawfulness of those activities has reasonably strong prospects of success and that if the respondents fail to establish their ownership of the land in matter No. 1820 of 2008, the applicants will be successful in obtaining the final relief sought in this action. There is "sufficient likelihood of success"[2] for interlocutory relief to be granted.

Balance of convenience and irreparable injury

[11] Because there is undoubtedly a serious question to be tried, this case turns on the balance of convenience and the extent to which the applicant may suffer irreparable injury for which damages would not be an adequate compensation if it is not granted interlocutory relief. Those questions are particularly important in this case because of the activities of Mr Sultan Deen on the portion of the land over which he claims beneficial ownership.

[12] The applicant is permitted by a certificate issued by the Environmental Protection Agency ("EPA") to undertake certain registered activities on the land. These include dredging material to a certain extent; screening, washing, crushing, grinding, milling, sizing and separating material extracted from the earth to a certain extent; and waste disposal by operating a facilities for disposing of only general waste or limited regulated waste. That certificate of registration is number ENRE 00524106. The certificate is issued under s 73F of the *Environmental Protection Act* 1994 (Qld) ("EP Act").

[13] In addition the applicant has amended development approval pursuant to s 3.5.33 of the *Integrated Planning Act* 1997 (Qld) ("IPA") under permit number IPDE 00356606D11 ("the EPA permit") to operate a waste disposal facility. As previously mentioned the waste must consist only of general waste or limited or regulated waste. There are a large number of conditions attached to the EPA permit and the permit is subject to the applicant's complying with those conditions.

[14] In February 2007 the applicant was issued with two penalty infringement notices by the EPA in relation to breaches of various of the conditions attached to the EPA permit. The applicant alleges that the first and/or second respondents, that is Sultan Deen and Deen Brothers Group, were responsible for the activities on the land which led to the issue of the penalty infringement notices. On 15 February 2007, Warapar Resources paid $3,000 to the EPA in satisfaction of the two penalty infringement notices.

[15] On 19 July 2007 the Brisbane City Council issued Warapar Resources with a show cause notice pursuant to the EPA permit in relation to alleged development offences being committed on the land by the second respondent and/or a company known as Bellwood Contracting Pty Ltd, companies associated with or controlled by the first respondent, Sultan Deen. An enforcement notice may be given to the owner of the land pursuant to s 4.3.11(7) of the IPA where the person who is alleged to have committed the offence is not the owner. The enforcement notice may require the owner to remedy the commission of the offence.

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2 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [65].

[16] It is alleged that the activities of the first and second respondents which attracted the issue to Warapar Resources of the show cause notice included, amongst other things, the erection of a large shed structure, and the dumping and storage on the land of fill material and building and demolition waste.

[17] The applicant is the only entity that has a licence to conduct any activities on the land. On 19 October 2007, Warapar Resources revoked what it said to be a bare licence given in 2003 by the previous owner of the land, Warapar Pty Ltd, to the respondents to use the subject land for the purpose of parking their earthmoving and transport equipment until they found another site, on condition that they kept the site clean and tidy and that they would not do anything prejudicial or detrimental to the land owner's licences in respect of the land. In revoking the licence said to have been given, Warapar Resources demanded the removal of the respondent's goods and chattels from the land and the removal of the structures and "fill" that the Brisbane City Council alleged that the respondents had placed on the land, by 30 November 2007. The respondents did not take the actions requested.

[18] On 18 December 2007 the legal practitioners acting for the applicant asked the Brisbane City Council to withdraw the show cause notices issued to the applicant. On 8 January 2008 the Brisbane City Council informed the applicant that, while acknowledging that the applicant was not involved in the commission of the alleged development offences on the premises, nevertheless the show cause notices were issued to it as the registered owner of the premises. It had been decided not to issue an enforcement notice to the applicants at that stage on the proviso that all necessary measures were being taken to remove the business trading as the Deen Bros Group from the premises and to restore, as far as practicable, the premises to the condition the premises were in immediately before development was started. The Council noted that the applicant would be seeking an injunction from the Supreme Court to achieve this. The Council also reserved its right to continue with the enforcement action against the applicant by issuing an enforcement notice pursuant to s 4.3.11(7) of the IPA.

[19] It is alleged by the applicant that the respondents have continued to carry out the activities the subject of the show cause notice on the land and on 19 June 2008 the Brisbane City Council commenced prosecution action against the first respondent, Sultan Deen, in relation to the alleged breaches of the IPA. There are some 414 charges laid. The complaint alleges breaches of s 4.3.1 of the IPA by carrying out assessable development within the meaning of the IPA without an effective development permit, and a number of contraventions of s 4.3.15 of the IPA, for failing to comply with enforcement notices. The respondents do not, in these proceedings, deny carrying out those activities but rather say they are entitled to do so because it is a pre-existing use. They further assert they have the right to carry out the activities as a pre-existing use as beneficial owner of the part of the land which they occupy.

[20] Section 4.3.1(1) of the IPA provides that a person must not carry out assessable development unless there is an effective development permit for the development. The maximum penalty for each offence is 1,665 penalty units. Section 4.3.15 of the IPA provides that a person must comply with an enforcement notice. The maximum penalty for failing to do so is also 1,665 penalty units for each such failure. The value of a penalty unit is said by s 5 of the *Penalties and Sentences Act* 1992 (Qld) to be $100. The IPA does not provide for any period of imprisonment in

default of payment of the penalty. In such a case, s 183 of the *Penalties and Sentences Act* provides that if the offender does not pay the penalty the offender may be imprisoned for a period prescribed by s 185 of the *Penalties and Sentences Act*. Section 185(2) provides that the term of imprisonment must be such as, in the court's opinion will satisfy the justice of the case, but not more than 14 days imprisonment for each penalty unit that the offender was ordered to pay and must be served cumulatively with any term of imprisonment the offender is serving or has been sentenced to serve, unless the court otherwise orders.

[21] There seems little doubt that the balance of convenience favours the grant of interlocutory relief in this case. The activities which the respondents do not dispute they have carried on are alleged to be unlawful and are being carried out on land of which the applicant is both the registered proprietor and the holder of the only permits for any work to take place on the land. If, as is alleged, unlawful activities are taking place on the land then the applicant attracts liability both as the owner of the land pursuant to s 4.3.11(7) of the IPA and as the holder of the only permits for activities on the land. That liability, even it is not currently the subject of enforcement action, is not one that can be cured by an assessment of damages since it is liability for offences which give rise to penalties. This distinguishes this case from those cases which stress the limited capacity of the courts to grant interlocutory relief at the hands of private citizens to prevent commission of criminal offences by others.[3] This case also falls within one of the exceptions to the general reluctance of the civil courts to intervene to restrain criminal behaviour, that is to enjoin those who continue to flout the law;[4] but, more importantly, the applicant will suffer irreparable injury if the relief be not granted.

[22] It is true that the respondents may suffer a loss of income if they are prevented from continuing to carry on those activities. On the other hand it is argued that those activities are ones that they are not lawfully permitted to carry on in any event. It is appropriate therefore to grant the injunction. As the matter will proceed to trial expeditiously those questions will soon be finally determined.

[23] The applicant is the registered proprietor of the land and has offered the usual undertaking as to damages. However Mr Abdul Deen has also offered an undertaking as to damages and it will be on the undertaking of both Mr Abdul Deen and Warapar Resources that the relief sought will be granted. Because of the undertakings which have been given to the court, the relief granted will be limited to the placing of clean fill, including soil, on the land.

Orders:

[24] Upon the usual undertaking as to damages given by Warapar Resources Pty Ltd and Abdul Rahmen Deen, until trial in these proceedings or further earlier order:

(1) The respondents are restrained from placing clean fill, including soil, on the land.

(2) The costs will be reserved.

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3 *ABC v Lenah Games Meats Pty Ltd* at [49]; *K v T* [1983] 1 Qd R 396; *Attorney-General (ex rel Kerr) v T* [1983] 1 Qd R 404.

4 *Attorney-General v Harris* [1961] 1 QB 74 at 86; *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* [2007] FCA 1868 at [20] – [21].