SUPREME COURT OF QUEENSLAND

CITATION:	*Breeton Pty Ltd v Capregan Pty Ltd & Ors* [2010] QSC 170
PARTIES:	**BREETON PTY LTD ACN 069 855 661** (applicant) **v** **CAPREGIN PTY LTD ACN 050 412 863** (first respondent) **FIZRAY PTY LTD ACN 051 769 521** (second respondent) **WHITE RHINOS PTY LTD ACN 082 036 977** (third respondent) **RAPOONA PTY LTD ACN 010 071 940** (fourth respondent) **JAMES MORTIMER GORMAN** **(**fifth respondent)
FILE NO/S:	BS151 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application for stay by second and fifth respondents
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2010
JUDGE:	Alan Wilson J
ORDER:	**Application dismissed**
CATCHWORDS:	PRACTICE AND PROCEDURE – ENFORCEMENT OF JUDGMENTS – ENFORCEMENT OF MONEY ORDER – INHERENT JURISDICTION TO STAY OR SET ASIDE – where costs were awarded against second and fifth respondents in 2006 – where applicant applied to court for an enforcement hearing summons in 2010 – where second and fifth respondents allege enforcement of money order and hearing summons is an abuse of court's process – whether enforcement order and enforcement summons should be stayed or set aside *Uniform Civil Procedure Rules* 1999, r 494, r 737, r 800, r 807 *Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd* [1999] 2 Qd R 458, considered

Carol v Jensen (1900) 10 QLJ 60, considered
JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2) [1983] 2 Qd R 255, considered
Re Pacific Mobile Phone Pty Ltd [2008] QSC 210, distinguished
Williams v Spautz (1992) 174 CLR 509, applied

COUNSEL: SD Anderson for the applicant/second & fifth respondents
IA Erskine for the respondent/applicant

SOLICITORS: Walsh Halligan Douglas for the applicant/second & fifth respondents
Tucker & Cowan Solicitors for the respondent/applicant

[1] In 2006, costs were awarded in these proceedings against the second respondent Fizray Pty Ltd and the fifth respondent James Mortimer Gorman. In 2009 the costs were assessed at $45,888.64, and a certificate of assessment issued[1]. On 23 September 2009 an order was made by a Deputy Registrar[2] that Fizray and Mr Gorman pay those costs. The amount of assessed costs then fell within the definition of a 'money order',[3] which could be enforced by the party entitled to the costs, Breeton Pty Ltd, under Chapter 19 of the *Uniform Civil Procedure Rules* 1999 (r 494: *Enforcement of money orders*).

[2] On 9 March 2010 Breeton applied to the court for an enforcement hearing summons under r 807 against Mr Gorman, and a Ms Victoria Thompson. The rule provides that, at any time after a money order is made, the enforcement creditor may apply without notice for an enforcement hearing and the issue of an enforcement hearing summons. The summons issued, requiring the recipients to complete a statement of their financial positions and send it to Breeton within 14 days, and attend for an oral examination. The summons against Ms Thompson was withdrawn on 21 April 2010.

[3] On 8 April 2010 Fizray applied for orders that the enforcement order made on 9 March 2010 be stayed, or set aside. During the hearing of the application it became clear that Mr Gorman was also an intended applicant and leave was given, without opposition, to add him in that role.

[4] Although *UCPR* r 800 allows the court to stay the enforcement of all or part of a money order including, as r 800(1)(a) says, '*…because of facts arising or discovered after the order was made*', the application was not brought under that rule. Nor is it brought under r 819, which permits an enforcement debtor to apply to the court to set aside or stay enforcement at any time. Rather, it was advanced under the court's inherent jurisdiction to stay or, in the alternative, set aside the issue of the enforcement hearing summons on 9 March 2010 because, it is said, it represents an abuse of the court's process.

[5] It is alleged that Breeton is well aware that Fizray and Mr Gorman are capable of satisfying the costs judgment, and that the service of the summons upon Ms Thompson was motivated by Breeton's desire to cause, in the words used in an

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1 Under *UCPR* r 737.
2 Under *UCPR* r 740
3 *Supreme Court of Queensland Act* 1991, schedule 2.

affidavit of the solicitor who represents Ms Thompson (and Mr Gorman and Fizray), '*…the maximum discomfort and anxiety to, in particular, the Fifth Respondent*'.

[6] Ms Thompson is, the solicitor's affidavit says, Mr Gorman's '*long term partner'* and the primary purpose of serving her was to harass and embarrass Mr Gorman. The argument is supported, it is said, by the fact that the enforcement summons was not served on Mr Gorman until after he and Fizray brought this application; and that Breeton knew, or ought to have known, that Ms Thompson had ceased being a director of Fizray in August 2009.

[7] Fizray and Mr Gorman have also, in separate proceedings, alleged that the costs which were the subject of the money order were compromised and released by an agreement between the parties on 1 August 2007. Those proceedings (BS9576/09) were not commenced until 31 August 2009 and assert compromise and release by the terms of the deed itself or, in the alternative, seek rectification '… *so as to embody the Agreement actually made between the plaintiffs (Fizray Pty Ltd and Mr Gorman) and the defendants (Breeton Pty Ltd, and Ors) or the true intentions at the time of executing the same …*'.

[8] As I understood their submissions, it is said for Fizray and Mr Gorman that the abuse of process is to be found in the combination of Breeton's choice to proceed in the way it has, the motive which underlies its conduct, its erroneous notice to Ms Thompson, and the fact it presses proceedings pursuant to its money order despite their countervailing action in which they now deny any obligation to pay the costs.

[9] The court has an inherent power to stay enforcement of a money order where there is an abuse of its process[4]. In determining whether a proceeding constitutes an abuse the question is whether the allegedly offensive process has, as its predominant purpose, the design of obtaining some collateral advantage, and not the purpose for which the procedure is properly designed, and exists[5].

[10] There is little to suggest the question should be answered affirmatively here. It may be observed that enforcement proceedings will, by their nature, often carry a measure of embarrassment for the enforcement debtor. Neither Ms Thompson nor Mr Gorman has sworn to the matters ventured on their behalves by their solicitor.

[11] The history of the matter does not suggest any mischief in Breeton's conduct from which it might be inferred that the current process is tainted by an improper, collateral motive. The original order for costs was made in the course of a judgment in the proceedings from Muir J on 24 July 2006 and no stay of execution of that judgment was sought. Nor was there any appeal against the money order made on 29 September 2009 after, it appears, a process of assessment of costs which was regularly conducted. The solicitor for Fizray and Mr Gorman did write to Breeton's solicitor on 9 October 2009 saying his clients would 'resist any process to obtain payment' but nothing followed by way of proceedings under rr 800, or 819, or at all until the enforcement summons' issued. The summons to Ms Thompson was withdrawn in an open letter from Breeton's solicitors of 21 April 2010 which invited her to signify if she desired anything else to be done.

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4 *Carrol v Jensen* (1900) 10 QLJ 60

5 *Williams v Spautz* (1992) 174 CLR 509 at 528-29 per Mason CJ, Dawson, Toohey and McHugh JJ

[12] While it is possible, as the solicitor's affidavit asserts, that Breeton did seek to embarrass Mr Gorman that cannot readily be categorised as its predominant purpose in circumstances where it has a judgment, is entitled to the fruits of that judgment unless good reason is shown to the contrary[6], and is using a process plainly contemplated by the rules of court. It can, also, as readily be said that it is a matter for the enforcement creditor whether it proceeds by way of the kind of investigation and enquiry it has sought to get underway pursuant to r 807, or by taking more direct proceedings against property or assets of the enforcement debtors.

[13] Nor does anything in the history of this matter points to, or identifies, some collateral advantage to Breeton if it uses the enforcement procedures under Chapter 19 to discover (as is the obvious intention of those proceedings) the most efficient form of obtaining satisfaction of its judgment. Once that is appreciated, the possibility of embarrassment could not be categorised as higher than an incidental purpose; an unattractive one, granted, but not predominant.

[14] Even if a different conclusion had been reached this is not a case in which a stay is warranted. The proceedings Fizray and Mr Gorman have brought claiming their liability for costs has been extinguished by compromise are discreet, and they do not claim to suffer any fear that costs recovered by Breeton in its enforcement proceedings could not be repaid if their action ultimately succeeds.

[15] Relevantly, too, the deed upon which they rely does not manifest obvious or compelling grounds for concluding that their cross-action has a high prospect of succeeding. Its terms do not refer to any liability under the costs order in the current proceedings, although they do refer to other proceedings between other persons and entities. There is also evidence that the controlling mind for Breeton, during negotiations towards and on execution of the deed, had the specific intention that its entitlement to costs would not be compromised or released under its terms. Those circumstances, combined with the rather dilatory nature of the proceedings and, in particular, the fact that they were not begun until six months after Breeton first moved to have its costs in this action assessed, militate against the action as something providing a basis for exercising the discretion to stay.

[16] There is nothing otherwise to suggest Fizray or Mr Gorman will suffer a disadvantage if the stay is refused, or that the balance of advantage favours granting one[7]. Nor are any of the matters they raise relevant to the enforcement of the money order, in the sense of going to its inherent fairness[8]. The same conclusions apply to the alternative application to set the enforcement summons' aside.

[17] I was referred, in support of the stay, to the decision of White J in *Re Pacific Mobile Phone Pty Ltd* [2008] QSC 210, but that was a case in which the default judgment upon which a winding up application before her Honour had been set aside and there were continuing proceedings disputing the debt upon which it had been based. That is quite different from the circumstance in which the enforcement creditor has a judgment for a debt now almost four years old and has, over the past 15 months, moved steadily but lawfully through the steps necessary to obtain its enforcement.

[18] The application is dismissed. I will hear submissions about costs.

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6 *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2)* [1983] 2 Qd R 255 at 258.

7 *Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd* [1999] 2 Qd R 458.

8 *JC Scott Constructions*, above n 6.