SUPREME COURT OF QUEENSLAND

CITATION:	*Mulhern Constructions & Ors v Mulhern* [2012] QSC 120
PARTIES:	**MULHERN CONSTRUCTIONS PTY LTD ACN 060 410 102** (first plaintiff) and **CELTIC PACIFIC PROPERTIES PTY LTD ACN 071 232 230** (second plaintiff) and **GLADSTONE UNITED PTY LTD ACN 098 085 708** (third plaintiff) and **WAK GLADSTONE PTY LTD ACN 098 226 343** (fourth plaintiff) and **DICEY'S GLADSTONE PTY LTD ACN 098 084 372** (fifth plaintiff) and **BANK OF QUEENSLAND LIMITED ACN 009 656 740** (sixth plaintiff) **v** **JACQUELINE PATRICIA MULHERN** (defendant)
FILE NO/S:	BS6655/10
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	9 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2012
JUDGE:	Douglas J
ORDER:	**Judgment for the plaintiffs**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where application for summary judgment – where the defendant withdrew money from bank

accounts held by the first to fifth plaintiff companies with the sixth plaintiff on 19 May 2010 – where receivers were appointed to the companies on 24 May 2010 under charges given by each of the companies over their assets in favour of the sixth plaintiff – whether the defendant has a real prospect of defending the claim

Fire Nymph Products Ltd v The Heating Centre Pty Ltd (in liq) (1992) 7 ACSR 365 referred

COUNSEL: B T Porter for the applicant

R Mulhern (self-represented) for the respondent

SOLICITORS: Dibbs Barker for the applicant

R Mulhern (self-represented) for the respondent

[1] **Douglas J**: This is a summary judgment application seeking to recover from the defendant money which she withdrew from bank accounts held by the first to fifth plaintiffs with the sixth plaintiff shortly before receivers were appointed to the companies under charges given by each of the companies over their assets in favour of the sixth plaintiff, Bank of Queensland Limited. The receivers were appointed on 24 May 2010 and the monies, totalling $479,466 had been transferred by her into a personal account in her name on 19 May 2010. On 25 May 2010 the plaintiffs obtained Mareva orders freezing the funds in her personal account and those funds were paid into Court on 8 August 2011.

[2] The plaintiffs' case is that judgment should be given in their favour on three grounds. The first is that the funds taken from the first plaintiff and the second plaintiff totalling $228,176 were the subject of charges which had crystallised on the filing of winding up applications on 29 March 2010 in respect of those companies.

[3] The consequence argued was that the bank, the sixth plaintiff, thus had an equitable proprietary interest in the first two plaintiffs' assets on and from crystallisation on 29 March 2010 which it was entitled to trace into the funds in the personal account whether or not Mrs Mulhern was arguably a creditor of those companies. The charges provided that the floating component of them would become fixed, amongst other things, if "any step is taken to wind you up". The argument was that the filing of the application to wind up the companies was such a step and reliance was placed upon a passage in WJ Gough, *Company Charges* (2 ed) at 135, 138. A passage of the judgment of Gleeson CJ in *Fire Nymph Products Ltd v The Heating Centre* Pty Ltd (in liq) (1992) 7 ACSR 365, 371 was also relied upon as leading to a similar conclusion. It seems clear based on those passages that an agreement that such an event can crystallise a floating charge is capable of taking effect. On that basis it seems to me that the plaintiffs' argument is correct. It was submitted that those applications later did not proceed but that does not seem to me to affect the principle or the effect of the agreement.

[4] The next submission for the plaintiffs was that if the accounts from which the funds were withdrawn were subject to the floating component of the charges on 19 May 2010 the transfers of the funds by Mrs Mulhern were not within the scope of any

authorised dealings under the charges because Mrs Mulhern was not a creditor of the companies other than the first plaintiff. The result argued was that, therefore, the bank could require the funds other than the $7,550 taken from the first plaintiff to be retransferred to the companies. There was evidence of money owed by the first plaintiff to Mrs Mulhern from her affidavits and from the books of account of the first plaintiff.

[5] The argument on the pleadings was that she was entitled to deal with the funds in the ordinary course of business until the charges fixed and that the transfers were such dealings because they comprised repayments of debts due to her which were made before the crystallisation of any charge. The evidence of the books of account of the company that were in existence does not support the existence of any obligation to pay money to Mrs Mulhern by the second, third, fourth and fifth plaintiffs.

[6] She said in her affidavit that monies showing in the first plaintiff's accounts as a debt of an American company described in the accounts as "Mulhern Properties (USA)" should have been recorded as a loan made by her personally to the first plaintiff but there is no documentary evidence that she made a loan to any other of the second to fifth plaintiffs while there is evidence that she was a significant debtor of the second plaintiff where the withdrawal of monies from its account to hers by her simply increased the debt she owed to that company. She is recorded as neither a creditor nor debtor of the third to fifth plaintiffs in any of their accounts.

[7] It was also argued that the financial records relied on by the plaintiffs to establish that Mrs Mulhern was not owed money by the second to fifth plaintiffs were unreliable because they were works in progress and that ultimately transactions may have been treated differently when financial statements were prepared by her tax accountant. The evidence in respect of those issues was not such as to persuade me, however, that she had a real prospect of success in establishing that she was owed money by companies other than the first plaintiff.

[8] Nor is she a creditor pursuant to any right to contribution on a case said to be raised by the pleadings and evidence. The guarantees that were relevant expressly prohibited her from claiming an amount from another guarantor of the first plaintiff without the Bank of Queensland's consent where an amount payable under any of the first plaintiff's facilities remained unpaid. The guarantee also prohibited her from claiming the benefit of another guarantee or mortgage or charge given to the Bank of Queensland in connection with an amount payable under any other guarantee of the first plaintiff's debt without the Bank of Queensland's consent.

[9] There remains approximately $12,000,000 unpaid by the first plaintiff and there is no evidence of any consent from the bank to her pursuing any right to contribution from the other companies. Mr Porter's submission at paragraphs 51 and 52 also point to other significant problems associated with any such possible defence.

[10] His submission then was that, where Mrs Mulhern was not a creditor of any of the second to fifth plaintiffs, the plaintiffs were entitled to judgment against her because she had breached her fiduciary duty owed to them as a director of each company by diverting their funds to her own benefit when she had no entitlement to them. That had the effect that those plaintiffs could trace their claims against her into her personal account and then to the monies paid into court. He also submitted that the

bank could require the funds to be retransferred to the companies because they were not within the scope of the authorised dealings under the floating component of the charges held by the bank because Mrs Mulhern was not a creditor of the companies other than, arguably, the first plaintiff.

[11] The claim based on the fiduciary duty owed by her as a director is a strong one in the circumstances as it appears clear on the evidence that the funds were withdrawn by her in circumstances where she was not entitled to them as against the second to fifth plaintiffs.

[12] It was also argued for the bank that it was entitled to an order retransferring the property to it because of breaches of the implied licence in its charges that monies could only be paid in payment of a just debt before a charge crystallised. That too seems to me to be correct in respect of the claims of the second to fifth plaintiffs.

[13] There were some other matters argued for the defendant by her husband, whom I gave leave to appear for her. He had a grievance that the Bank of Queensland had appointed receivers when, from his point of view, the value of its interest in his and his wife's companies' funds was exceeded by the value of the companies' assets. That grievance did not assist me in respect of the issues that were litigated between the plaintiffs and Mrs Mulhern. There was other evidence that the companies were in arrears in respect of their obligations under their loans. Mr Mulhern argued that the companies were not in arrears but the evidence does not support that. The evidence in respect of those matters is summarised in paragraph 76 of Mr Porter's submissions.

[14] There is also an argument in a proposed draft defence that the Bank of Queensland could not appoint receivers until it had made a demand on the companies and given them a reasonable time to pay the monies due. That argument is made in the face of an admission that the receivers were appointed pursuant to the charges in the defence already pleaded. Even if it were a permitted amendment to the defence the charge is clear that a demand is not a precondition for the appointment of a receiver. That can occur pursuant to cll 6.1 and 6.3 of the charges in a number of circumstances which are said to occur here including that the secured money is not paid when it is due to be paid, or if there is a failure to pay money that must be paid under an agreement between the bank and the company, or if any person whose obligations the debtor has guaranteed does not observe any agreement with the bank. As was pointed out in submissions, being in arrears alone was sufficient to justify the appointment of the receivers.

[15] Mr Porter also submitted that, even if there were a triable issue concerning the validity of the appointment of the receivers, the bank was entitled to judgment otherwise in respect of its fixed charges after crystallisation and its floating charges as it had standing to obtain judgment on those claims in its own right as chargee.

[16] Accordingly, the defendant has not satisfied me that she has a real prospect of defending the claim. Although there is a superficial complexity to some of the facts, viewed simply they amount to Mrs Mulhern taking the amount of $479,466 from the first to fifth plaintiffs in circumstances where the bank's charge had crystallised in respect of the money she took from the first and second plaintiffs and where she had no entitlement to take any money from the second to fifth plaintiffs as she has no real prospect of showing that she was owed money by them before

receivers were appointed to those companies, or at any stage. In doing so she breached her fiduciary duties as a director of those companies in circumstances where they and the bank are entitled to trace those funds into her possession in the bank account into which she transferred the money and from there to the monies paid into this court. Accordingly I shall give judgment for the plaintiffs.