

SUPREME COURT OF QUEENSLAND

CITATION: *Creswick v Creswick & Ors* [2012] QSC 174

PARTIES: **FELIX ANTONIO CRESWICK**
(applicant/defendant/plaintiff by counterclaim)
v
JOHN FRANCIS CRESWICK
(first respondent/first plaintiff/first defendant by counterclaim)
WILLIAM GERARD CRESWICK
(second respondent/second plaintiff/second defendant by counterclaim)
SHAYNE MARISE CRESWICK
(third respondent/third plaintiff/third defendant by counterclaim)
JANE VERONICA CRESWICK
(fourth respondent/fourth plaintiff/fourth defendant by counterclaim)
TABTILL PTY LTD ACN 010 408 545 AS TRUSTEE FOR THE JOHN CRESWICK FAMILY TRUST
(fifth respondent/fifth plaintiff/fifth defendant by counterclaim)
TABTILL NO 2 PTY LTD ACN 098 424 741
(sixth respondent/sixth plaintiff/sixth defendant by counterclaim)
TABTILL NO 3 PTY LTD ACN 106 070 848
(seventh respondent/seventh plaintiff/seventh defendant by counterclaim)
TABTILL NO 4 PTY LTD ACN 106 071 096
(eighth respondent/eighth plaintiff/eighth defendant by counterclaim)
T2 PROJECTS PTY LTD ACN 109 792 707
(ninth respondent/ninth plaintiff/ninth defendant by counterclaim)

FILE NO/S: BS10963 of 2007
Appeal No 11039 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 June 2012

DELIVERED AT: Brisbane

HEARING DATE: 18 April 2012

JUDGE: Martin J

ORDER: **As attached to these reasons.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – INSPECTION AND INTERIM PRESERVATION OF PROPERTY – where the Court of Appeal found for the applicant and made costs orders in his favour – where the applicant has sought undertakings that the respondents would not dissipate assets – where the respondents did not provide such undertakings – whether a freezing order should be granted over the assets held by the respondents

Uniform Civil Procedure Rules 1999 (Qld), r 260A, r 260B, r 260D

Creswick & Ors v Creswick [2010] QSC 339, considered
Patterson v BTR Engineering (Aust) Ltd & Ors (1989) 18 NSWLR 319, applied
Tabtill Pty Ltd v Creswick; Creswick v Creswick & Ors [2011] QCA 381, considered
Tabtill Pty Ltd v Creswick; Creswick v Creswick & Ors [2012] QCA 78, considered

COUNSEL: AC Stumer for the applicant
R A Perry SC for the first, third, fifth, sixth, seventh, eighth and ninth respondents
C D Coulsen for the second and fourth respondents
J B Sweeney for G E Commercial Corporation Pty Ltd intervening
P A Schmidt (solicitor) for Bank West intervening

SOLICITORS: HopgoodGanim Lawyers for the applicant
Thomsons for the first, third, fifth, sixth, seventh, eighth and ninth respondents
LynchMorgan Lawyers for the second and fourth respondents
DibbsBarker for G E Commercial Corporation Pty Ltd intervening
Norton Rose for Bank West intervening

- [1] The applicant seeks a freezing order on the assets held by the respondents.
- [2] In 2010, after a 23 day trial, orders were made that, among other things, a particular agreement between the first to fourth plaintiffs and the defendant be specifically performed.¹ On 23 December 2011, the Court of Appeal allowed an appeal from that decision² and, among other things, made the following orders:

¹ *Creswick & Ors v Creswick* [2010] QSC 339.

² *Tabtill Pty Ltd v Creswick; Creswick v Creswick & Ors* [2011] QCA 381.

- (a) Setting aside an agreement between Felix (consistently with the decisions of the trial judge and the Court of Appeal, I will refer to the natural parties by their given names) on the one hand and John, Bill, Shayne and Jane on the other. The basis of this was the undue influence brought to bear on Felix by John;
 - (b) Declaring that the purported signature of Felix on 105 documents was affixed by John without the authority of Felix;
 - (c) Remitting the proceedings to the Trial Division for Felix to trace any benefits obtained by the respondents as a result of John affixing Felix's signature to the documents; and
 - (d) That Felix be entitled to obtain all accounts, inquiries and disclosure to carry out the tracing exercise.
- [3] The respondents to this application sought special leave to appeal to the High Court from the orders of the Court of Appeal concerning the setting aside of the agreement and the findings of forgery. That application was refused on 9 March 2012.
- [4] On 30 March 2012 the Court of Appeal made costs orders concerning the trial and the appeal.³ In summary they were:
- (a) Tabtill Pty Ltd ("Tabtill") pay Felix's costs of and incidental to Tabtill's appeal to be assessed on the standard basis;
 - (b) The respondents (in this application) pay Felix's costs of and incidental to the trial including reserved costs, and costs of and incidental to Felix's appeal to be assessed on the standard basis;
 - (c) Felix pay one-third of Tabtill's costs of and incidental to Tabtill's cross-appeal.
- [5] Since 9 March 2012 Felix's solicitors have engaged in correspondence with the respondents seeking undertakings from them that they would not dissipate any assets. Felix's solicitors informed the respondents that in the absence of an appropriate undertaking, an application would be made to this Court for freezing orders. The respondents declined to provide any undertaking until this matter came before the court on 13 April, at which time a form of undertaking was proffered. This application was filed on 10 April.

Principles to be applied

- [6] Rule 260A(1) of the *Uniform Civil Procedure Rules* ("UCPR") states:
- “(1) The court may make an order (a **freezing order**) for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied.”
- [7] If the applicant can demonstrate a “good arguable case” (r 260D(2)), then r 260D of the UCPR applies. Rule 260D(3) states:
- “(3) The court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or

³ *Tabtill Pty Ltd v Creswick; Creswick v Creswick & Ors* [2012] QCA 78.

prospective judgment will be wholly or partly unsatisfied because—

- (a) the judgment debtor, prospective judgment debtor or another person might abscond; or
- (b) the assets of the judgment debtor, prospective judgment debtor or another person might be—
 - (i) removed from Australia or from a place inside or outside Australia; or
 - (ii) disposed of, dealt with or diminished in value.”

[8] Rule 260E provides that the UCPR does not work to diminish the inherent, implied or statutory jurisdiction of the court to make a freezing order or ancillary order.

[9] The tests to be applied when exercising the inherent jurisdiction of the court were described by Gleeson CJ in *Patterson v BTR Engineering (Aust) Ltd & ors*:⁴

- (a) Is there a prima facie cause of action against the defendant? and
- (b) Is there a danger that by reason of the defendant’s absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if successful, will not be able to have judgment satisfied?

[10] The difference between that test and the test that is required under r 260D was noted by McMurdo J in *Fletcher v Fortress Credit Corporation (Australia) II Pty Ltd*.⁵

[11] No issue exists concerning whether one or other of the “good arguable case” or “prima facie case” need be used because it is accepted that there is a cause of action open to the plaintiff on the basis of the decisions already made in these proceedings.

[12] As for the second part of the test referred to in *Patterson*, an applicant need not show that the purpose of any disposition by a defendant of assets is to prevent recovery of the amount of any judgment which might be obtained. It need only be demonstrated that there is a danger of dissipation which is likely to prevent recovery.⁶

Prospects

[13] The applicant already has orders in his favour for costs. Although those costs have yet to be assessed it is reasonable, on the material, to proceed on the basis that he is likely to be entitled to recover some millions of dollars.

[14] The second part of the claim by the applicant concerns the tracing action which is to take place. In light of the declarations made by the Court of Appeal as to the substantial number of forgeries and the documents which were generated as a result of those forgeries, I am satisfied that Felix has a good arguable case.

[15] The issues which were the subject of most argument on the application were:

- (a) the amount likely to be recovered;
- (b) the level of risk was; and

⁴ (1989) 18 NSWLR 319, 321-322.

⁵ (2011) 82 ACSR 352; [2011] QSC 30.

⁶ *Northcorp Limited v Allman Properties (Australia) Pty Ltd* [1994] 2 Qd R 405, 407.

- (c) whether that risk could be dealt with by the undertaking.

Amount likely to be recovered

- [16] The applicant contends that the total likely recovery is in the order of at least \$16.4m.⁷ This is made up as follows:
- (a) \$10.4m – proceeds and interest from the sale of properties owned by Felix;
 - (b) \$3.2m – loans still secured over properties owned by Felix; and
 - (c) \$2.8m – likely costs order in Felix’s favour.
- [17] The largest of those sums is drawn from a schedule prepared for the applicant. It lists the various properties held in Felix’s name which were the subject of the forgery of his signature. The schedule records the face value of each of the documents the subject of the forgeries and calculates simple interest at the rate of 10% per annum since the date of each forgery.
- [18] What Felix may recover as a result of the tracing action cannot be estimated with any precision at this stage. The amounts set out in the schedule do set out what is the more relevant amount, namely Felix’s equity in each of the properties. I accept that, in the circumstances of this case and, certainly, at this stage of proceedings it is not possible to do so. The amount which might be recovered could range from a figure much lower than the face value to at least the face value.
- [19] It was argued by Mr Perry SC that Felix’s current pleadings also circumscribe the amount that he is able to claim and, thus, recover. That may be so, but pleadings can be amended and I prefer to proceed on the basis of the evidence.
- [20] The undisputed evidence is that:
- (a) a very large number of transactions concerning property owned by Felix were fraudulently entered into by John;
 - (b) this was to Felix’s financial disadvantage; and
 - (c) the properties had substantial values.
- [21] Felix has been denied the value of his interest in those properties for varying periods of time and will, most likely, receive interest on that amount. Given the periods of time and applying the default interest rate of 10%, that could amount to a doubling of the benefit obtained by the respondents and, thus, to which Felix is entitled.
- [22] The amount likely to be the assessed figure for costs is in the order of \$2.8m. As for the balance claimed, I do not regard the applicant as having established a figure with certainty. However, the applicant is in this position because of the unlawful behaviour of John, who should not be able to benefit from it by rendering this application more difficult due to the uncertainty generated by his own actions. At this point, having considered the reasons of the trial judge and the Court of Appeal, I think it prudent to fix a figure by reference to the lower amount advanced by Mr Stumer and then to discount it by 50%. Thus, the relevant amount which I will use for the purposes of the application is \$9.6m.⁸

⁷ This, and the associated figures, were rough estimates provided in written submissions and modified during argument.

⁸ $(10.4 + 3.2) \times .5 + 2.8 = 9.6$.

Level of risk

- [23] I regard the level of risk that John, at least, will take steps to dissipate the assets as high.
- [24] He is an untrustworthy person whose conduct has been disgraceful.
- [25] There are a number of matters which have occurred since the appeal which highlight the suspicion with which his actions must be viewed.
- [26] On 9 March 2012, immediately after the application for special leave was dismissed by the High Court, John telephoned Felix. He spoke to Marcia Banfield, Felix's partner. She described his tone as threatening and aggressive. He told her to congratulate Felix on having won and then said: "[Y]ou will never get the house and you won't get much else either." This was not disputed by John (who did not provide any affidavit for use at the hearing) and I accept that it is a clear statement of his intent that Felix should receive little, perhaps nothing, from the action envisaged in the Court of Appeal's orders.
- [27] There have been some property transactions which demonstrate that there has been a dissipation of assets. The Bunker Road property and the Nelson Road property were both disposed of in ways and at times which raise a healthy suspicion about the bona fides of the sales. I do not need to reach a concluded view and I must take into account the fact that the respondents associated with John make their money through the purchase and sale of properties. Nevertheless, it would take an observer more charitable than I not to regard these transactions as having more than an air of contrivance to them.
- [28] Little was proffered by way of justification for these sales. If innocent, they could have easily been explained.
- [29] Further, John and Shayne gave undertakings to Daubney J on 19 December 2007 to refrain from entering upon or taking possession of the property at Seahaven Court, which is the property referred to in the telephone conversation between John and Marcia Banfield. In that conversation, John told her that he was going to arrange for Suncorp to take possession and sell the property. That may not be a breach of the undertaking but it demonstrates a determination to deny his father the fruits of his success.
- [30] Little attention was given to the position of Shayne but, on the basis of the undisturbed findings about her unmitigated hostility towards Felix and her complicity in the actions concerning Seahaven Court I do not see a reason to treat her differently from John.
- [31] William is in a slightly different category. He was found to have been untruthful when he gave evidence about identifying his father's signature but he was also found to have, in effect, left the conduct of the corporate respondents to John. William, as well as John, Shayne and Jane, was the subject of an order by White J (as her Honour then was) on 28 February 2008. That order required that those persons pay all outstanding rates and land tax on identified properties, continue the payment of rates and land tax on those properties and pay to Felix the amount of

\$1,250 a week. In early 2011 Felix applied for a declaration that John, William, Shayne and Jane were in breach of the orders, and for consequential orders. On 17 June 2011 Daubney J gave judgment in the relevant application. His Honour observed:

“There is no doubt that there was a failure to make payments which were required to be made pursuant to the order of White J. It was only after the hearing on 28 April 2011 that those plaintiffs purged their non-compliance by making payment into Court of the amounts which previously ought to have been paid to Felix under the order of White J.

...

I have been given no excuse or explanation, let alone an apology, for what appears to have been wilful and deliberate non-compliance with the orders of White J.”

- [32] His Honour went on to order that John, William, Shayne and Jane pay Felix’s costs on the indemnity basis “... in view of the lack of apology, excuse or explanation for what was clearly contemptuous disregard of the orders of White J ...”.
- [33] It was said on behalf of William and Jane that Jane has never been a director or shareholder of any of the respondent companies, and the property in Cleveland (the residence of William and Jane) is not the subject of any tracing allegations so far. The family relationship in this matter is so bitter and dysfunctional that, taken with Daubney J’s undisturbed findings as to William’s credit and honesty, I have concerns about what he might do. But, that must be balanced against these matters:
- (a) He (and Jane) have only a relatively small parcel of real property and that is their family residence;
 - (b) It is not obviously a property which is likely to be the subject of the tracing exercise; and
 - (c) Neither William nor Jane have exhibited an overt threat to the assets which might be the subject of the action.

Balance of convenience

- [34] In light of the findings I have made with respect to risk, the balance of convenience favours the granting of a freezing order. In the absence of such an order, Felix faces a very high danger of having any judgment obtained by him rendered nugatory through the dissipation of assets.

Undertaking by Felix

- [35] The Practice Direction⁹ envisages an undertaking by an applicant to procure a bank guarantee to secure the undertaking given as to damages. The undisputed evidence is that Felix is impecunious and that financial position was asserted (and was not contested) to be a consequence of the conduct of the respondents, in particular, the many forgeries of his signature by John. The inability to obtain a bank guarantee, which has been occasioned by the misconduct of the respondents, should not be allowed to stand in the way of the applicant’s obtaining a freezing order where it is otherwise appropriate.

⁹ No 1 of 2007.

Ancillary order

- [36] In the draft freezing order provided by Felix there are other orders sought with respect to information concerning identified property.
- [37] Rule 260B of the *Uniform Civil Procedure Rules* provides that the court may make any order ancillary to a freezing order or prospective freezing order it considers appropriate. Such an order may concern, among other things, the obtaining of information about assets relevant to the freezing order. The draft order would require John to provide information with respect to the transfers of the properties at Wellington Point and at Victoria Point. I am not satisfied that it is appropriate for John to be required to give explanations in the terms sought in the draft order. It may later become appropriate and I see no obstacle to a further application being made seeking such an order.

Respondent's ordinary living expenses

- [38] The applicant has nominated that each respondent be allowed up to \$1,250 a week for ordinary living expenses. No material was filed by the respondents dealing with that and, in the absence of any such material, I will use that figure.

Order

- [39] The order is attached to these reasons. It does not affect William and Jane. It contains provisions which deal with the concerns of the interveners.
- [40] The parties will have liberty to apply on giving notice of two business days and, of course, this order is subject to any further order. Thus, should the respondents find themselves in a position where the demands of the business they conduct require the disposition of certain property, then it is incumbent upon them to seek an order to that effect.

SUPREME COURT OF QUEENSLANDREGISTRY: Brisbane
NUMBER: BS 10963 of 2007Applicant/Defendant/
Plaintiff by Counterclaim:**FELIX ANTONIO CRESWICK**

And

First Respondent/
First Plaintiff/First Defendant
by Counterclaim:**JOHN FRANCIS CRESWICK**

And

Second Respondent/
Second Plaintiff/Second
Defendant by Counterclaim:**WILLIAM GERARD CRESWICK**

And

Third Respondent/Third
Plaintiff/Third Defendant by
Counterclaim:**SHAYNE MARISE CRESWICK**

And

Fourth Respondent/Fourth
Plaintiff/Fourth Defendant
by Counterclaim:**JANE VERONICA CRESWICK**

And

Fifth Respondent/Fifth
Plaintiff/ Fifth Defendant by
Counterclaim:**TABTILL PTY LTD ACN 010 408 545 AS
TRUSTEE FOR THE JOHN CRESWICK
FAMILY TRUST**

And

Sixth Respondent/Sixth
Defendant by Counterclaim:**TABTILL NO. 2 PTY LTD ACN 098 424 741**

And

Seventh Respondent/Seventh
Defendant by Counterclaim:**TABTILL NO. 3 PTY LTD ACN 106 070 848**

And

Eighth Respondent/Eighth
Defendant by Counterclaim:**TABTILL NO. 4 PTY LTD ACN 106 071 096**

And

Ninth Respondent/Ninth
Defendant by Counterclaim:**T2 PROJECTS PTY LTD ACN 109 792 707**

ORDER

Before: Justice Martin
 Date: 21 June 2012
 Initiating document: Application filed 10 April 2012

On the undertakings in Schedule A to this order,

THE COURT ORDERS AS FOLLOWS:**Introduction**

1. Anyone served with or notified of this order may apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified.
2. This order applies to the first, third, and the fifth to ninth respondents only. In this order:
 - (a) 'respondent', if there is more than one, includes the first, third, and the fifth to ninth respondents;
 - (b) 'third party' means a person other than the respondent and the applicant;
 - (c) 'unencumbered value' means value free of mortgages, charges, liens or other encumbrances.
3.
 - (a) A respondent ordered to do something must do it by himself or herself or through directors, officers, partners, employees or agents;
 - (b) A respondent ordered not to do something must not do it personally or through directors, officers, partners, employees, agents or in any other way.

Freezing of assets

4.
 - (a) The respondents must not remove from Australia or in any way dispose of, deal with or diminish the value of any of their assets in Australia ('Australian assets') up to the unencumbered value of AUD\$9.6M ('the relevant amount') until further order.
 - (b) If the unencumbered value of the respondents' Australian assets exceeds the relevant amount, the respondents may remove any of those assets from Australia or dispose of or deal with them or diminish their value, so long as the total unencumbered value of the respondents' Australian assets still exceeds the relevant amount.
5. For the purposes of this order, the respondent's assets include:
 - (a) all its assets, whether or not they are in its name and whether they are solely or co-owned;
 - (b) any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were its own (you are to be regarded as having such power if a

third party holds or controls the asset in accordance with the respondent's direct or indirect instructions); and

- (c) the following assets in particular:
 - (1) the properties listed in Schedule B;
 - (2) any money in any account in the name of one or more of the respondents;

Provision of information

- 6. Subject to paragraph 9, the respondents must:
 - (a) within 21 working days (or within such further time as the Court may allow) to the best of their ability inform the applicant in writing of all the respondents' assets in Australia, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of the respondents' interest in the assets;
 - (b) within 28 working days after being served with this order, swear and serve on the applicant an affidavit setting out the above information.
- 7.
 - (a) This paragraph applies if the respondent is not a corporation and wishes to object that compliance with paragraph 7 may tend to incriminate the respondent or make the respondent liable to a civil penalty;
 - (b) This paragraph also applies if the respondent is a corporation and all of the persons who are able to comply with paragraph 7 on its behalf and with whom it has been able to communicate, wish to object that compliance may tend to incriminate them respectively or make them respectively liable to a civil penalty;
 - (c) The respondent must, within 14 working days (or within such further time as the Court may allow), notify the applicant in writing that the respondent or all the persons referred to in (b) wish to take such objection and identify the extent of the objection;
 - (d) If such notice is given, the Court may give directions as to the filing and service of affidavits setting out such matters as the respondent or the persons referred to in (b) wish to place before the Court in support of the objection.

Exceptions to this order

- 8. This order does not prohibit:
 - (a) The first and third respondents from each paying up to \$1250 a week on each respondents' ordinary living expenses;
 - (b) The respondents from paying their reasonable legal expenses;

- (c) The respondents from dealing with or disposing of any of the respondents' assets in the ordinary and proper course of the respondents' business, including paying business expenses bona fide and properly incurred, except that the respondents shall not dispose of or encumber any real property or any interest in real property, save that this order does not prevent the respondents granting from on or after 30 April 2012 legal mortgages over the properties identified in Schedule C in favour of GE Commercial Corporation Pty Ltd ("GECOM") pursuant to any secured guarantee given by any respondent to GECOM; and
 - (d) in relation to matters not falling within (a), (b) or (c), the respondents from dealing with or disposing of any of the respondents' assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that before doing so the respondent gives the applicant, if possible, at least two working days written notice of the particulars of the obligation.
9. The respondents and the applicant may agree in writing that the exceptions in the preceding paragraph are to be varied. In that case the applicant or the respondents must as soon as practicable file with the Court and serve on the other a minute of a proposed consent order recording the variation signed by or on behalf of the applicant and the respondents, and the Court may order that the exceptions are varied accordingly.
10. (a) This order will cease to have effect if the respondents:
- (1) pays the sum of AUD\$9.6M into Court; or
 - (2) pays that sum into a joint bank account in the name of the respondent's solicitor and the solicitor for the applicant as agreed in writing between them; or
 - (3) provides security in that sum by a method agreed in writing with the applicant to be held subject to the order of the Court.
- (b) Any such payment and any such security will not provide the applicant with any priority over the respondents' other creditors in the event of the respondents' or any of the respondents' insolvency.
- (c) If this order ceases to have effect pursuant to (a), the respondents must as soon as practicable file with the Court and serve on the applicant notice of that fact.

Costs

11. The first, third, and the fifth to ninth respondents pay the applicant's costs of and incidental to this application.

Persons other than the applicant and respondents

Set off by banks

12. This order does not prevent any bank from exercising any right of set off it has in respect of any facility which it gave the respondents before it was notified of this order.
13. This order does not restrain any existing secured creditor or a receiver appointed by an existing secured creditor from exercising any of its rights under an existing security.

Bank withdrawals by the respondent

14. No bank need inquire as to the application or proposed application of any money withdrawn by the respondents if the withdrawal appears to be permitted by this order.

SCHEDULE A**Undertakings given to the court by the applicant**

1. The applicant undertakes to submit to such order (if any) as the Court may consider just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.
2. As soon as practicable, the applicant will cause anyone notified of this order to be given a copy of it.
3. The applicant will pay the reasonable costs of anyone other than the respondents which have been incurred as a result of this order, including the costs of finding out whether that person holds any of the respondents' assets.
4. If this order ceases to have effect the applicant will promptly take all reasonable steps to inform in writing anyone who has been notified of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.
5. The applicant will not, without leave of the Court, use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in or outside Australia, other than this proceeding.
6. The applicant will not, without leave of the Court, seek to enforce this order in any country outside Australia or seek in any country outside Australia an order of a similar nature or an order conferring a charge or other security against the respondent or the respondent's assets.

SCHEDULE B

Schedule of all interests and holdings, whether legal or equitable, known to the Respondents in any real property by each of the Respondents as at 17 February 2012