SUPREME COURT OF QUEENSLAND

CITATION:	*Chief Executive of the Department of Justice and Attorney-General v Hambleton* [2013] QSC 356
PARTIES:	**CHIEF EXECUTIVE OF THE DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (Applicant) v **DAVID HAMBLETON (AS LIQUIDATOR OF SKY 1 PTY LTD (ACN 109 799 162))** (First Respondent) and **DAVID HAMBLETON (AS LIQUIDATOR OF SKY 5 PTY LTD (ACN 111 907 530))** (Second Respondent)
FILE NO/S:	BS 8535 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2013
JUDGE:	Douglas J
ORDER:	**The application is dismissed.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – EQUITABLE DOCRINES AND PRESUMPTIONS – SUBROGATION – GENERALLY – where respondent liquidator disallowed proofs of debt lodged by the applicant – where applicant seeks to review the disallowances – where proofs of debt were lodged by the applicant to recover payments from the Property Agents and Motor Dealers Claim Fund under the *Property Agents and Motor Dealers Act* 2000 (Qld) to individual creditors – where the applicant then sought to substitute himself in place of those individuals as creditor – where no evidence of an assignment was available to the court – where no evidence of an indemnity for costs for the subrogation was available to the court – whether the remedy of subrogation is available – whether the court should grant

subrogation as a remedy

Acts Interpretation Act 1954 (Qld), s 23, s 33
Auctioneers and Agents Act 1971 (Qld) (repealed), s 124
Corporations Act 2001 (Cth), s 1321
Property Agents and Motor Dealers Act 2000 (Qld), s 492, s 493, s 495, s 595

Aetna Life Insurance Co v Middleport 124 US 534 (1887), cited
Bofinger v Kingsway Group Ltd (2009) 239 CLR 269; [2009] HCA 44, discussed
Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd (2003) 59 NSWLR 452; [2003] NSWSC 1072, cited
John Edwards & Co v Motor Union Insurance Co Ltd [1922] 2 KB 249, cited
Royston v McCallum [2007] 1 Qd R 361; [2006] QSC 193, cited
Saffron Sun Pty Ltd v Permafit Finance Pty Ltd (in liq) (2005) 65 NSWLR 603; [2005] NSWSC 1317, cited
Sargood Brothers v Commonwealth (1910) 11 CLR 258; [1910] HCA 45, cited

COUNSEL: J M Horton for the applicant
R B Dickson for the respondent

SOLICITORS: Crown law for the applicant
Irish Bentley Lawyers for the respondent

[1] The respondent, Mr Hambleton, as liquidator of Sky 1 Pty Ltd and Sky 5 Pty Ltd, has disallowed two proofs of debt lodged by the applicant, Chief Executive of the Department of Justice and Attorney-General, pursuant to s 1321 of the *Corporations Act* 2001 (Cth). This application seeks to review those disallowances. Initially the application sought an order that they be reversed and, subsequently, by amendment, that the applicant be subrogated to earlier proofs of debt made by other persons against each company.

[2] The proofs of debt arose from payments from the Property Agents and Motor Dealers Claim Fund ("the fund") by the applicant to a number of individuals. The applicant currently administers the fund under the *Property Agents and Motor Dealers Act* 2000 (Qld). The payments were ordered to be made by the Queensland Civil and Administrative Tribunal ("QCAT") because of losses the individuals had suffered from breaches of the Act, principally by a Mr Stanley Tuxford whom I understood to be a real estate agent employed by Sky 1 and Sky 5. The evidence was not clear as to his role or what led to the payments being made from the fund.

[3] The liquidator had accepted proofs of debt from each of the individuals who were paid from the fund but, after the fund payments were made, the liquidator rejected the proofs of debt lodged by the applicant. The express purpose of those proofs of debt was to recover the amounts which had been paid to the individuals from the fund and to substitute the applicant in place of those individuals as creditor. The

applicant submitted that his proofs of debt ought to have been accepted by him being subrogated to the rights of the individuals who had received payments from the fund.

[4] There was no evidence that the individual creditors had assigned their claims to the applicant or that they had agreed to him being subrogated to their rights. Nor was there any evidence that the applicant had offered to indemnify the creditors in the event that he was subrogated to their rights. The absence of such evidence seems to me to be fatal to the application.

Background

[5] The relevant individual claims amounted to $492,257 paid by nine prospective purchasers of land to Sky 5 and a further $100,000 paid by two prospective purchasers to Sky 1. The individuals' claims and the amounts allowed in respect of each claim for payments made to Sky 5 were as follows:

"Angus MacDonald	$131,856.11
Stephane Nijskens	$139,311.95
Stephane & Gerda Nijskens	$16,003.88
Digital Data Pty Ltd	$33,078.50
John Maddock	$33,078.50
Scott White & Agnes Foo	$33,078.50
Realeaf Pty Ltd	$19,846.05
Karanjeeet & Gurbinder Guyaya	$66,157.00
Francis Rashu	$19,847.10"

[6] The names of the claimants and the amounts allowed by QCAT in respect of the claims against Sky 1 were:

"Adam Wallace & Agnieszka Kowalska	$50,000.00
Scott White & Agnes Foo	$50,000.00"

[7] QCAT ordered those amounts to be reimbursed from the fund for the full amount of the creditors' claims. The liquidator had previously allowed their proofs of debt but, after the applicant had paid those creditors' claims from the fund and sought to be substituted for them as creditors by lodging his two proofs of debt, the liquidator responded by asserting that the creditors, by lodging their proofs of debt, were subrogating their rights to compensation from the fund to the companies and him as liquidator. The liquidator then invited the applicant to withdraw his proofs of debt on the basis that the creditors had been paid in full and had no claims against another company.

[8] The applicant responded, by letter dated 11 July 2013, by pointing out, validly in my view, that payment from the fund did not extinguish the requirement for a company to pay its creditors. It also asserted a right, in effect, to be subrogated to the claims of the creditors and requested to be substituted for them.

[9] The respondent subsequently rejected the applicant's proofs of debt asserting that the creditors were no longer properly described as such after they had been paid from the fund. That seems to me to be a misconceived analysis of their position. The applicant characterised the situation as one where there had been a payment made akin to that made by an insurer where, as the insurer, he was entitled to be subrogated to the individuals' claims to recover the amounts that he, as insurer, had paid to them.

[10] When the matter came before me initially, the application claimed simply that the disallowance of the proofs of debt should be reversed, as I have said earlier. Mr Horton, for the applicant, argued, however, that his client was entitled to be subrogated to each of the creditors' existing proofs of debt. Mr Dickson, for the liquidator, submitted that the relief sought was not appropriate to a claim for subrogation. The applicant's proofs of debt sought to substitute him for the creditors. He did not, however, prove any assignment of the debts, nor did he establish, for example, that the creditors consented to the applicant pursuing their existing proofs of debt using their names.

[11] In respect of those arguments he relied on the following passage from Meagher, Gummow and Lehane's *Equity, Doctrines and Remedies* where the learned authors said:[1]

> "[9-020] The party asserting subrogation to the rights of X at law, had, without the intervention of equity, no capacity to sue at law upon X's rights. He could never sue at law in his own name, and in this respect assignment must be clearly distinguished from subrogation: *King v Victoria Insurance Co Ltd* [1896] AC 250; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101; [1964] 1All ER 216; *Morris v Ford Motor Co Ltd* [1973] QB 792 at 800-801; [1973] 2 All ER 1084 at 1090; *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] AC 643 at 663; [1989] All ER 37 at 44; *Linsley v Petrie* [1998] 1 VR 427 at 445; BC9605600. The remedy was to sue at law using X's name and often this would be done with X's consent; as early as 1782 Lord Mansfield spoke of this as happening, 'every day': *Mason v Sainsbury* (1782) 3 Doug KB 61 at 64; 99 ER 538 at 540. But if X proved uncooperative then Chancery would compel him to permit the action at law in his name: *Simpson and Co v Thomson* (1877) 3 App Cas 279; *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330 at 339; [1961] 2 All ER 487 at 490; *Royal Exchange Assurance Co v Grimshaw Bros Ltd* [1928] 2 DLR 412. Chancery might grant such relief only on terms such as indemnity to X for his costs in the proceedings at law: *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249 at 254."

[12] Mr Dickson submitted that there was no evidence of any assignment by the creditors to the applicant of their rights against the companies which would have justified a reversal of the liquidator's rejection of the proof of debt.

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1 (4th Edition, 2002, LexisNexis Butterworths) at [9-020].

[13] The applicant then sought to amend the originating application to claim further relief as an alternative, namely to seek modification of the decisions of the liquidator to treat the proofs of debt lodged by the creditors as ones upon which no claim founded on subrogation could be based so as to subrogate the applicant to those claims. I allowed that amendment and adjourned the application for the filing of further written submissions.

[14] The parties then exchanged further written submissions which addressed several issues, namely:

(a) whether the applicant has standing and legal authority to bring the application and to be subrogated;
(b) whether the way in which the applicant has communicated his desire to be subrogated is an efficacious means to have done so;
(c) whether subrogation ought properly be regarded as restitutionary in character; and
(d) the significance to be drawn from the omission in the Act of the general subrogation right formerly included as s 124 to previous legislation, the *Auctioneers and Agents Act* 1971 (Qld), a statute which has now been repealed.

The applicant's standing

[15] It is apparent from the orders of QCAT that the "Chief Executive of the Department of Employment, Economic Development and Innovation" was the person ordered to make payments from the fund in November 2011 and March and April 2012. The proofs of debt were lodged by the "Chief Executive, Department of Justice and Attorney-General". This change in description of the relevant Chief Executive seems to have been prompted by an *Administrative Arrangements Order (No 1)* made by the Governor in Council on 2 February 2012 and published in the Government Gazette on 3 February. By that Administrative Arrangements Order the relevant "Administrative Unit" became the Department of Justice and Attorney-General and the conclusion urged is that since then the relevant Chief Executive for the purposes of the Act was the applicant, the Chief Executive of that department. Section 33(11) of the *Acts Interpretation Act* 1954 (Qld) also provides that a reference to the Chief Executive, without specifying a particular public sector unit by name, is a reference to the Chief Executive of the Public Sector Unit that deals with the relevant matter or matters to which the provision relates.

[16] Mr Horton also pointed to s 23(2) of the *Acts Interpretation Act* which provides that if an Act confers a function or power on a specified officer or a holder of a specified office, the function may be performed, or the power may be exercised, by the person for the time being occupying or acting in the office concerned. If I were not satisfied of that, he submitted that the designation of the party could be rectified by substituting the applicant in this case for the appropriate Chief Executive and should not prevent the matter being dealt with in its substance.

[17] Mr Dickson submitted that it was important to clarify more exactly the circumstances in which there had been a change of identity between the relevant

Chief Executives, pointing to authority for the proposition that the doctrine of subrogation "is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own."[2] He also argued that the applicant bore the onus of proof and argued that the absence of evidence of the circumstances in which the arrangements had been changed between the two Chief Executives should encourage me to dismiss the application on that ground alone.

[18] The likelihood is that the identity of the relevant Chief Executive would not be material to the rights to be subrogated asserted here. The power to bring the application seems to me to be one, according to s 23(2), able to be exercised by the person for the time being occupying or acting in the office of Chief Executive pursuant to the Act, no matter the department to which that office is referable from one time to the other.

[19] The next issue relating to the applicant's standing or ability to be subrogated is more substantial. As I have said, there was no evidence before me dealing with the factual issue whether the creditors were willing to consent to the applicant using their name to enforce the proofs of debt which each of them had made against the relevant company. If they were to refuse their consent, as the passage from Meagher, Gummow and Lehane referred to earlier establishes, then Chancery would compel them to permit the action at law in their names. It is relevant, in my view, however, that Chancery might grant such relief only on terms, such as an indemnity to the creditors for their costs in the proceedings at law.[3]

[20] In the absence of any evidence of the attitude of the creditors to the proposed use of their names or as to whether they have been offered an indemnity for their costs but remain reluctant, I do not believe I should order that the applicant be subrogated to their rights.

Efficacious communication of the Chief Executive's entitlement

[21] Mr Horton submitted that the applicant's desire to be "substituted" for the creditors of the company expressed in his correspondence was equivalent to him asserting that he wished to be subrogated. He relied, for example, on a passage in Edelman & Bant, *Unjust Enrichment in Australia*[4] that asserts that subrogation simply means "substitution." He also pointed to a letter of 11 July 2013 exhibited to the affidavit of Mr Prior where the applicant said that he had "now stepped into the shoes of the creditors he made payment to. The debts accepted by the company now remain owing to the Chief Executive as the entity that has made payment of the debt acknowledged by the company."

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2 See *Aetna Life Insurance Co v Middleport* 124 US 534 (1887) at 549 referred to in Meagher, Gummow and Lehane, op cit, at [9-010].

3 *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249, 254.

4 Oxford University Press, 2006, at p 288.

[22] Those reasons seem to me to be sufficient to establish that the applicant was seeking to be subrogated to the rights of the creditors. That fact has been communicated to the liquidator. It seems clear to me that the parties are aware that there is now an issue between them as to whether the applicant should be subrogated to the creditors' rights.

Subrogation as a restitutionary remedy

[23] Mr Dickson submitted that equating subrogation to unjust enrichment has been doubted in two decisions, *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd*,[5] and *Saffron Sun Pty Ltd v Permafit Finance Pty Ltd (in liq)*.[6] Mr Horton drew my attention to a number of textbooks dealing with the view that subrogation may in certain circumstances be a restitutionary remedy.[7]

[24] To those decisions and texts may be added the authoritative discussion in the High Court's reasons in *Bofinger v Kingsway Group Ltd*,[8] where the Court said, for example:[9]

> "Subrogation, like other equitable doctrines, is applicable to a variety of circumstances, as explained earlier in these reasons. One circumstance concerns sureties, another the paying off of an existing mortgage. But that is not to say that subrogation is a 'tangled web' in need of the imposition of the 'top-down' reasoning which is a characteristic of some all-embracing theories of unjust enrichment.
>
> Such all-embracing theories may conflict in a fundamental way with well-settled equitable doctrines and remedies."

[25] Whether or not "unjust enrichment" amounts to a unifying factor applicable to the equitable doctrine of subrogation does not necessarily mean, however, that subrogation may not be used as a remedy to assist in the recovery of money paid in discharge of another's obligation. It is an appropriate course to pursue in a case of this nature.

Relevance of omission of a provision equivalent to s 124 of the *Auctioneers and Agents Act*

[26] Mr Dickson submitted that the absence of a section such as s 124 of the *Auctioneers and Agents Act*, which gave a statutory right of subrogation to the committee that administered the predecessor to the current fund and which permitted the relevant committee under that Act to enforce its rights of subrogation in its corporate name, was a notable absence in the current Act. He submitted that the rights of the

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5 (2003) 59 NSWLR 452; [2003] NSWSC 1072 at [46]-[50].

6 (2005) 65 NSWLR 603; [2005] NSWSC 1317 at [13].

7 See *Mason and Carter's Restitution Law in Australia*, (2nd ed, 2008, LexisNexis Butterworths) at [639]; Edelman and Bant, *Unjust Enrichment in Australia* (2006, Oxford University Press) at pp 288-289 and Birks, *Unjust Enrichment* (2nd ed, 2005, Oxford University Press) at p 171.

8 (2009) 239 CLR 269, 299-302 at [90]-[91].

9 (2009) 239 CLR 269, 299-302 at [85]-[98].

applicant were sufficiently protected by s 492, s 493 and s 495 of the Act. Section 495 in particular allows the recovery of an amount more than a claimant is entitled to recover in a case of overpayment of the original creditors, for example, in this case.

[27] Nonetheless, I am not disposed to conclude that the absence of an equivalent to s 124 in the current Act indicates some legislative intention to preclude the application of the equitable doctrine of subrogation. As the right of subrogation is a valuable right of property, a statute will not be construed as taking away the right unless the language is reasonably capable of no other construction.[10] Mr Horton also pointed out that s 595 of the Act provides that nothing in the Act affects or limits any civil remedy that a person may have against a licensee or another person in relation to any matter.

[28] In these circumstances, the proper conclusion is that the legislature did not intend to omit a general right to subrogation from the Act simply because it did not re-enact a similar provision to that contained in s 124 of the *Auctioneers and Agents Act*. It is likely to have proceeded on the assumption that the general law already made provision for such an entitlement, which was one that did not need to be reinforced.

Conclusion and orders

[29] The absence of evidence of any agreement with the creditors for the assignment of their proofs of debt leads to the result that the application as originally formulated should be dismissed. The liquidator's refusal to admit the applicant's claim to be substituted for the creditors is justifiable in the absence of evidence of an assignment of the claims.

[30] Similarly the absence of evidence that the creditors consented to the applicant's use of their names to pursue those claims, or that they had been uncooperative in lending their names, where there is no evidence that the applicant had offered them an indemnity for their costs, leads to the conclusion that the application should be dismissed.

[31] I have considered whether I should permit the application to proceed in the absence of such evidence by imposing a condition that the applicant offer the creditors an indemnity for their costs but have decided against taking that course. The application has been adjourned once already to allow the applicant to respond to that argument, among others. I do not believe that it is appropriate to provide a further opportunity to canvass that issue at this stage.

[32] I shall hear the parties further as to costs.

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[10] See *Halsbury's Laws of Australia* (online edition) at [185-490]; *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 279; *Royston v McCallum* [2007] 1 Qd R 361, 370 at [48].