

SUPREME COURT OF QUEENSLAND

CITATION: *Re Bank of Queensland Limited* [2015] QSC 256

PARTIES: **CHARLENE GRAY**
(applicant)
v
ADBRI MASONRY PTY LTD
(respondent)

FILE NO/S: BS 4686 of 2015

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 20 August 2015

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2015 and further written submissions 19 August 2015

JUDGE: Bond J

ORDER: **Judgment delivered *ex tempore* on 20 August 2015:**

The order of the court is that:

- 1. I declare that Adbri Masonry Pty Ltd ACN 009 687 521 is entitled to be paid the \$31,768.55 paid into Court by Bank of Queensland Limited in proceeding 4686 of 2015, together with accretions thereto.**
- 2. I order that the \$31,768.55 paid into Court by Bank of Queensland Limited in proceeding 4686 of 2015, together with accretions thereto, be paid out of Court to Adbri Masonary Pty Ltd ACN 009 687 521.**

CATCHWORDS: PROCEDURE – transfer of proceedings – related proceedings in Federal Circuit Court – where application brought to transfer proceedings to the Federal Circuit Court – no jurisdiction to transfer proceedings to Federal Circuit Court

Family Law Act 1975 (Cth), s 90SM

Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), s 5(1)

Chan v Johnson [2014] NSWSC 1439, followed

COUNSEL: K Cornell (*sol.*) for the applicant
 G M Twemlow (*sol.*) for the respondent

SOLICITORS: Turnbull Mylne Lawyers for the applicant
 Patane Lawyers for the respondent

HIS HONOUR: Christian Thorburn and three other people traded in partnership under the business name Fewcha Bricklaying. They entered into a credit trading agreement with the applicant Adbri Masonry Pty Ltd. Each of the partners entered into a written guarantee of Fewcha's obligations to Adbri.

Amongst other things, the terms of Mr Thorburn's guarantee operated to charge the whole of Mr Thorburn's property (including land owned by him) with the payment of monies owed by Fewcha to Adbri. As at 12 September 2012 the total indebtedness of Fewcha to Adbri was \$78,344.15. Adbri lodged a caveat over Mr Thorburn's land. A sequestration order was subsequently made against Mr Thorburn.

The Bank of Queensland Ltd ("the bank") was the registered mortgagee of Mr Thorburn's land. Mr Thorburn was in default under that mortgage. The result was that the bank exercised its power of sale. The surplus funds available after payment of the bank's debt and relevant costs were \$31,768.55. The bank paid those moneys into Court.

In reliance on its rights under Mr Thorburn's guarantee (which - based on the judgment by P McMurdo J in a related case which considered the same instrument - it contended had created an equitable charge over Mr Thorburn's property, including his interest in the moneys paid into Court), Adbri applied for -

- (a) a declaration that it is entitled to be paid the \$31,768.55 plus accretions; and
- (b) an order that the moneys be paid out to it.

The evidence reveals that the persons who might have had an interest in those funds were the following:

- (a) ABC Brick Sales Pty Ltd;
- (b) Mr Thorburn's trustee in bankruptcy;
- (c) Boral Masonry Pty Ltd and Boral Resources Pty Ltd;
- (d) Charlene Gray.

As to ABC Brick Sales Pty Ltd:

- (a) A solicitor on behalf of ABC Brick Sales Pty Ltd deposed to the fact that “[o]ther than the cost of providing the release of caveat, ABC Brick Sales Pty Ltd is owed no funds.”
- 5 (b) ABC Brick Sales Pty Ltd did not assert any claim to the funds held in Court in priority over Adbri’s claim.

As to the trustee in bankruptcy of Mr Thorburn:

- (a) Adbri’s solicitors served the trustee with its application and sought an indication whether the trustee –
- 10 (i) consented to the application;
- (ii) opposed the application; or
- (iii) neither consented to nor opposed the application.
- (b) At the time of the hearing before me the trustee had not responded and did not appear before me to assert any claim to the funds held in Court in priority over
- 15 Adbri’s claim.

As to Boral Masonry Pty Ltd and Boral Resources Pty Ltd:

- (a) The material seems to demonstrate those two entities had been paid any debt they were owed.
- 20 (b) In any event the solicitors for Adbri had served their solicitors in the same way and with the same request as had been to Mr Thorburn’s trustee in bankruptcy and with the same lack of response.

25 Apart from the position of Charlene Gray to which I will shortly turn, I am satisfied that it would be appropriate to make the orders which Adbri seeks that the moneys in Court, together with accretions be paid out to it.

30 Ms Gray resisted the application by Adbri and cross-applied for an order that the matter be transferred to the Federal Circuit Court of Australia, and that the moneys in Court be transferred to the trust account of her solicitors to be held pending determination of the proceedings in the Federal Circuit Court of Australia.

The basis of that application was as follows:

- (a) Ms Gray was the ex-de facto partner of Mr Thorburn.
- 35 (b) She had filed an application for property settlement in the Federal Circuit Court pursuant to s 90SM of the *Family Law Act 1975* (Cth) in which she sought –
- (i) an order that the relevant asset pool be divided between she and Mr Thorburn in the proportion 75:25; and
- (ii) orders that the moneys subject to Adbri’s claim be paid to her for her benefit
- 40 and that of she and Mr Thorburn’s daughters.

(c) In the course of considering such an application, the Federal Circuit Court had the power to take into account not only the entitlement claimed by Ms Gray but also any claim by Adbri in respect of those funds.

5 (d) The proceedings commenced by Adbri should be cross-vested from the Supreme Court of Queensland to the Federal Circuit Court by exercise of power pursuant to s 5 of the *Jurisdiction of Court (Cross-Vesting) Act 1987* (Cth).

10 Adbri resisted the cross vesting application, although, after some evidentiary gaps in Ms Gray's material were remedied by Ms Gray's solicitors, it determined that it would not seek to persuade me that there was no arguable basis on the material that Ms Gray might have an entitlement to an order under the *Family Law Act* in relation to the monies which the bank had paid into Court. It argued that in the exercise of my discretion I should refuse to make the cross-vesting order sought and should instead make directions for the future conduct of the proceeding in this Court with a view to resolving the question of Ms Gray's entitlement to an order in relation to monies in Court.

15 After I reserved my decision I directed the parties' attention *Chan v Johnson* [2014] NSWSC 1439 and requested submissions in relation to it. In that case Brereton J held (emphasis added):

[1] By notice of motion filed on 15 September 2014, the defendant Jessica Johnson seeks an order that the proceedings be transferred to the Federal Circuit Court, to be joined with proceedings already pending in that court.

25 [2] Although the evidence has not been examined in detail, I apprehend that the proceedings pending in that court are proceedings under the (Cth) Family Law Act 1975, for financial adjustment between de facto partners. The present plaintiff, Mrs Chan, is the mother of one of those de facto partners, and the defendant, Ms Johnson, is the other de facto partner. These proceedings concern a claim to an interest in property in the name of one of the de facto partners, and no doubt a similar issue would arise in the financial adjustment proceedings in the Federal Circuit Court.

30 [3] **Ordinarily, for reasons that I have explained in *Valceski v Valceski* [2007] NSWSC 440; (2007) 210 FLR 387; (2007) 36 Fam LR 620, because the family law dispute is the larger dispute of which the dispute in this court is a subset, it would be appropriate that these proceedings be transferred to the court hearing the family law dispute, which is seized of the larger and more comprehensive litigation. However, the family law proceedings are, as the Notice of Motion acknowledges, pending not in the Family Court of Australia but in the Federal Circuit Court. There is no power in this court, under the (Cth) Jurisdiction of Courts (Cross-Vesting) Act 1987, to transfer proceedings to the Federal Circuit Court. The notice of motion as originally framed is, for that reason, entirely misconceived.**

35 [4] There is of course power to transfer the proceedings to the Family Court of Australia but that power is conditioned on the court being satisfied that it is in the interests of justice that the relevant proceeding be determined by the Family Court [Jurisdiction of Courts (Cross-Vesting) Act, s 5(1)(b)(ii)]. **As there is no proceeding pending in the Family Court, and no application made or foreshadowed for removal of the proceedings in the Federal Circuit Court into the Family Court, it is not possible to see why it is more appropriate that this proceeding be determined by the Family Court. If the Circuit Court proceedings were removed into the Family Court, or there were some agreement that that should happen, the position might be different, but the condition is manifestly not satisfied at present.**

40 [5] An amendment to the motion, to seek that the proceedings be transferred to the Family Court with a view to being remitted to the Federal Circuit Court, has been foreshadowed, but

that does not seem to me to enliven s 5(1)(b) because such an order made with a view to remitter would not contemplate determination of the proceeding by the Family Court.

[6] Accordingly, I order that the Notice of Motion be dismissed with costs.

5 In response to my request for submissions, Adbri relied on *Chan v Johnson* to submit that Ms Gray's application for a cross-vesting order should be dismissed. On the other hand, the solicitors on the record for Ms Gray advised me that their instructions had been withdrawn and as a consequence they no longer acted for Ms Charlene Gray in the matter before me. After I listed the matter for directions those solicitors
10 confirmed that their instructions had been withdrawn, and told me that they had written instructions from Ms Gray that she no longer intended to prosecute her claim that she had an entitlement in respect of the monies paid into Court which Adbri claimed.

15 I will follow *Chan v Johnson*. Ms Gray's cross-vesting application is misconceived. In light of the fact that no steps of the nature of those adverted to by Brereton J in *Chan v Johnson* at [4] had been taken or were foreshadowed, and in light of Ms Gray's instructions to her solicitors on the record, it is appropriate to dismiss Ms Gray's cross vesting application and I so order.

20

In light of the fact that Ms Gray no longer seeks to prosecute her claim I should make the orders which Adbri seeks. Accordingly:

(a) I make a declaration that Adbri Masonry Pty Ltd ACN 009 687 521 is entitled to be paid the \$31,768.55 paid into Court by Bank of Queensland Limited in proceeding
25 4686 of 2015, together with accretions thereto.

(b) I order that the \$31,768.55 paid into Court by Bank of Queensland Limited in proceeding 4686 of 2015, together with accretions thereto, be paid out of Court to Adbri Masonry Pty Ltd ACN 009687521.

30 I will hear the parties as to costs.

...

35

HIS HONOUR: In relation to the judgment and the order that I made this morning, I heard the parties as to costs. Adbri indicated to me that in light of the evidence as to the impecuniosity of Ms Gray they did not intend to seek a costs order against Ms Gray.

40

However, Adbri did seek a costs order, the effect of which, would be that its costs would be payable by the parties in proceeding BS 11679 of 2012. Those defendants are Christian Thorburn, who I have mentioned in my reasons earlier this morning, and the other partners in Fewcha Bricklaying, namely, Benjamin John Thorburn,
45 Patricia Joyce Thorburn and Robert John Thorburn.

The basis for the proposition was that –

(a) each of those parties were also signatories to the general credit agreement which was the basis for Adbri's entitlement to the monies that were the subject of the order that I made this morning; and

5 (b) the relevant clauses of the general credit agreement and of the guarantee made it very clear that what one might call enforcement costs (such as the costs that Adbri have incurred in prosecuting its order for the payment out of the monies which the Bank of Queensland had paid in in BS 4686 of 2015) would be recoverable against the parties to that instrument.

10 It is necessary to refer only to clause 14 of the general credit terms and clause 12 of the guarantee terms.

Clause 14 of the general credit terms provided:

15 **Expenses:** The Customer must pay to Adbri any costs, charges and expenses (including all stamp duty and legal fees and costs and debt recovery expenses on a full indemnity basis as a liquidated debt) incurred by Adbri in connection with the entry into these Credit Terms, the exercise or attempted exercise of any power, right or remedy under these Credit Terms and/or the failure of the Customer to comply with these Credit Terms.

20

Clause 12 of the guarantee terms provided:

25 **Expenses:** The Guarantor must pay to Adbri full costs, charges, fees and expenses (including, without limitation, all stamp duty and legal fees and costs and debt recovery expenses on a full indemnity basis as a liquidated debt) incurred by Adbri in connection with any entry into this Guarantee, the exercise or attempted exercise of any power, right or remedy under this Guarantee and/or the failure of the Guarantor to comply with any obligations under this Guarantee.

30 I regard the legal costs which Adbri incurred of and incidental to its application for the orders that I made this morning, including its resistance to Ms Gray's application, to be expenses within the meaning of those two clauses.

35 Accordingly, it seems to me very likely that there would be no defence by the parties who are the subject of that obligation. However, as I have not heard those parties it does not seem to me to be appropriate to formulate an order the effect of which might be to oblige them to pay those moneys. Accordingly, I decline to make the costs order in the form that Adbri seeks to have me make.

40
