SUPREME COURT OF QUEENSLAND

CITATION:	*Worrell v Issitch* [2000] QSC 146
PARTIES:	**IVOR WORRELL as Trustee of the bankrupt estate of SIGFRIED TANTNER** (applicant) **v** **LUDMILLA ISSITCH** (respondent)
FILE NO:	S 3507 of 2000
DIVISION:	Trial Division
DELIVERED ON:	25 May 2000
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2000
JUDGE:	Holmes J

ORDER:

1. **That the property and improvements situated at 49 St Clair Crescent, Wishart in the State of Queensland, more particularly described as Lot 137 on RP806400 County of Stanley Parish of Bulimba being all the land contained in Title Reference 18052217 (the property) be sold.**

2. **That the applicant be appointed to conduct the sale.**

3. **That for the purposes of conducting the sale the property vest in the applicant pursuant to s 100 of the *Property Law Act* 1974 (Qld).**

4. **That the respondent deliver up vacant possession of the property to the applicant within 30 days.**

5. **That the sale be conducted by public auction.**

6. **That the applicant be authorised to engage a qualified real estate agent to advertise the property and conduct the auction.**

7. **That the applicant be at liberty to sell the property by private treaty prior to the auction.**

8. That the proceeds of sale be applied as follows:

(a) in discharge of the charging order dated 25 October 1999; and

(b) to the costs of sale;

and that the balance thereafter be paid to the respondent.

CATCHWORDS: Order for sale - property subject to a charge - s99(2) Property Law Act 1974

COUNSEL: Mr M.D. Martin for the applicant
Mr A.P. Abaza (solicitor) for the respondent

SOLICITORS: Baker Johnson for the applicant
A.P. Abaza for the respondent

[1] **HOLMES J:** The applicant is the trustee of the bankrupt estate of one Sigfried Tantner (now deceased). He seeks an order for a sale of property at Wishart, registered in the name of the respondent, who was formerly married to Mr Tantner. His application is made pursuant to s 99(2) of the *Property Law Act* 1974, or more generally in the exercise of the court's equitable jurisdiction.

[2] The history to the application is that on 22 October 1999, Dowsett J. in the Federal Court made a declaration in favour of the applicant that he was entitled to a charge upon the respondent's property to secure payment of an amount of $90,167. The findings of his Honour giving rise to that declaration were that in November 1993 the respondent had drawn funds totalling $110,167 from the account of her husband, Sigfried Tantner, and of those funds had spent $90,167 on the construction of a house at Wishart. Mr Tantner became bankrupt by a sequestration order made on 29 September 1994; the movement of the funds to the respondent was thus a voidable settlement for the purposes of s 120(1) of the *Bankruptcy Act*

1966. His Honour concluded that that settlement was in fact void as from 29 May 1995 when the proceedings before him were commenced. He declared that the applicant was entitled to the charge already referred to; and gave judgment in the sum of $20,000 for the balance of the funds received by the respondent and not, as he found, expended on the construction of the house. The respondent appealed the decision to the Full Court of the Federal Court, her appeal being dismissed on 12 April 2000.

[3] Mr Martin, for the applicant, contended that the existence of the equitable charge that is subject of Dowsett J.'s declaration entitled his client to an order for sale under s 99(2) of the *Property Law Act* 1974, which provides, relevantly: "In any action … for sale … the Court, on the request of the mortgagee … and, even though ….any other person dissents … and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms, subject to subsection (3) as it thinks fit …"

[4] "Mortgage" is defined in the dictionary in Schedule 6 of the Act as including "a charge on any property for securing money or moneys worth". Mr Martin pointed to the commentary in Duncan and Vann, *Property Law and Practice* (loose-leaf edition at paragraph 7.4740) as support for the proposition that the power to order sale extended to equitable charges. For further support he relied on the decision of Young J in *United Travel Agencies Pty Ltd v Cain* (1990) 20 NSWLR 566. In that case, an order had been made under the *Judgment Creditors Remedies Act* 1901, charging shares owned by the defendant with payment of a judgment debt. His Honour concluded that such a charge did not equate with a mortgage and that foreclosure was not available; but it was appropriate to order sale of the judgment

debtor's interest in the charged shares. A like approach was, Mr Martin submitted appropriate here.

[5] The applicant also sought an order vesting the property in him, pursuant to s 99(7) of the Act; various orders in relation to the mechanism of sale; and an order that the proceeds of sale be paid, firstly, in discharge of the charging order; secondly, to the costs of sale; and thirdly, to the applicant, to be held subject to an accounting of other moneys owing as between him and the respondent. Mr Martin argued that the last order was warranted because of the risk of dissipation of the funds by the applicant, in circumstances where costs and the judgment amount of $20,000 were still outstanding. He contended the power to make such an order was to be found in r 260 of the *Uniform Civil Procedure Rules,* which permits the making of Mareva orders.

[6] Mr Abaza, for the respondent, submitted that there was no authority for this court to make an order of sale in relation to a Federal Court judgment. The applicant did not have an entitlement to "redeem mortgaged property" within the meaning of s 99. (This, perhaps, misconceives the application as brought under sub-section (1), rather than sub-section (2).) Moreover, the applicant was already seeking a writ of execution in the Federal Court, and should not be permitted to pursue such relief in both courts. The appropriate course, in any event, was for the applicant to seek a writ of execution rather than to seek sale of the entire property, which he submitted constituted an impermissible attempt to improve its position to that of a proprietary interest.

[7] The respondent also relied on her own affidavit swearing that she became the registered proprietor of the property as trustee for her son, Timothy Bolotnikoff under Nomination of Trustees Registered No L24300N, and had remained as trustee ever since. She sought (although this was not the subject of any formal application) a declaration that she was trustee for her son, and the removal of a caveat lodged by the applicant over the property. The proper course was, Mr Abaza said, the making of directions, so that the issues raised by the application could be the subject of a hearing.

[8] Mr Martin tendered a copy of a Certificate of Title and a current title search in relation to the property. The former indicates that the respondent did indeed hold the property as trustee under the specified Nomination of Trustees, that instrument being produced on 29 April 1992; but that in January 1994 there were on the same day transfers, first to Timothy Bolotnikoff, and then to the respondent. Mr Abaza says that this is explicable because of some obligations in relation to land tax; but it is noteworthy that no explanation whatever is given in the respondent's affidavit to that effect, or indeed more generally as to what trust presently exists, its terms, or how, when or why it was created. Nor does it appear to have been suggested at any time during the Federal Court proceedings that the respondent was anything other than legally and beneficially entitled to the property. In those circumstances I am not prepared to accept or act on the bald assertion that the respondent's son has an interest in the land.

[9] I am satisfied that the terms of s 99(2) are sufficiently wide to empower sale of property subject to a charge such as that created by the order of Dowsett J. In reaching that conclusion I note the comment of Williams J in *Re Himstedt* (1989) Q

Conv R 54-311 as to the width of the jurisdiction conferred by s 99(2). I have had regard also to the commentary in *Duncan v Vann* at paragraph 7.4740 to the effect that the power of sale in s 99 extends to charges; and that in any event the power to order sale exists under the general law.

[10] Having reached the view that an order for sale may be made pursuant to subsection 99(2), I am unpersuaded by the respondent's arguments that the order should not be made. It seems to me immaterial that other enforcement action has been taken in the Federal Court, and I can see no justification for confining the applicant's remedies to those available to it either in that court or under the *Uniform Civil Procedure Rules*. I note, too, that the contention for the respondent that the applicant ought not be permitted to exercise its rights in relation to the charge as if it were a proprietary interest runs counter to the views expressed by the authors of the *Law of Securities* Sykes and Walker 5th ed at p 19, which are to the effect that a charging order does create a property right in the property subject to the charge. Those views, as expressed in an earlier edition of the work, were adopted in *Australian and New Zealand Banking Group Ltd v Greig* (1980) 1 NSWLR 112, and I am equally inclined to consider them correct.

[11] Accordingly I consider it appropriate to make the order for sale sought, and to appoint the applicant, given that he sues in his capacity as trustee in bankruptcy, to conduct the sale on the terms set out in the application. As to the proceeds of sale, I consider it appropriate that they be paid in discharge of the charging order and the cost of sale; but I do not consider that there is any basis for permitting the balance to be held by the applicant for an accounting of what other moneys may be due to him, as trustee, from the respondent. Those moneys are not the subject of any

charge; and I do not consider that an order which permitted the applicant to retain them pending such an accounting would, as suggested by Mr Martin, constitute an order of the type contemplated by r 260 of the *Uniform Civil Procedure Rules*. In any event there is not before me material which would satisfy the requirements of r 260 for the making of a Mareva order.

[12] My orders then are as follows:

1. That property and improvements situated at 49 St Clair Crescent, Wishart in the State of Queensland, more particularly described as Lot 137 on RP806400 County of Stanley Parish of Bulimba being all the land contained in Title Reference 18052217 be sold.

2. That the applicant be appointed to conduct the sale.

3. That, for the purposes of conducting the sale, the property vest in the applicant pursuant to s 100 of the *Property Law Act* 1974 (Qld).

4. That the respondent deliver up vacant possession of the property to the applicant within 30 days.

5. That the sale be conducted by public auction.

6. That the applicant be authorised to engage a qualified real estate agent to advertise the property and conduct the auction.

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