



Transcript of Proceedings

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State Reporting Bureau

Date: 28 July, 2006

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No 15 of 2005

SARAMICK PTY LTD
(ACN 082 117 422) AS TRUSTEE FOR
FLYNNFILE SUPER FUND, GERARD JOSEPH
BRETHERTON AND KAREN-ANN BRETHERTON

Plaintiff

and

QUEENSLAND QUARRIES PTY LTD
(ACN 050 409 973)

First Defendant

and

QUEENSLAND ROAD AND CIVIL PTY LTD
(ACN 050 397 272)

Second Defendant

and

JEFFREY SCOTT STUART

Third Defendant

AND

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SARAMICK PTY LTD
(ACN 082 117 422) AS TRUSTEE FOR
FLYNNFILE SUPER FUND, GERARD JOSEPH
BRETHERTON AND KAREN-ANN BRETHERTON

Enforcement
Creditor/Respondent

and

JEFFREY SCOTT STUART

Enforcement Debtor

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and

BORAL RESOURCES (QLD) PTY LIMITED
(ACN 009 671 809)

Third Person/Applicant

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BRISBANE

..DATE 18/07/2006

JUDGMENT

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HIS HONOUR: This is an application by the third person pursuant to rule 819 of the *Uniform Civil Procedure Rules 1999* that an enforcement warrant-redirection of debt authorizing the redirection to the respondents, the enforcement creditors of a debt allegedly belonging to the enforcement debtor from the applicant, be set aside. The warrant was issued on 5 July 2006 and shows \$423,934.73 owing by the enforcement debtor against whom the respondents obtained judgment on 10 April 2006.

On 9 June 2006 17.4 hectares of land at 97-125 Colvin Street, Toowoomba, of which the enforcement debtor was the registered proprietor, was sold at auction for \$825,000 by the Bendigo Bank Limited as registered mortgagee exercising the power of sale under two mortgages. The debt owing to the Bank is approximately \$170,000 excluding solicitors' costs, together with what its solicitors refer to in a letter dated 11 July 2006 to the solicitors for the enforcement creditor as "significant further costs". The applicant is owed "some \$15,438.66" by the enforcement debtor together with costs and interest under the terms of an equitable mortgage. The Bank's mortgages were registered on 22 and 23 October 2002 and a caveat by the applicant on 29 June 2005. The caveat is registered next after the Bank's mortgages.

The enforcement warrant was issued against the possibility that the residue of the proceeds of sale received by the Bendigo Bank could, after having been applied to discharge the debts owed by the enforcement debtor to the Bank and the

applicant pursuant to s. 88 of the *Property Law Act* 1974 be in
the hands of the applicant, thus constituting a residue the
applicant would hold as trustee for the enforcement debtor.
That possibility appears from correspondence between the
respondents' solicitors and the Bank's solicitors, although in
a recent letter dated 11 July 2006 the latter referred to the
possibility of paying the money into court.

The enforcement warrant was served on the applicant on 5 July
2006. No part of the proceeds of the sale had been paid to
the applicant on that day and that position has not changed.
On behalf of the applicant reliance was placed on sub rules
(1) and (3) of rule 840 of the *Uniform Civil Procedure Rules*
in chapter 19 (Enforcement of money orders) part 5
(Enforcement warrants for redirection of debts) division 1
(General) under which the enforcement warrant was issued. So
far as it is relevant, then, the rule is as follows:

"840(1) A court may issue an enforcement warrant
authorising redirection to an enforcement creditor of
specified debts certainly payable, belonging to an
enforcement debtor, from a third person.

...

(3) A debt may be redirected only if the debt, or the
part of the debt belonging to the enforcement debtor, is
payable to the enforcement debtor from the third person
on the date the enforcement warrant is served on the
third person."

The argument for the applicant was that there has not been to
now a debt owed by the applicant to the enforcement debtor and
that that circumstance is fatal to the warrant.

In *Webb v. Stenton* (1883) 11 Q.B.D. 518 Brett M.R. observed that the law "has always recognized as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future" (p.524). In the same case Lindley L.J. said "a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in presenti, solvendum in futuro" (p.527), and later, "moneys which may or may not become payable from a trustee to his cestui que trust are not debts" (p.528). A debt may be "not only what was a common law debt before the passing of the Judicature Act, but also what was a mere equitable debt, that is to say a liquidated sum of money owing in equity from one person to another... But is a trustee a debtor of his cestui que trust? You cannot say he is unless he has got in his hands money which it is his duty to hand over to the cestui que trust" *ibid* at p.526 per Lindley L.J.

Applying that analysis to the natural meaning of the words of rule 840, one would conclude that sub-rule (1) provides that a court may not issue an enforcement warrant authorizing redirection to an enforcement creditor unless there is an existing debt at the time of issuing the warrant. The debt could be an equitable debt, but the rule would require it to be certainly payable: not necessarily payable at the time of issuing the warrant, but certainly payable in the future by reason of a present obligation. It would not be an equitable debt of the kind relied on in this case at all unless the third person had the money in hand. A further requirement, from sub-rule (3), would be that the debt could be redirected

only if the third person were obliged to pay the enforcement debtor when the warrant was served.

That would be the effect of the natural meaning of the words of rule 840, but on behalf of the respondents reliance was placed on the effect of the definition of "third person" in rule 793 in part 1 (Preliminary) of chapter 19: in chapter 19, division 1, "third person" means:

- (a) a person (including the State) from whom a debt -
 - (1) is payable to the enforcement debtor or;
 - (2) is likely to become payable to the enforcement debtor.

Mr Beacham, for the respondents, submitted that rule 840 must be construed having regard to the definition of "third person" in rule 793. He submitted that the "obvious intention of the definition of third person" was to expand the ambit of the provisions relating to the redirection of debts by avoiding the need for a creditor to wait until a debt becomes due and payable before a warrant for redirection can be issued. The reference to "debts certainly payable" in rule 840(1) must be taken, Mr Beacham argued, to refer to debts where the basis for liability is certain, even if the actual obligation to pay has not yet arisen, or the obligation depends on a particular factual situation arising. In other words, a debt which is likely to become payable at a point in the future under a building contract (say, upon the issue of a superintendent's certification) would be a debt certainly payable. That is a construction suggested by Dr B.C. Cairns in his *Australian*

Civil Procedure, 6th ed., in which the following appears at page 595:

"The definition of the term 'third person' in rule 793 is significant. It means a person from whom a debt is payable to an enforcement debtor or is likely to become payable to the enforcement debtor. Applying this definition to the notion of a debt "certainly payable" in rule 840 a future debt may be attachable if it is sufficiently certain to mature at a fixed or ascertainable time, a future sum payable to the enforcement debtor under a contract might be an example."

The construction contended for, Mr Beacham argued, advances the utility of the enforcement process by allowing the service of a warrant at an early point in time, rather than requiring the creditor to attempt both the issue and service of the warrant during the narrow window of time between the debt's becoming payable and its being paid over. The construction does not place any greater burden upon the third person: if for some reason the debt does not become payable it will assume no obligations under the warrant; if an obligation to pay does arise it will have been given advance notice of the redirection, Mr Beacham continued.

On behalf of the applicant it was argued that the definition of "third person" would not, by operation of the principle that provisions of general application give way to specific provisions when in conflict, *generalalia specialibus non*

derogant, apply to rule 840. I am not persuaded, however, that that is the correct construction of the rules in question because I conclude that they can be read in a way that shows that they are not in conflict, as Mr Beacham for the respondents suggested. Rule 840(1) can be read in the way suggested by Dr Cairns, i.e., a court may issue an enforcement warrant authorizing redirection to an enforcement creditor or specified debts belonging to an enforcement debtor from a third person, not yet in existence but likely to become payable to the enforcement debtor and certainly payable when they do come into existence. Subrule (3) can then be read as providing that such a debt may be redirected only if the debt, or part of the debt, belonging to the enforcement debtor is payable to the enforcement debtor from the third person on the date the enforcement warrant is served on the third person, i.e., by the time of service the debt must be in existence and payable to the enforcement debtor.

The evidence in this case reveals that when the enforcement warrant was issued, it could not be said that the alleged debt in question (an equitable debt arising from the applicants having in hand a residue after the mortgage debt to it had been discharged) was more than a possibility, especially in view of the stated position of the solicitors for the Bendigo Bank who it appears were considering payment into court. It is not in dispute that there is no debt at present payable to the enforcement debtor by the applicant: it has no part of the proceeds of the sale of the land in hand and had none on the day the enforcement warrant was served. It follows that

the requirement of subrule (3) cannot be met. Accordingly, I
am satisfied that the applicant has established its case for
setting aside the enforcement warrant.

...

HIS HONOUR: The orders will be that the enforcement
warrant-redirection of debt issued on 5 July 2006 by the
respondent enforcement creditors against the applicant be set
aside and that the respondents pay to the applicant its costs
of and incidental to the application to be assessed.

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