

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 2985 of 2008

CEMEX AUSTRALIA PTY LTD
(ACN 099 732 297)

Applicant

and

NIKOLA RADMANOVIC also known as
RINKER AUSTRALIA PTY LIMITED

Respondent

BRISBANE

..DATE 21/11/2008

ORDER

HER HONOUR: This is an application for default judgment and sale of property of which the defendant is the registered proprietor.

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On 10 February 2006 the plaintiff and the defendant entered into a written credit agreement pursuant to which the plaintiff agreed to supply goods to the defendant on particular terms.

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There were payment terms, which included that the cost of any legal or other debt collection costs incurred by the plaintiff should be paid by the defendant to the plaintiff, and also this charging clause:

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"Applicant charge

The applicant(s) [defendant] charge in Rinker Australia [plaintiff]'s favour all their estate and interest in any land in which the applicant(s) now have or may later acquire and any other asset or trust assets with payment all monies owed to Rinker Australia by the customer or any of the applicant(s)."

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The defendant owes the plaintiff the sum of \$14,157.90. The plaintiff obtained a judgment in that amount in the Magistrates Court at Brisbane on 19 March 2008.

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On 26 March 2008 the plaintiff lodged a caveat over the property in question in respect of its charge over the

defendant's interest in that property. The ground of the
caveat was stated as follows:

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"An equitable charge pursuant to the clause entitled
'Applicant charge' of a commercial credit agreement executed
on or about 10 February 2006 between CEMEX Australia Pty Ltd
(formerly known as Rinker Australia Pty Ltd) ABN 87 099 732
297 and Nikola Radmanovic under which Nikola Radmanovic
charged all of his estate and interest in any land that he now
has or may later acquire with the payment of all monies owed
to CEMEX Australia Pty Ltd (formerly known as Rinker Australia
Pty Ltd) ABN 87 099 732 297."

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This proceeding was commenced on 3 April 2008. The plaintiff
claims the sum of \$510.85 being legal costs incurred in
lodging the caveat and payable pursuant to the clause of the
credit agreement to which I have referred, as well as:

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"2. a declaration that the Defendant granted a charge and/or
equitable mortgage to the Plaintiff in respect of the
defendant's interest in the estate and interest in the
property at lot 78 on RP61580 Count of Ward Parish of
Nerang Title Reference 12317205 ("the Property");

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3. a declaration that the said charge and/or equitable
mortgage charges the interest of the Defendant in the
Property with the payment of all moneys due and owing by
him to the Plaintiff;

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4. an order for the sale of the Property without prejudice to any encumbrance having priority to the Plaintiff's charge and/or equitable mortgage and free from the encumbrances (if any) of such of the encumbrancers [sic] as shall consent to the sale and/or do not have priority; 1
5. such further or other orders including an order vesting interest in the Property or appointing a person to convey interest in the Property or an order creating or vesting in the plaintiff a legal estate in interest in the Property to enable the plaintiff to carry out the sale. 10 20
6. costs on an indemnity basis." 20

The claim and statement of claim were served on 1 October 2008. Meanwhile on 2 September 2008 Mr G D McDonald had been appointed as the controlling trustee of the estate of the defendant. 30

The plaintiff's claim is as a secured creditor and, accordingly, it is not necessary for the plaintiff to obtain leave of the Court in order to proceed with this claim. 40
I refer to the supplementary submissions prepared by the solicitors for the plaintiff on this point.

No defence has been filed. Accordingly the defendant is deemed to have admitted the plaintiff's claim. 50

The plaintiff has applied for judgment pursuant to Rule 288 of the Uniform Civil Procedure Rules. In my view it is entitled to that judgment.

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Orders for the sale of the property were sought in the claim. The Court has power to direct a sale pursuant to section 99(2) of the Property Law Act (see Phillips v. Hogg [2001] QSC 390) as well as an inherent power to do so (see Bunnings Building Supplies Pty Ltd v. Blue Diamond Homes Pty Ltd [2004] QSC 54).

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The plaintiff seeks the appointment of Messrs Sweeney and Cronan as trustees for sale. Both are registered trustees in bankruptcy and they consent to act. In my view it would be a proper exercise of the Court's power to appoint them accordingly.

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They are entitled to their reasonable expenses of effecting the sale, those expenses to include professional costs and disbursements.

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The only remaining issue is that of the disposition of the sale proceeds.

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There is a first registered mortgage in favour of the Commonwealth Bank of Australia. It was registered on 6 December 2007.

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Then a caveat was lodged by Provident Capital Limited on 17 December 2007; there is no evidence of any proceeding being

commenced to enforce the claim made in that caveat and,
accordingly, I assume it has lapsed.

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The plaintiff's caveat was lodged on 26 March 2008.

There are two subsequent caveats, one lodged on 7 April 2008
by Langs Building Supplies Pty Ltd and the other lodged on 10
April 2008 by Waco Kwikform Limited. Again there is no
evidence of proceedings being taken to enforce the claims made
in those caveats.

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Finally there is a notation of a writ made on 11 July 2008 by
Burlee Holdings Pty Ltd.

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The draft order which has been put before the Court provides
for Messrs Sweeney and Cronan to be entitled to deduct the
costs of sale from the sale proceeds after first paying the
registered mortgagee, Commonwealth Bank of Australia. That
seems correct in the circumstances. The draft order then goes
on to provide that Messrs Sweeney and Cronan may deduct such
costs before making payment to any subsequent encumbrancee and
finally paying the surplus, if any, to the defendant. Again,
that provision seems proper in the circumstances.

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As for the payment of costs, the plaintiff seeks costs on the
indemnity basis, to be assessed if not agreed. Having regard
to the provisions of the credit agreement, such an order is
appropriate.

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Accordingly I make an order in terms of the draft.

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