

SUPREME COURT OF QUEENSLAND

CITATION: *Dodrill & Anor v Bank of Queensland & Ors* [2010] QSC 371

PARTIES: **JOSEPH MICHAEL DODRILL**
(first applicant/cross-respondent)

JOHN ANTHONY DODRILL
(second applicant/cross-respondent)

v

BANK OF QUEENSLAND LIMITED
ABN 32 009 656 740
(first respondent/cross-applicant)

**JOHN RICHARD PARK AND KELLY-ANNE LAVINA
TRENFIELD IN THEIR CAPACITY AS RECEIVERS
& MANAGERS OF MULHERN CONSTRUCTIONS
PTY LTD (ACN 060 410 102) (RECEIVERS AND
MANAGERS APPOINTED)**
(second respondent/cross-applicant)

**MULHERN CONSTRUCTIONS PTY
LTD(RECEIVERS AND MANAGERS APPOINTED)**
ACN 060 410 102
(third respondent/cross-applicant)

FILE NO/S: SC No 9831 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 October 2010

DELIVERED AT: Brisbane

HEARING DATE: 24 September 2010

JUDGE: Chief Justice

ORDERS: **1. On the applicants' application filed 14 September 2010, there will be a declaration that each of the applicants is beneficially entitled to one half of the amount held in trust by Lynch Morgan Lawyers being part proceeds of sale of the property at 3 Sherwood Road, Toowong of which the third respondent was the registered proprietor, and an order that the respondents pay the applicants' costs, to be assessed on the standard basis.**

2. There will be an order that the respondents' cross-application filed by leave on 24 September 2010 be refused.

CATCHWORDS: EQUITY– GENERAL PRINCIPLES – PRIORITY AND NOTICE – PRIORITY – PRIORITY BETWEEN PRIOR LEGAL AND SUBSEQUENT EQUITABLE INTEREST – where applicants claim to be entitled to surplus proceeds of sale of real property at Toowong held in trust account of Lynch Morgan Lawyers – where surplus of \$620,695.63 arose after the satisfaction of a debt owed to the registered mortgagee, Bankwest Ltd – where applicants claim to be entitled to the monies because of writs of execution they registered over the land prior to its sale – where respondents seek a declaration that surplus monies are subject to registered charges and an order that the money be paid to Mulhern as directed by the receivers – where applicants submitted that an enforcement creditor's interest prevails over all unregistered interests unless notified by caveat lodged prior to the registration of the enforcement warrant, but not prior registered interests and that accordingly, the applicants' interest prevailed over any interest claimed by the first respondent – where the respondents argued that the surplus should be characterised as a future asset falling within the purview of the Bank of Queensland's charges which were released only with respect to the land itself – where the respondents further submitted that the terms of the subsisting charges were wide enough to cover the surplus so that the equitable interest in that surplus should take priority over the claim of the applicants as unsecured judgment creditors – whether the applicants' interest in the surplus proceeds, by force of the registered writs of execution, prevailed over the respondents' interest

Corporations Act 2001 (Cth), s 269

Land Title Act 1994 (Qld), s 120

Agnew v Commissioner of Inland Revenue [2001] 2 AC 710, cited

Black v Garnock (2007) 230 CLR 438; [2007] HCA 31, cited
Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd [1984] 2 Qd R 507, applied

Ferrier v Bottomer (1972) 126 CLR 597; [1972] HCA 11, cited

Mineral and Commercial Traders Pty Ltd v Tymczyszyn Pty Ltd (1994) 15 ACSR 398, cited

Re Bartlett Estates Pty Ltd [1989] 2 Qd R 175, cited

Secure Funding Pty Ltd v Doneley & Anor [2010] QSC 91, cited

COUNSEL: R Perry SC for the applicants/cross-respondents
B Porter for the respondents/cross-applicants

SOLICITORS: Lynch Morgan Lawyers for the applicants/cross-respondents
Dibbs Barker for the respondents/cross-applicants

CHIEF JUSTICE:

Introduction

- [1] The applicants, Joseph Dodrill and John Dodrill, claim to be entitled to surplus proceeds of sale of real property at Toowong. The surplus arose after the satisfaction of a debt owed to the registered mortgagee, Bankwest Ltd. The amount of the surplus, \$620,695.63, is held in the trust account of Lynch Morgan Lawyers.
- [2] The applicants claim to be entitled to the monies because of writs of execution they registered over the land on 7 May 2010 prior to its sale. The applicants were enforcement creditors of the registered proprietor of the land, the third respondent, Mulhern Constructions Pty Ltd, which is in receivership. The second respondents, Mr Park and Ms Trenfield, are its receivers and managers. The applicants claim declarations as to their respective, equal entitlements.
- [3] The first respondent, Bank of Queensland Ltd, joins with the other respondents in claiming a declaration that the surplus monies are subject to registered charges numbered 870041 and 930437 granted by Mulhern to the Bank, and an order that the money be paid to Mulhern as directed by the receivers.

Additional factual circumstances.

- [4] Mulhern gave Bank of Queensland three securities over the land:
1. On 27 March 2002, a charge over all its “assets and undertakings, both present and future, related to, connected with” the land and the business carried on at the land, which I will term “the first charge”, registered with ASIC on 20 June 2002;
 2. Also on 27 March 2002, a registered mortgage over the land (“the mortgage); and
 3. On 4 February 2003, a charge over all its assets and undertakings, both present and future (“the second charge”), registered with ASIC on 20 March 2003.
- [5] A limited refinancing of Mulhern’s indebtedness to Bank of Queensland occurred in August 2009. That involved the following:
- (a) There were partial releases of the property secured by the first and second charges, evidenced by the Form 312 documents lodged with ASIC dated 7 August 2009, each of which relevantly provides:
 - “3. Discharge extent
 - ...
 - Property released
 - Description of property release
 - 3 Sherwood Road Toowong Qld 4066, referred to as Lot 9 on RP218793 – title reference 17154064.”

- (b) The fixed mortgage was released.
 - (c) At the settlement of the refinancing transaction on 31 August 2009:
 - (i) Bankwest advanced the amount of \$4.8 million;
 - (ii) Those funds were applied in reduction of debts owed to Bank of Queensland by Mulhern and a related company; and
 - (iii) Bankwest took a charge to secure its advance, limited to Mulhern's interest in the land and receivables generated by it.
- [6] On 7 May 2010 each of the applicants registered an enforcement warrant over the title to the land, based on judgments in their favour against Mulhern, each in the amount of \$334,875.
- [7] The receivers and managers were appointed to Mulhern on 24 May 2010. At that stage Mulhern owed Bank of Queensland \$12.3 million. The debt now exceeds \$12.5 million.
- [8] On 25 May 2010, the receivers were appointed as receivers and managers of the property under the Bankwest charge. They took possession of the land and sold it, the sale being completed on 17 September 2010, yielding a surplus after payment of the debt to Bankwest. The amount of that surplus was paid into the solicitors' trust account, pending agreement or determination as to its disposition.

The parties' contentions

- [9] Relying on *Black v Garnock*¹, Mr Perry, who appeared for the applicants, submitted that an enforcement creditor's registered interest prevails over all unregistered interests unless notified by caveat lodged prior to the registration of the enforcement warrant, but not prior registered interests. He submitted that accordingly, the applicants' interest prevailed over any interest claimed by Bank of Queensland.
- [10] The execution and lodgement of the releases in August 2009 extinguished any interest in the land in favour of Bank of Queensland. Mr Perry referred to s 269 of the *Corporations Act 2001*.
- [11] Mr Porter, who appeared for the respondents, acknowledged the releases operated to release the land from the charges in favour of Bank of Queensland, but characterised the proceeds of sale as an asset of Mulhern which was separate and distinct from the land itself. The surplus should, he submitted, be characterised as a future asset falling within the purview of the Bank's charges, which were released only with respect to the land itself. He referred to *Ferrier v Bottomer*²; *Agnew v Commissioner of Inland Revenue*³; *Mineral and Commercial Traders Pty Ltd v Tymczyszyn Pty Ltd*⁴ and other cases.

¹ (2007) 230 CLR 438, para 88, and see s 120 *Land Title Act 1994* (Qld).

² (1972) 126 CLR 597, 605.

³ [2001] 2 AC 710, para 43.

⁴ (1994) 15 ACSR 398, 412.

- [12] The terms of the subsisting charges are, he submitted, wide enough to cover the surplus, so that the equitable interest in that surplus of Bank of Queensland should take priority over the claim of the applicants as unsecured judgment creditors.
- [13] Mr Perry submitted that because the floating component of the charge crystallised on 24 May 2010 when the receivers were appointed, which was after the registration of the writs of execution which had occurred on 5 May 2010, any interest of Bank of Queensland must have been postponed to that of the applicants.
- [14] Mr Porter emphasised that by registration of a writ of execution, the execution creditor gains no interest in the land, and he referred to the analysis by Martin J in *Secure Funding Pty Ltd v Doneley & Anor.*⁵ The floating charge here created an equitable charge over the assets of Mulhern (*Re Bartlett Estates Pty Ltd*⁶), including future assets, covering the land, and after the release, the surplus proceeds.

Analysis

- [15] The surplus monies constitute “future assets” subject to the Bank’s charges. But the Bank’s equitable interest in those monies only attached when the floating component of the charges crystallised, with the appointment of receivers on 24 May 2010, which was after the registration of the writs of execution (7 May 2010). The Bank had earlier released its interest in the land.
- [16] As confirmed by Martin J in *Secure Fundings Pty Ltd v Doneley*, the interest of the judgment creditor under a registered writ of execution is subject only to prior legal and equitable interests in the land. See *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd.*⁷ The Bank released its interest in the land, and its interest in the surplus monies arose subsequently to the registration of the writs of execution, when, as I have said, the floating charges crystallised.
- [17] The applicants’ interest in those monies, by force of the registered writs of execution, therefore prevailed over the later equitable interest attaching in favour of the Bank upon crystallisation.

Orders

- [18] On the applicants’ application filed 14 September 2010, there will be a declaration that each of the applicants is beneficially entitled to one half of the amount held in trust by Lynch Morgan Lawyers being part proceeds of sale of the property at 3 Sherwood Road, Toowong of which the third respondent was the registered proprietor, and an order that the respondents pay the applicants’ costs, to be assessed on the standard basis.
- [19] There will be an order that the respondents’ cross-application filed by leave on 24 September 2010 be refused.

⁵ [2010] QSC 91, paras 19, 20.

⁶ [1989] 2 Qd R 175, 179.

⁷ [1984] 2 Qd R 507.