SUPREME COURT OF QUEENSLAND

CITATION:	*Dart & anor v Singer & ors* [2014] QSC 316
PARTIES:	**FREDERICK WILLIAM DART** (first applicant) and **MEGAN ANN HAJRIDIN** (second applicant) **v** **CLIFFORD SINGER** (first respondent) and **ROYAL SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS QUEENSLAND INC** (second respondent) and **DEPARTMENT OF ENVIRONMENT, ECONOMIC DEVELOPMENT AND INNOVATION** (third respondent)
FILE NO/S:	51 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	31 October 2014 (*ex tempore*)
DELIVERED AT:	Townsville
HEARING DATE:	31 October 2014
JUDGE:	Carmody CJ
ORDERS:	1. **The application is refused;** 2. **Order that the applicants pay the respondents' costs fixed at $3,000.**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – where applicants apply for judgment debt to be enforced through an instalment order – where respondents contend that such an order would be unreasonable and futile – whether circumstances justify payment of judgment debt in instalments *Hellier Capital Pty Ltd v Richard Albarran* [2009] NSWSC 403, cited
COUNSEL:	FW Dart for the applicants (self-represented). AJ Hocking for the respondents.

SOLICITORS: Roberts Nehmer McKee for the respondents.

THE CHIEF JUSTICE: This is an application by judgment debtors for an enforcement order under r 868 at the rate of $125 per week over an estimated period of five years. The application is opposed on a number of grounds: (a) there is no definite financial plan for the payment of specific sums at regular intervals until the debt is satisfied; (b) it is unreasonable to extend payment over a period of five years; (c) any proposal for the instalment payments would ultimately be futile; and (d) this is the time to draw a line in the sand to end litigation between the parties.

Unless the instalment order is made, the applicants are likely to be forced into bankruptcy.

The debt consists of assessed costs of $25,987. No payments have been made since the debt was incurred on 29 January 2014. The current balance is $27,385, increasing at the rate of 8.5 per cent for interest. The respondents have made an application under a creditor's petition seeking sequestration orders against the estates of both applicants under the *Bankruptcy Act 1966* (Cth) for non-compliance with bankruptcy notices based on the judgment debt at the centre of this application.

The mandatory factors that must be taken into account in deciding whether to issue an enforcement warrant for payment of a money order or other judgment debt by instalments are set out in Rule 869. They are: whether the enforcement debtor is employed; the enforcement debtor's means of satisfying the order; whether the order debt, including any interest, will be satisfied within a reasonable time; the necessary living expenses of the enforcement debtor and any dependants; other liabilities; and whether, having regard to the availability of other means of enforcement, making the order would be consistent with the public interest in enforcing money orders efficiently and expeditiously. In deciding the amount and timing of instalments, the Court must be satisfied that the instalment order will not impose unreasonable hardship on the enforcement debtor.

The second applicant does not satisfy the criterion in subrule 869(1)(a). She is unemployed, a welfare recipient, and has no assets.

The first applicant, Mr Dart, has deposed to being employed for 20 years by the same employer, having an ability to pay up to $125 a week off the debt, with hopes of satisfying it within five years. He has no dependants, modest fixed assets, with a potential offsetting claim pending in the Supreme Court against the enforcement creditor.

Exhibit F, the affidavit filed by leave today, identifies a total income of $1036 net per week, a mortgage debt of $240,517, which is paid off at the rate of $440 a week, a MasterCard account of nearly $4,000, which is reduced by $20 per week, and a SPER debt approaching $50,000, which is currently being diminished at the rate of $100 a week. Total weekly expenses are $890 a week, leaving a remaining net disposable income of $146, according to the financial position statement at exhibit F.

It appears that the mortgage debt is disclosed for the first time in the first applicant's affidavit filed by leave today. The enforcement creditor says that exhibit F and the

additional financial information is inadequate for meeting the requirements of UCPR 869, because it provides no details of employment (except its asserted length), does not identify the employer, and unsupported by any documentary evidence. Moreover, it contends that I could not be reasonably satisfied on the available material that the proposed instalment payment period is a reasonable one and that payments would be made as and when they fell due, because there is no payment schedule, leaving the manner and amount of payment largely to the discretion of the first applicant.

In *Hellier Capital Pty Ltd v Richard Albarran* [2009] NSWSC 403, McDougall J relied on matters similar to those set out in UCPR 869 to determine an application for rescission of an instalment order in circumstances where the judgment debtor was paying by instalments a debt of $1.6 million. The rescission application appears to have been made for no other particular reason than a wish to proceed to bankruptcy by the judgment creditor. The evidence was that the judgment debtor had surplus of assets over liabilities, at least on paper, of about half a million dollars, but only if a strata title property was sold at the value ascribed by the judgment debtor. There were unresolved property settlement issues in the Family Court and a number of applications for finance by the judgment debtor to enable him to pay the judgment debt, all of which were rejected. Importantly, the judgment debtor's ability to earn income was dependent upon his remaining and practising as a registered insolvency practitioner, which he would not be able to do if bankrupted.

At [19] McDougall J identified, in addition to the statutory factors, other discretionary considerations that needed to be taken into account when deciding whether or not to allow payments of a judgment debt by instalments. One of those is the "public interest in enabling parties who had litigated their disputes [especially in a commercial context] to enforce the victory that they had achieved." His Honour continued:

> That public interest arises, at least in part, because the system of adjudication through courts depends firstly on acceptance of the outcome (if necessary, after exhausting all available avenues of appeal) and, secondly, the ability to enforce the outcome. If the process of adjudication is to survive, so that people do not resort to self-help, the courts should be slow to interfere in the normal processes of enforcement.

McDougall J identified the legitimate public interest in having insolvency practitioners available to the community and not excluded by preventable bankruptcy proceedings (at [20]), and the equally important public interest in giving proper support to dependants (at [21]).

His Honour also took into account the fact that the instalment order that was on foot would not mean that the judgment debt remained outstanding for an unconscionable length of time. The proposed repayments made a substantial reduction in the principal amount of the debt of just under $23,000 per month, to increase thereafter. His Honour found that if the instalment order was rescinded and the judgment debtor bankrupted, repayment of the judgment debt was unlikely. I would add that there is also a public interest in finality to litigation between the same parties.

Other relevant principles include that "an instalment order ought not to be made if the judgment debtor's means are sufficient to enable [the debt to be discharged] immediately and in full" (at [8]); "an instalment order ought not to be made if it is obvious that to make it would be futile because the judgment debtor could not meet his or her obligations under it" (at [9]); and "the period for payment must be a reasonable one" (at [10]).

Again, it would not ordinarily be a proper exercise of the discretion, according to McDougall J in *Hellier*, to make an instalment order if the amount proposed would not enable some meaningful reduction to be made in the amount of the judgment debt, and the fact that judgment debts carry interest, an instalment order which "chipped away" at only part of the interest obligation and did not reduce the principal would be "inefficacious" (at [11]).

The applicant bears the onus of satisfying me that the mandatory statutory criteria and the discretionary considerations favour the making of an instalment order. The information he has provided, however, has failed to discharge that onus. I am not satisfied of his means for satisfying the order or that the order, including any interest, will be met within a reasonable time, having regard to his other liabilities and the fact that, despite nine months having elapsed since the making of the order, no attempt has been made to reduce it by payment.

In my view, making the instalment order would only continue litigation between these parties. It is contrary to public interest for the court to make orders that will likely only *encourage* the parties to finalise a dispute rather than actually end the dispute. There is a public interest in allowing the judgment creditor the fruits of victory, and also in encouraging unsuccessful litigants to accept the outcome and the inevitability that there is really, in the end, no point throwing good money after bad.

The application is refused. Order that the applicants pay the respondents' costs fixed at $3,000.