

CITATION: *GRD Building Pty Lid v Total Development Supplies Pty Ltd & Sunbuild Pty Ltd* [2008] NTMC 050

PARTIES: GRD BUILDING PTY LTD  
v  
TOTAL DEVELOPMENT SUPPLIES PTY LTD  
AND  
SUNBUILD PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Darwin

FILE NO(s): 20809117

DELIVERED ON: 24 July 2008

DELIVERED AT: Darwin

HEARING DATE(s): 18 June 2008

JUDGMENT OF: Jenny Blokland CM

**CATCHWORDS:**

GARNISHEE SUMMONS – FIXED AND FLOATING CHARGE

*Local Court Rules (NT)*, Rule 49.03

Gillooly, “Securities Over Personality”, the Federation Press at 9-11.

**REPRESENTATION:**

*Counsel:*

Applicant: Mr Morris  
Respondent: Mr Maher

*Solicitors:*

Applicant: Clayton Utz  
Respondent: Paul Maher

Judgment category classification: B  
Judgment ID number: [2008] NTMC 050  
Number of paragraphs: 17

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20809117

[2008] NTMC 050

BETWEEN:

**GRD BUILDING PTY LTD**  
Judgment Creditor

AND:

**TOTAL DEVELOPMENT SUPPLIES  
PTY LTD**  
Judgment Debtor

**SUNBUILD PTY LTD**  
Garnishee

REASONS FOR DECISION

(Delivered 24 July 2008)

JENNY BLOKLAND CM:

1. This is an application on a Garnishee Summons brought on behalf of GRD Building Pty Ltd (“Judgment Creditor”) in respect of Total Development Supplies Pty Ltd (“Judgment Debtor”) and Sunbuild Pty Ltd (“the Garnishee”). The Garnishee Summons brought pursuant to Rule 49.03(1)(a) *Local Court Rules* seeks an order that the Garnishee “pay to the Judgment Creditor in such amount or amounts or at such time or times as the Court may direct the debt accruing from you to the Judgment Debtor, or so much of that debt as may be sufficient to satisfy the judgment debt payable by the Judgment Debtor to the Judgment Creditor under an order made by the Court on 28 March 2008 for \$99,228.54” Interest and certain fees are also claimed. A stay application (*Local Court Rule 25.02(a)*) filed by the Judgment Debtor did not proceed although the Court was informed that final issues between the parties would be dealt with in the Federal Court in September.

2. The brief history of this matter is that a contract was entered into by GRD Building Pty Ltd and Total Development Supplies Pty Ltd; a dispute arose and the parties referred the dispute to an appointed adjudicator under the *Construction Contracts (Security of Payments) Act* (NT). The adjudication is set out in the annexure to the affidavit of George Ronald Day filed in these proceedings on behalf of the Judgment Creditor (sworn 21 April 2008). At paragraph 80 the adjudicator concluded as follows:
  - 80.1 For the reasons set out in the adjudication, I determine the adjudicated amount for the applicant is \$99,228.54 including GST.
  - 80.2 The date payable is 28 October 2007. Interest due and payable to 26 March 2008 is \$4,281.78 and interest continues to accrue at the rate of \$28.55 per day until payment is made.
  - 80.3 The parties legal and preparation costs are not awarded.
  - 80.4 The adjudicator's costs are to be shared equally between the applicant and the respondent.
  - 80.5 The adjudicated amount in favour of the applicant is supplemented with \$1,930.00 for adjudicators fees owed by the respondent and paid by the applicant.
3. The adjudication was registered in the Local Court as a judgment. The Garnishee application is made as a result of the adjudication being registered as a judgment. The Garnishee has not sought to be represented in these proceedings. The Judgment Debtor had entered into a separate contract with Sunbuild Pty Ltd (the Garnishee) in relation to the construction of a building.
4. Paragraph 6 of the affidavit of Mr Day (cited above) states that the judgment debt remains wholly unsatisfied and interest continues to accrue. *Local Court Rule* 49.03 provides as follows:

### **49.03 Application for order**

(1) A Judgment Creditor may apply for an attachment of debts order by filing –

- (a) a Garnishee summons in accordance with Form 49A; and
- (b) an affidavit stating –
  - (i) that the judgment debt is unsatisfied, either wholly or to a specified amount;
  - (ii) that a debt is due or accruing to the Judgment Debtor from the Garnishee;
  - (iii) the particulars identifying the transaction between the Judgment Debtor and the Garnishee under which the debt is due or accruing; and
  - (iv) that the Garnishee is in the Territory.

(2) An affidavit under this rule may contain statements of fact based on information and belief if the grounds are set out.

(3) The Registrar who issues the summons must mark on it the date, time and place fixed for the hearing of the application.

- 5. It was submitted on behalf of the Judgment Creditor that material contained in paragraph 6 of Mr Day's affidavit fulfils the requirement of Rule 49.03(b)(i), providing as it does, that the judgment debt remains wholly unsatisfied.
- 6. Paragraph 8 of Mr Day's affidavit sets out a conversation between Mr Day and a Director of the Garnishee. It states the Sunbuild Pty Ltd Director told him that the Judgment Debtor had a contract with Sunbuild relating to the supply and laying of tiles by the Judgment Debtor in a particular development; that that contract contemplated the work to be performed and completed by July 2008 but that the development was running behind schedule; the contract contemplates the Garnishee pay the Judgment Debtor in monthly instalments paid at the end of each month; that on 31 March 2008 \$380,000.00 was paid to the Judgment Debtor by the Garnishee; that further payments are expected to be paid by the Judgment Debtor and the

amount paid will depend on the work performed by the Judgment Debtor in the proceeding months. It was submitted on behalf of GRD Building Pty Ltd that this material satisfied the criteria in Rule 49.03(b)(ii)(iii).

7. I was referred to the affidavit of Steven John Stirrup filed in the Federal Court (Northern Territory Registry) no. 19 of 2007 in the action “Total Development Supplies Pty Ltd and GRD Pty Ltd”), page 32 sets out a table entitled “Total Development Supplies Pty Ltd” and “Receivables [Reconciliation] Summary”. The entries on that summary relate to 30 April 2008 and I was referred to an entry that shows an amount of \$921,800.31 owing to Sunbuild (Evolution) Pty Ltd the Garnishee. I was referred to a further affidavit of Steven John Stirrup filed in Court at the hearing of this application (sworn 18 June 2008), indicating Total Development Supplies Pty Ltd (the Judgment Debtor) is receiving \$62,700.00 per week from Sunbuild.
8. In relation to Rule 49.05(1), it was noted that if a Garnishee disputes liability for payment of the debt to the Judgment Debtor the Garnishee may file and serve an affidavit on both the Judgment Creditor and Judgment Debtor setting out the facts on which liability is disputed. The Garnishee has not taken any such action.
9. The position of the Judgment Debtor is that it also owes money to Bank West: (affidavit, Steven John Stirrup, sworn 18 June 2008). Annexed to that affidavit is a copy of the details of a Fixed and Floating Charge. The argument is that the granting of a Garnishee order should not be made as the money is currently secured by virtue of the Fixed and Floating Charge. Paragraph 2 of Mr Stirrup’s affidavit states the Judgment Debtor granted the charge in favour of Bank West in September 2006. At paragraph 5 of the affidavit it is stated “TDS is presently receiving \$62,700.00 per week from Sunbuild. Mr Steve Purkis, the Darwin branch manager of Bank West has informed me, and I believe that pursuant to its registered charge, Bank West

requires that the whole of the \$62,700.00 be deposited each week to reduce the overdraft account, and that \$20,000.00 then be transferred on to reduce its ITA debt”.

10. Paragraph 3.3 of the Bank West fixed and floating charge terms reads as follows:

- 3.3 Where this charge is floating (whether under the terms of this charge or at law), it immediately and automatically becomes fixed:
- (a) over any charged property we notify you is to be subject to a fixed charge;
  - (b) over any charged property affected if:
    - (i) you breach an obligation under clause 9; or
    - (ii) a judgment, order or encumbrance is:
      - enforced;
      - becomes enforceable; or
      - can be rendered enforceable by the giving of notice, lapse of time or fulfilment of a condition, in respect of that *charged property*;
  - (c) over all the charged property if you or a *debtor/guarantor* are or become *insolvent* or steps are taken to make you or the *debtor/guarantor insolvent*;
  - (d) over the *charged property* that is money or rights to money if any person takes any step, or attempts or agrees to do anything, which may result in taxes or an amount owing to an authority, ranking ahead of the floating charge (including issuing a notice of direction that has the effect of giving an authority a preference, priority or advantage over creditors);
  - (e) over all the *charged property* if you cease carrying on business;

- (f) over any *charged property* over which this charge is floating that you deal with except in the ordinary course of your business; and
- (g) if the law provides that this charge becomes fixed.

11. It was submitted that in effect Bank West could sue the Judgment Debtor as a possible effect of clause 3.3 is that once a judgment or order becomes enforceable, the floating charge over the liquid assets becomes fixed. Clause 18 provides that if Total Development Supplies Pty Ltd is in default, the amount owing is payable on demand. Further, after the default has occurred, Bank West may “do one or more of the following in addition to anything else the law allows us to do as mortgagee or chargee: (a) sue for the amount owing; (b) appoint a receiver; (c) do anything that a receiver could do under Clause 19.5”. Clause 19.5 allows for taking up possession of property. The Judgment Creditor argues that if there are monies owed by Sunbuild to TDS, the Court should make an order Garnisheeing those monies in favour of the Judgment Creditor, however the Judgment Debtor submits that given the existence of the fixed and floating charge, the money should go to Bank West and not the Judgment Creditor.
12. On behalf of the Judgment Debtor the Court was reminded that “charged property” under the fixed and floating charge terms means “all [your] rights, property and undertaking: of whatever kind and wherever situated; and whether present or future”. The Judgment Debtor reminds the Court that the charge existed from the date of the instrument being September 2006. I accept all the relevant property became *charged* from that time. By virtue of clause 3.2 the charge is floating over all the other charged property. It was submitted that by virtue of clause 3.3(a) the charge becomes fixed “Over any charged property we notify you to be subject to a fixed charge” and pursuant to clause 3.3(b)(ii), over any charged property affected if a judgment or order becomes *enforceable*. It was submitted that the wording of clause 3.3 meant that charged property here becomes fixed without any

further notification in contradiction from clause 3.3(a). Mr Stirrup's affidavit indicated that there was notice in any event – I accept as pointed out by Mr Maher there was meant to be a comma in paragraph 5 of the affidavit so that it reads, "...has informed me, and I believe, that pursuant to its registered charge..."

13. Throughout the hearing I had some sympathy with the Judgment Creditor's argument that it would be unlikely that the Judgment Debtor would be able to continue trading or effectively provide material and wages for the work undertaken at Sunbuild without financial reward. It was also submitted that the documents before the Court were merely evidence of an arrangement between the bank and the Judgment Debtor to the effect that of moneys payable by Sunbuild to TDS an amount of \$62,700.00 goes to Bank West.
14. The problem with treating the regular payment of the \$62,700.00 as simply an arrangement between the Judgment Debtor and Bank West is that it is an arrangement *secured* by the fixed and floating charge. If there are further moneys owed by Sunbuild to the Judgment Debtor, they too, according to the terms of the fixed and floating charge become secured. The Judgment Creditor submitted the garnishee be granted and Sunbuild could then avail itself of a defence if the Judgment Creditor sought to exercise the garnishee. In my view it would be pointless to make an order if such a defence was assured.
15. I am satisfied the Judgment Creditor has made out the criteria required by *Local Court Rule* 49.03, however, having read the relevant parts of the Fixed and Floating Charge details, it is clear that from the time of either registering the judgment or bringing this application to enforce, the charge became fixed on any monies payable by Sunbuild. It is not necessary under the terms of the Fixed and Floating Charge for Bank West to give notification, although the affidavit material indicates they have given notification. I note the comments in Gillooly, "Securities over Personalty"



(the Federation Press) (9 – 11) indicating that courts have interpreted security documents consistent with the floating charge theory to prevent paralysis of a company's business and supportive of the contractual nature of securities. The Judgment Debtor exercised its right to grant Bank West a fixed and floating charge in September 2006. Unsecured creditors, even those who have obtained judgment endure the effects of that arrangement.

16. This Court cannot override the contractual Security arrangements made between the Judgment Debtor and Bank West to secure property the subject of the Fixed and Floating Charge.
17. I dismiss the application.

Dated this 24<sup>th</sup> day of July 2008.

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**Jenny Blokland**  
CHIEF MAGISTRATE