

MAGISTRATES COURTS OF QUEENSLAND

CITATION: *GoGetta Equipment Funding Pty Limited a division of Silverchef Limited v. Putohe* [2016] QMC 21

PARTIES: FILE 262/16

**GOGETTA EQUIPMENT FUNDING PTY LIMITED A
DIVISION OF SILVERCHEF LIMITED ABN 88 124
102 647**

(Applicant)

v

**PETER DANIEL NICHOLAS PUTOHE trading as
PETER FALWASSER ABN 31 931 533 984
(Respondent)**

FILE 263/16

**GOGETTA EQUIPMENT FUNDING PTY LIMITED A
DIVISION OF SILVERCHEF LIMITED ABN 88 124
102 647**

(Applicant)

v

**RAYMOND CLICE WARDEN trading as RCW
PLUMBING ABN 21 694 578 548**

(First respondent)

And

**THE STATE OF QUEENSLAND (DEPARTMENT OF
TRANSPORT AND MAIN ROADS) ABN 39 407 690 291**

(Second respondent)

FILE 264/16

**GOGETTA EQUIPMENT FUNDING PTY LIMITED A
DIVISION OF SILVERCHEF LIMITED ABN 88 124
102 647**

(Applicant)

v

**COLIN STONE trading as COLIN STONE ABN 39 989
983 108**

(First respondent)

And

**THE STATE OF QUEENSLAND (DEPARTMENT OF
TRANSPORT AND MAIN ROADS) ABN 39 407 690 291**

(Second respondent)

FILE 270/16

**VOLKSWAGEN FINANCIAL SERVICES AUSTRALIA
PTY LIMITED ABN 20 097 071 460**

(Applicant)

v

RICARDO AWADALLAH

(Respondent)

FILE 271/16

**VOLKSWAGEN FINANCIAL SERVICES AUSTRALIA
PTY LIMITED ABN 20 097 071 460**

(Applicant)

v

SEYED AHMAD NEJAT

(First respondent)

And

**THE STATE OF VICTORIA (ROADS CORPORATION
TRADING AS VICROADS) ABN 61 760 960 480**

(Second respondent)

FILE 275/16

**VOLKSWAGEN FINANCIAL SERVICES AUSTRALIA
PTY LIMITED ABN 20 097 071 460**

(Applicant)

v

SORAN AHMED AZIZ

(Respondent)

FILE 276/16

**VOLKSWAGEN FINANCIAL SERVICES AUSTRALIA
PTY LIMITED ABN 20 097 071 460**

(Applicant)

v

ANTHONY EDGERTON

(Respondent)

FILE NO/S: 262/16, 263/16, 264/16, 270/16, 271/16, 275/16 and 276/16

DIVISION: Magistrates Court of Queensland

PROCEEDING: Application

ORIGINATING
COURT: Cleveland

DELIVERED ON: 18 November 2016

DELIVERED AT: Cleveland

HEARING DATE: 11 November 2016

MAGISTRATE: Magistrate Simpson

ORDER:

On each application:

1. The applicant has leave to re-file any originating process in accordance with the rules;
2. The originating process is to be served on the respondent in accordance with the rules;
3. No order as to costs.

CATCHWORDS: PROCEDURE – QUEENSLAND – PROCEDURE UNDER COURT RULES – where non-compliance with rules relating to an originating process - whether a commercial agent can sign an originating process – whether a commercial agent can appear on an application – whether an application to recover possession of a motor vehicle under a credit contract can be heard without service of the application

Motel Marine Pty Ltd v. IAC (Finance) Pty Ltd (1964) 110 CLR 9

McRae v. Coulton (1986) 7 NSWLR 644

Walsh v Toyota Finance Australia Ltd T/A Toyota Financial Services [2016] QDC 92

ss. 88(5), 100 and 101 *National Consumer Credit Protection Act* 2009 (Cth)

ss.123 and 144 *Personal Property Securities Act* 2009 (Cth)

s. 18 *Magistrates Court Act* 1921

rr 17, 19, 22(2)(c), 26(6), 26(8), 35, 38, 250, 373 and 985 *Uniform Civil Procedure Rules* 1999

Forms 2, 5, 9, 16 *Uniform Civil Procedure Rules* 1999

COUNSEL: Mr Robert Foster (Commercial Agent) given leave to appear for the applicants in each matter

SOLICITORS: No solicitors for the applicants
No appearance of the respondents

- [1] In each matter the applicant is a credit provider who has provided finance for a motor vehicle. The respondents, save for the second respondents, have allegedly defaulted on the loan contracts for the motor vehicles and the applicants now seek an order to recover each of those vehicles. The applicants asked for these matters to be decided on the papers without service and without an appearance. I was not prepared to do that and required an appearance of the applicants to resolve the following issues:

1. Have the applications been commenced correctly?
2. What authority does a commercial agent have to commence these applications in the name of the applicant?
3. Can these applications be heard without service on the respondents?

- [2] The matters were heard together because Mr Robert Foster, a commercial agent, was the deponent in the affidavits supporting each application. I granted leave for

him to appear under s. 18 *Magistrates Court Act* 1921 for the purpose of determining these preliminary issues.

Have the applications been commenced correctly?

- [3] Each application was commenced by filing a Form 9 Application *Uniform Civil Procedure Rules* 1999 (“UCPR”) – an interlocutory application form. The form is signed by Mr Foster as “Applicant/Authorised person”. There are no other proceedings before the court and clearly these applications have not been started by the correct originating process. An originating process should be started as an originating application (Form 5) or claim and statement of claim (Forms 2 and 16). These issues are only an irregularity under the rules and the proceedings cannot be struck out for that reason (r 373 UCPR).
- [4] However, as will be explored in answering the other issues, each application is also not compliant with the following rules:
- | | |
|--------------------------|---|
| Rule 17 | Correct contact details and address for service; |
| Rule 19 | The originating process must be signed; |
| Rules 22(2)(c) and 26(8) | The court’s jurisdiction to hear the matter must be set out; |
| Rule 26(6) | An application made under an Act must state the name and section number of the Act under which the application is made; |
| Rule 35 | An application should be filed in the appropriate registry. |

What authority does a commercial agent have to commence these applications in the name of the applicants?

- [5] Mr Foster relied on written submissions at the preliminary hearing. He submitted that these applications were made under ss. 100 and 101 *National Consumer Credit Protection Act* 2009 (Cth). He also relied upon s. 88(5) *National Consumer Credit Protection Act* 2009 (Cth), ss.123 and 144 *Personal Property Securities Act* 2009 (Cth) and Rule 250 UCPR. None of those provisions were disclosed on the face of the applications or in the supporting material. He claimed that filing these documents and seeking these order was simply a continuation of recovery proceedings which he was authorised to do as a commercial agent.
- [6] For files 262/16, 263/26 and 264/16 Mr Foster relies upon an authority to commence these proceedings generally in the following terms (as found on File 263/16 but with appropriate amendments on each other file):

“Robert Walter Foster is hereby authorised to conduct the following actions on our behalf:

- *Make application to the court on behalf of GoGetta Equipment Funding for the return of all securities subject to Contract Number.....”*

The letters of authority are unsigned but purportedly from Jennifer Leeding whose position with the applicant is not disclosed.

- [7] For files 270/16, 271/16, 275/16 and 276/16 Mr Foster relies upon similar authorities in the following terms (as found on File 270/16 but with appropriate amendments on each other file):

“Please be advised Mr Robert Walter Foster has been authorised to act on behalf of Volkswagen Financial Services Pty limited, in issuing a Court Order in regards to this matter.

Mr Robert Walter Foster is authorised to attend court for the purpose of obtaining an order for possession and then executing upon that order.”

On files 270/16 and 271/16 the letters are signed by Pedro Eid, Recoveries and Skip Trace Officer. On file 275/16 the letter by Mr Eid is unsigned. On file 276/16 there is a slightly different authority to the same effect, unsigned, but purportedly from Davis Ma, Collections Officer.

- [8] In terms of contact details I note that on files 262/16, 263/26 and 264/16 the barest details of the address for service are marked as 20 Pidgeon Close West End and that appears to be the business address of the applicants. However, the footer on the application and affidavits shows the post office box for Mr Foster as the address of the applicants. On files 270/16, 271/17, 275/16 and 276/16 the address for service of the applicants is the post office box of Mr Foster in Redland Bay. The contact details listed for the actual applicants or their solicitors should be done in accordance with r 17 UCPR.
- [9] An originating process of the court must be signed by the applicant, plaintiff or their solicitor (r 19 UCPR). A solicitor can do other acts for a party under the rules (r 985 UCPR). This does not extend to a commercial agent. An appearance should be by a party or their lawyer or some other person by the court’s leave (s. 18 *Magistrates Court Act* 1921). A commercial agent does not have a right of appearance.
- [10] A company can sign documents by an agent: *Motel Marine Pty Ltd v. IAC (Finance) Pty Ltd* (1964) 110 CLR 9. The line of authorities considered in *McRae v. Coulton* (1986) 7 NSWLR 644 at 663 to 666 per Hope JA suggest that such an agent who signs for a company would be doing so in the course of his/her duties in the business of the company or with the requisite authority of the company.
- [11] Mr Foster is not an employee of the applicants but a commercial agent engaged by them. In my view, he is not an agent acting in the course of his duties in the business of the applicants.
- [12] As I noted above the applications were signed by Mr Foster. The note of his capacity is as “Applicant/Authorised Person”. The contact details for the companies listed in the footers of the filed documents give the impression that Mr Foster and his local post office box are the points of contact for the application and not the applicants. He submitted in writing that: *“it is more economical for the credit providers – and, in the end, the debtor – for me to continue with the repossession action, and the only costs involved in these matters other than the repossession*

action, is the Court Filing fees". Whilst it may not be his intention, the impression left by these factors is that Mr Foster, in his capacity as a commercial agent, is standing in the place of the applicants rather than acting as an agent on behalf of the applicants as contemplated in the cases referred to in [10].

- [13] The letters of authority cannot overcome the proposition that Mr Foster does not have any right of appearance and in all the circumstances a new originating process should be filed by the applicants or their solicitors in accordance with the rules.

Can these applications be heard without service on the respondents?

- [14] None of these applications were served on any of the respondents. Mr Foster submitted that the application should and could be dealt with *ex parte* urgently. He relied upon s. 88(5) *National Consumer Credit Protection Act* 2009 (Cth) and s. 144 *Personal Property Securities Act* 2009 (Cth). Those provisions deal with enforcement notices and default notices as required under the respective Acts. Those sections do not provide a basis for urgent hearing of the applications without notice to the respondents.
- [15] More generally, the issue of whether these types of matters can be dealt with *ex parte* was dealt with by Smith DCJA in the appeal *Walsh v Toyota Finance Australia Ltd T/A Toyota Financial Services* [2016] QDC 92 at [26] to [34]:

Whether the hearing should have been ex parte

[26] *The usual rule is that an application must be served on the opposing party at least three days before the date of hearing Rule 27(2) Uniform Civil Procedure Rules though provides that the time limit does not apply if the rules or another act permit the application to be heard and decided without being served.*

[27] *Under r 27(3) Uniform Civil procedure Rules if the application is not served the Court must not hear and decide the application unless the Court considers it just to hear and decide the application on the day of the hearing if one of the following applies:*

“...

(a) the court is satisfied delay caused by giving notice of the application would cause irreparable or serious mischief to the applicant or another person;

(b) the court is satisfied the respondents to the application will suffer no significant prejudice if it hears and decides the application on the day set for hearing;

(c) the respondents to the application consent to the court hearing and deciding the application on the day set for hearing.

Example of subrule (3)—

The court may decide subrule (3) has been satisfied if the application is a cross application by a respondent to another application and it is convenient for the applications to be heard together.

(4) For an application not served as required by subrule (1)—

(a) the court may make an order on an undertaking given by the applicant and acceptable to the court; and

(b) a person affected by the order may apply to the court for it to be set aside.”

[28] In this matter the respondent argues that the matter was able to be heard ex parte. However, I am of the view that an error occurred here.

[29] The material relied on to support the application was the affidavit of Robert Foster. It was a very short affidavit and provided no evidence upon which one could rely to engage any of the sub paragraphs of r 27(3). There is no transcript of the hearing below so the Court is left in a position of not being able to examine the reasons given.

[30] The respondent relied on the decision of Ndjamba v Toyota Finance Australia. In that decision Blokland J held that the application could be heard ex parte. However, in that case there was evidence giving rise to a strong inference that the appellant would take steps to prevent repossession if served. Her Honour noted at [8]:

“The primary considerations on whether or not to proceed ex parte concern whether there is urgency; whether irreparable damage would flow from making an ex parte order; whether hardship would flow to a party against whom an order is made and whether such an order can be set aside.”

[31] In the present case there was no such evidence. Indeed, there was a real chance of prejudice to the appellant if the order was made. As it now turns out the vehicle has been sold.

[32] The making of an ex parte order is a significant step and it should only be undertaken with due care.

[33] In the circumstances the magistrate should not have made the order ex parte and was in error in doing so. The Magistrate should have been adjourned to enable service on the appellant.

[34] In any event, as it turns out, the appellant was “shut out” from making an application to set aside the order.

- [16] Mr Foster submitted in writing that *“the property is considered to be at serious risk, either by way of fraudulent activities by the debtor in obtaining the contract, or by the debtor intending to dispose of or damage the property, and URGENT action is required to protect the property.”* He goes further to submit *“In previous matters of this nature, the debtors have included members of Outlaw Motorcycle Groups and drug cartels.”* And *“Had the debtor had knowledge of the Court application prior to the Orders being made, the property would probably not have been recovered, and in some instances would have been dismantled and/or disposed of.”*
- [17] There is no evidence in the material on any application to support the serious allegation of fraud or that the any of the property was in danger of being destroyed. There is no evidence that the other assertions referred to above have anything to do with these applications.

- [18] Another issue relevant to these matters is the jurisdiction of the district of this court in which the applications have been brought. Rule 35 UCPR sets out the general requirements for the place to file an originating process. On the face of the material there is nothing tying these matters to Cleveland. In fact Mr Foster says he filed them in this district because it is where he lives. The respondents (leaving aside VicRoads and the Department of Transport and Main Roads) reside in Drewvale, Jensen, Helensvale, Nerang, Gladstone, and Kuraby. Those living in the south east corner of Queensland might be able to appear at Cleveland but the respondents from the Gladstone and Townsville districts might find that difficult. It provides another reason why the applications should be served so that if the respondents wish to object to the jurisdiction they can exercise that right under r 38 UCPR.
- [19] For the reasons given above the applications should not be heard without service.

Orders

- [20] The order will be as follows on each application:
1. The applicant has leave to re-file any originating process in accordance with the rules;
 2. The originating process is to be served on the respondent in accordance with the rules;
 3. No order as to costs.