

DISTRICT COURT OF QUEENSLAND

CITATION: *MC Projects Pty Ltd v Nigel Farah Trading as The Tiling Crew v Graydon Kline and Kiline Industries International Pty Ltd* [2009] QDC 288

PARTIES: **MC Projects Pty Ltd**
(Enforcement Creditor/Respondent)
v
Nigel Farah Trading as The Tiling Crew
(Enforcement Debtor)
v
Graydon Kline and Kiline Industries International Pty Ltd
(Third Persons/Applicants)

FILE NO: 173 of 2009

PROCEEDING: Application to Set Aside Enforcement Warrant

DELIVERED ON: 27 August 2009

DELIVERED AT: Southport

HEARING DATES: 26 June 2009 and 11 August 2009

JUDGE: C.F. Wall Q.C.

ORDER: Enforcement warrant set aside with costs.

CATCHWORDS: UNIFORM CIVIL PROCEDURE RULES – BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT – Where an enforcement warrant was issued authorising redirection of specified debts certainly payable -Where enforcement creditor performed work under sub-contract with the enforcement debtor pursuant to enforcement debtor's contract with the third persons - Where no debt was certainly payable by the third persons to the enforcement debtor – whether a claim or allegation of money owing is sufficient to establish a debt - whether there was a debt certainly payable by the third persons to the enforcement debtor that could be redirected.

CASES: *Cooks Construction Pty Ltd v SFS* [2009] QCA 75 at paragraphs [34], [37]-[47], [60]-[62], [81], [125], and [161] DIS
Cant Contracting Pty Ltd v Casella and Casella [2006] QCA 538 at paragraph [30] DIS
Brodyn Pty Ltd v Davenport (2004) 61 NSW 421 DIS

RJ Neller Building Pty ltd v Ainsworth [2008] QCA 397 at paragraphs [36] and [39]-[41], [42] DIS
Shilliday v Stevenson [1921] QWN 38 (QDC) FAA
Webb v Stenton [1883] 11 QBD 518 FAA
Jackson & Anor v Marsh & Webster Ltd [1924] SR Qd 318 FAA
Thomas Brown & Sons Ltd v Dempster [1902] QWN 62 (QDC) FAA
Queensland Carriage etc v Somerville (1890) 4 QLJ 10 FAA
Breen v Doyle (1920) 37 WN (NSW) 258 at 260 FAA
McDonnell & East Ltd v McGregor (1936) 56 CLR 50 DIS

LEGISLATION: *Building and Construction Industry Payments Act 2004 Sections 17, 21, 22, 24(4), 31*
Uniform Civil Procedure Rules 819, 840(1), 840(3), 841, 842(1), 842(2), 843(1), 843(2), 844
Queensland Building Services Authority Act 1991 Sections 42(1), 42(3), 42(4)

COUNSEL: Enforcement Creditor/Respondent: Mr J Sive
Enforcement Debtor: Mr S English
Third Persons/Applicants: Mr M Campbell

SOLICITORS: Enforcement Creditor/Respondent: Direct Access Brief
Enforcement Debtor: O'Sullivan's Law
Third Persons/Applicants: Whitehead Gupta Lawyers

HIS HONOUR: MC Projects Proprietary Limited, the enforcement creditor, performed tiling work at 11 Andromeda Way Robina (12 townhouses), and at 9 Forestridge Drive, Bonogin (a house), (the work) under a sub-contract with Nigel Farah, the enforcement debtor, who in turn had contracted with Graydon Kline and Kline Industries International Proprietary Limited, the third persons (the builder developer), to supply the materials and carry out the work. The enforcement creditor was to do the tiling work, that is, provide the labour to lay the tiles supplied by the enforcement debtor, (Affidavit of Nigel Farah).

Progress claims for the work were submitted to the enforcement debtor by the enforcement creditor. None were paid. The reasons given by the enforcement debtor were that some of the work was defective and the third persons had not paid the enforcement debtor.

The enforcement debtor requested the enforcement creditor to stop work on about the 19th of February 2009 and the enforcement creditor did so.

Under section 17 of the Building and Construction Industry Payments Act 2004 (the Act) the enforcement creditor (the claimant) served a payment claim on the enforcement debtor (the respondent) for the work he had performed. Under section 18 the enforcement debtor served on the enforcement creditor a payment schedule stating the enforcement debtor's reasons for withholding payment. Under sections 22 and 21 the enforcement creditor made an adjudication application. An adjudicator was appointed and the dispute was adjudicated.

The adjudicator in his decision referred to the "issue in dispute" between the parties in the following terms:

37. "The respondent has provided reasons for withholding payment in its payment schedule which are address as follows:
38. The respondent is withholding payment until the defects list has been completed. There is no allegation that defects exist in the claimant's work; simply that the defects list has not been prepared.
39. The respondent is withholding payment because it has not been paid by the builder. There is clearly a 'paid when paid' provision which has no effect in a construction contract pursuant to section 16 of the Act.
40. The respondent has provided additional reasons for withholding payment in its adjudication response. Pursuant to section 24(4) of the Act I am unable to consider any reason not included in the payment schedule. Accordingly I have not considered these additional reasons.
41. accordingly I decided that there are no valid reasons for withholding payment."

The adjudicator then valued the worked performed by the enforcement creditor at \$71,690.96 and determined the total adjudicated amount required to be paid by the enforcement debtor to the enforcement creditor at \$75,519.80. An adjudication certificate to this effect was issued on the 8th of April 2009. The enforcement debtor has not paid this amount and in fact the enforcement creditor has not to date been paid anything for the work it performed, subject possibly to one matter which I'll mention shortly.

Under section 31 of the Act the enforcement creditor filed the adjudication certificate in the District Court as a judgment for the amount owing. On the 8th of April 2009

the District at Southport gave judgment for the enforcement creditor against the enforcement debtor for \$75,519.80.

There has been no application by the enforcement debtor to set aside that judgment. The enforcement debtor says he has no capacity to pay. The judgment thus remains unsatisfied. On the 8th of April 2009 the enforcement creditor made an ex parte application to the District Court at Southport for an enforcement warrant. This was authorised by section 31(1) of the Act and the application was made under rule 840(1) of the Uniform Civil Procedure Rules which provides:

"840(1) A court may issue an enforcement warrant authorising redirection to an enforcement creditor of specified debts certainly payable, belonging to an enforcement debtor, from a third person."

The underlining is mine.

On the same date the District Court issued an Enforcement Warrant - Redirection of Debt, naming Graydon Kline as the third person.

The enforcement warrant is expressed to expire on the 6th of May 2009. This, though, is for service purposes. The warrant advises the third person of his right, after service of the warrant on him, to apply to the Court to set it aside or stay execution, (see rule 819 of the Uniform Civil Procedure Rules), and that on the hearing of such an application, if liability to pay is disputed, the Court may decide summarily the question of liability to pay or give directions for the question to be decided (rule 844 Uniform Civil Procedure Rules.)

By application filed the 6th of May 2009 the third person applied to be relieved of liability under the enforcement warrant "to the extent to be determined by the Court."

On the first hearing of this application on the 26th of June 2009 Graydon Kline and Kline Industries International Proprietary Limited, consented to an order that Kline Industries International Proprietary Limited be added as a second third person to the enforcement warrant and proceedings related thereto. Both were also given leave to amend the application by adding after the words "by the Court", the words "or that the said enforcement warrant be set aside in whole or in part." The enforcement warrant was served on the third persons prior to the 6th of May 2009.

In an affidavit filed on the 6th of May 2009 in support of the application to be relieved of liability under the enforcement warrant the first third person, Graydon Kline, says:

- He is not indebted to the enforcement debtor for \$75,858.80.
- He agreed with the enforcement debtor on the type of tiles to be supplied.
- They agreed on prices for supplying and laying the tiles.
- The tiling work has been completed although he has "issues over defects." These include waterproofing behind tiles and a defective shower, (the cost to rectify both is not yet known - Third Persons Additional Outline, paragraph 8); damage to bench tops (\$5,000 claimed); extra marble costs \$2,674.60; and the claim of \$6,820 relating to work done by Mr Bonello. Kline's affidavit filed on the 25th of June 2009 clarifies this claim: he says the enforcement debtor charged the third persons for the cost of laying marble tiles which work was in fact done by Bonello after the enforcement debtor refused to do the work and for which the third persons paid Bonello directly.

- The enforcement debtor invoiced him \$194,324.31 for the supply and installation of the tiles.
- He has paid the enforcement debtor \$128,757 leaving a balance of \$65,568.31 (see also Additional Outline, paragraph 7) or \$65,519.21 (enforcement debtor's affidavit paragraphs 26-29) or \$71,230.30 (enforcement debtors affidavit paragraph 39). In his affidavit filed on the 25th of June 2009 Mr Kline says he does not intend to pay the enforcement debtor any more money.
- They agreed on an upward variation of the price for larger porcelain tiles.
- The enforcement debtor charged more per square metre for some of the tiles.
- He has an issue over the delivery price for the tiles for the house involving a relatively small amount, \$877.80.
- The cost of delivery of tiles to the house (\$765) and the townhouses (\$2,550) was not agreed (total \$3,315).
- He was credited \$3,009.60 for tiles returned to the enforcement debtor, that is, unused tiles, whereas the credit should have been \$4,755.15. This represents a difference, in fact, of \$1,745.55. The \$4,755.15 claimed does not seem to allow for the credit of \$3,009.60 already given.

- He was charged for 37 or 38 square metres of tiles for the house which were not in fact laid, \$1,302.40, plus laying costs, \$4,731.10.
- He was overcharged for laying tiles at the house by \$2,645 and at the townhouses by \$17,895.90 (total \$20,540.80).
- He was charged \$2,610.40 for work done to the rear patio area which was not part of their agreement. He has, though, received the benefit of this work.

The enforcement debtor denies the matters referred to by Mr Kline and says:

- Kline never advised him that he was in any way unsatisfied with any of the work at either site.
- He has never received notice from the third persons in relation to any defects.
- He has never been advised of any damage to worktops or benches, and any such damage could have been caused by others. Mark Suhor in fact says he saw the tilers cause this damage and he agrees with \$5,000 as the cost to replace them as they can't be repaired.
- The work to the rear patio was done on instructions from Kline.

The complaints of the third persons are twofold - those involving the enforcement debtor and not the enforcement creditor and those relating to defective work and

damage caused by the enforcement creditor. Most of them appear to be of the former type, for which the enforcement creditor could not be said to be responsible.

Also, the fact that the enforcement debtor did not hold a contractor's licence of the appropriate class under the Queensland Building Services Authority Act 1991 (QBSA Act), is not, as counsel for the third persons seemed to contend, a reason why the enforcement creditor could not recover from the enforcement debtor the cost of the work performed by the enforcement creditor, or why the third person's potential liability for defective work by reason of the absence of a QBSA Act warranty, should be sheeted home to the enforcement creditor. The absence of the relevant licence is, though, relevant to the enforcement of any claim by the enforcement debtor against the third persons, and I will deal with this later.

Suffice it to say that the third persons have not sought to recover any monies already paid to the enforcement debtor by reason of his unlicensed status (QBSA Act section 42(3) and Cooks Construction Pty Ltd v. SFS [2009] QCA 75).

Cant Contracting Pty Ltd v. Casella and Casella [2006] QCA 538, relied on by the third persons is distinguishable from the present case. The third persons are not correct in asserting that the failure of the enforcement debtor to have a relevant licence is a bar to the adjudication here and the subsequent registration of the adjudication certificate as a judgment. That assertion confuses the positions of the enforcement debtor (unlicensed) and the enforcement creditor (licensed).

In Cant and in the New South Wales case of Brodyn Pty Ltd v. Davenport (2004) 61 NSW 421, referred to in Cant, it was the unlicensed contractor seeking to recover under the respective payment Acts. The enforcement creditor here is not analogous to the unlicensed contractor referred to in Cant at paragraph [30]. The work undertaken

here by the enforcement creditor, which is the subject of the enforcement warrant, was not performed by an unlicensed contractor.

The third persons contend, for the reasons advanced by Mr Kline, that they are not "obliged" to pay the enforcement debtor anything and there is therefore no money owing to the enforcement debtor.

By rule 840(1) what is redirected is a specified debt certainly payable belonging to the enforcement debtor from the third persons. By reference to the invoices submitted by the enforcement debtor to the third persons the amount owing to the enforcement debtor is \$65,568.31 which is less than the amount sought by the enforcement creditor, but that is all that can be redirected if it is in fact a debt owing by the third persons to the enforcement debtor.

The enforcement creditor denies that the third persons did not at all times (as they contend) know it was a subcontractor of the enforcement debtor. It denies that they did not know that its employees were employed by the enforcement creditor and not the enforcement debtor.

Kline says (Affidavit filed 25th of June 2009, paragraph 17), that Charlie Pak, the enforcement creditor's managing director, told him he had only received \$20,000 from the enforcement debtor. This doesn't seem to be correct. It is not consistent with the case advanced by the enforcement creditor or with the rest of the evidence.

In his affidavit filed on the 26th of June 2009, Mr Pak says:

- Kline oversaw, inspected and passed all work performed by tradesmen, including those employed by the enforcement creditor.

- The enforcement creditor performed all tiling work for the townhouses and only bedding work at the house.
- When he told Kline that the enforcement creditor was having problems getting paid by the enforcement debtor, Kline assured him he would "sort things out" with the enforcement debtor.
- The only defective work referred to by Kline required the replacement of two tiles at the townhouses.
- It is inconceivable that the enforcement debtor would agree to supply tiles and perform work for the third persons at rates less than those in his contract with the enforcement creditor.
- Kline said the third persons had the money to pay the enforcement creditor and all they needed was an enforcement warrant to protect them from any claim by the enforcement debtor related to direct payment to the enforcement creditor.

The adjudicator has already considered and resolved, as between the enforcement debtor and the enforcement creditor, issues relating to any alleged defective work which were raised by the enforcement debtor. These do not seem to have included those now raised against the enforcement debtor by the third persons.

The fact that the enforcement debtor may have charged the third persons more for laying the tiles than was charged to him by the enforcement creditor (and this may be what is suggested in Mr Bonello's statement dated 27th of April 2008 [sic] - Kline affidavit filed 6th of May 2009, Exhibit H), cannot be a reason for denying the

enforcement creditor the right to enforce its claim for laying those tiles, assuming the existence of a debt owing by the third persons to the enforcement debtor.

Likewise any dispute between the third persons and the enforcement debtor about the cost of tiles, the amount of tiles, and any credit for unused tiles cannot be a reason for denying the enforcement creditor the right to enforce its claim for laying tiles, assuming again the existence of a debt owing by the third persons to the enforcement debtor.

The enforcement creditor contended that the adjudication certificate and the judgment against the enforcement debtor, coupled with the issuing of the Enforcement Warrant - Redirection of Debt, are by themselves sufficient to require the third persons to pay to them the amount of the judgment debt. They cannot obtain more than what is owing, if anything, from the third persons to the enforcement debtor, and on the evidence, that is \$65,568.31 - \$71,230.30. And for them to recover even that amount there must first be a debt owing by the third persons to the enforcement debtor. A debt owing by the enforcement debtor to the enforcement creditor does not prove a like debt owing by the third persons to the enforcement debtor. I'll return to this part of the application shortly.

The enforcement creditor relied on R J Neller Building Pty Ltd v. Ainsworth [2008] QCA 397, but this is not with respect of any direct assistance in the present case. In Neller, the statement by Keane JA at paragraph [36] about the effect of adjudication is to be confined in its application to the present case, to its effect as between the enforcement debtor and the enforcement creditor, not to that between the enforcement creditor and third persons, as here. That is because of the terms of rule 844 in particular, and also rule 819 in its application to persons other than an enforcement debtor. The same applies to his Honours further remarks at paragraphs [39]-[41],

about the application of risk. These are directed to the relative positions of builder and owner.

The fact that the adjudication here is not as it was in Neller, "provisional" (see paragraph [42]) and "that an independent and expert arbiter has assessed the merits of the building dispute between (here the enforcement creditor and the enforcement debtor) and concluded that the merits of that dispute lie very much in (the enforcement creditor's) favour" cannot with respect create a debt owing by the third persons to the enforcement debtor which the enforcement creditor can have redirected.

Notwithstanding that the enforcement creditor has a judgment against the enforcement debtor for \$75,519.80, the most that can be recovered from the third persons via section 31 and rule 840(1) is \$65,568.31 - \$71,230.30. Rules 819 and 844 allow the third persons to challenge the fact that the debt claimed by the enforcement creditor is not in fact "certainly payable" by the third persons to the enforcement debtor.

A debt certainly payable belonging to an enforcement debtor from a third person (rule 840(1)) must mean an amount which is in fact payable by the third person to the enforcement debtor. It need not arise out of the same facts or dispute which led to the debt owing by the enforcement debtor to the enforcement creditor. In the present case, it does.

In the present case it cannot be said that \$65,568.31 or \$71,230.30 or any other amount, is an amount which is in fact or certainly payable by the third persons to the enforcement debtor because there's a dispute between them as to whether in fact that sum or part of it is in fact owing, and until that issue is determined adversely to the third persons, and it is determined that an amount is in fact payable by the third persons to the enforcement debtor there is no money available to satisfy the

enforcement creditor's claim or part of it. There must be a debt certainly payable. It cannot be the case that a redirected enforcement warrant attaches to any property of the third person in the same way that an enforcement warrant by an enforcement creditor may attach to any property of an enforcement debtor, as was the case in Neller, for example.

A redirected warrant can, in my view, only attach to money which is in fact owing by a third person to an enforcement debtor. Where a third person is able to point to facts suggesting that no money is in fact owing or that there is a dispute about whether any is owing there is, until that issue is resolved and resolved adversely to the third person, in fact no money which the enforcement creditor can with his redirected warrant attach, that is, have redirected to him. If it is determined that there is in fact money owing to the enforcement debtor by the third person that money can then be attached by the redirected warrant and redirected from the third person to the enforcement creditor.

Part 5 of the Uniform Civil Procedure Rules, which includes rule 840, is headed "Enforcement Warrants for Redirection of Debts" and in my view is predicated on there first being a debt which is capable of being redirected. See in particular:

- rule 840(3) "A debt may be redirected only if the debt is payable to the enforcement debtor from the third person..."
- rule 841 "...an enforcement debtor's debt..."
- rule 842(1) "...a debt belonging to an enforcement debtor from a third person..."
- rule 842(2) "...the debt is redirected in the hands of the third person to the

enforcement creditor to the extent of the amount specified in the warrant."

- rule 843(1) "...redirection of a debt in the hands of a third person..."
- rule 843(2) "...the redirected debt..."

In the present case there is dispute about the existence of such a debt.

The fact that in the redirected enforcement warrant the enforcement creditor states that the debt is "certainly payable" can mean no more than that is what the enforcement creditor believes to be the case. It is not by itself determinative that there is in fact such a debt.

In some cases there will be no dispute about the existence of the debt, in others (such as the present), there will be a dispute and until that dispute is resolved and it is determined that there is in fact a debt due to the enforcement debtor in the hands of the third person (a debt "certainly payable" by the third person to the enforcement debtor) there is not one to redirect.

The annotations in "Civil Procedure Queensland" (Butterworths) to the effect that "A redirection warrant places an obligation on the third person to pay the debt to the enforcement creditor rather than the enforcement debtor" (para 839.1) and "The debt must be owed to the judgment debtor by a third person" and "...the debt owing to the enforcement debtor..." (para 840.10) correctly state the position in my view.

There must be an actual debt, not a mere probability or possibility that a debt may become due; there must be an actual debt in existence, a debt existing at present, a debt then existing, not merely the possibility of a debt in the future or the mere prospect that money may be received in the future. Only debts can be redirected;

moneys which may or may not become payable are not debts which can be redirected: Shilliday v. Stevenson [1921] QWN 38 (QDC); Webb v. Stenton [1883] 11 QBD 518; Jackson & Anor v. Marsh & Webster Ltd [1924] SR Qd 318. See also Thomas Brown & Sons Ltd v. Dempster [1902] QWN 62 (QDC); Queensland Carriage etc v. Somerville (1890) 4 QLJ 10 and Breen v. Doyle (1920) 37 WN (NSW) 258 at 260 where the Prothonotary said:

"Whether or no the orders made in the Small Debts Court at Tocumwal ought to have been made is a matter which, in my opinion, I cannot take into consideration. So long as those orders have not been set aside, for the purpose of this application I must treat them as valid, and it is unnecessary to consider how, if at all, an appeal would lie, although I assume that, if at the time they were made there was no attachable debt due by Doyle, an application to set them aside might be made...

I think the cases clearly establish the proposition that at the time an order nisi for attachment is made, there must be a debt either due or accruing due from the garnishee to the judgment debtor. There must be an actual debt, although it may not be payable till some future time, and not merely certain circumstances which in the future may or may not give rise to a debt; in other words, a contingent debt, or a claim which, as the result of certain events happening, becomes a debt is not attachable, at any rate, when it is unknown whether those events will happen or not."

I must now deal with the enforcement debtor's unlicensed status and how this bears on the existence of a debt owing now (there isn't) or in the future by the third persons to the enforcement debtor for the balance of the materials supplied and work performed.

The third persons do not admit, on the contrary they deny owing any more money to the enforcement debtor, in particular \$65,519.21. If the enforcement debtor wants to recover that money or \$71,230.30 or an amount in between he would have to successfully sue the third persons. In such a proceeding the enforcement debtor's claim would be limited by section 42(1), (3) and (4) QBSA Act and may thus be less than the amounts just referred to. This limitation is described in the third persons Additional Outline (paragraph 20) in the following terms:

"20 In such instances the party's recovery is restricted to a reasonable remuneration for supplying materials and labour but not any amount for the person's own labour, for profit or for cost incurred in supplying materials and labour."

In such a proceeding the onus of proof is on the enforcement debtor, see Cooks Construction Pty Ltd v. SFS supra at paras [34], [37]-[47], [60]-[62], [81, [125] and [161].

This state of affairs would appear to present insurmountable problems for the enforcement creditor unless the enforcement debtor was prepared to sue the third persons for what he says is owing to him. Unless he does, and does so successfully, there is no debt certainly payable belonging to the enforcement debtor from the third persons. There is only a right to sue to try and establish such a debt.

It is in my opinion no answer to this situation for the enforcement creditor to say that it is open to it in the present proceeding to adduce evidence, including evidence from the enforcement debtor, that may establish that the third persons owe the enforcement debtor a sum of money. That, with respect to the enforcement creditor, does not establish or create a debt certainly payable by the third persons to the enforcement debtor belonging to the enforcement debtor; it would not be a claim (debt) which the enforcement debtor (not being a party to the proceeding) could force the third persons to pay, that is, it would not be a judgment debt which the enforcement debtor could enforce against the third persons. It would not be a debt belonging to the enforcement debtor, if anything it would be "belong" to the enforcement creditor but it could do nothing with it.

In his Statement Supporting Application For Enforcement Warrant - Redirection of Debt, dated and filed the 8th of April 2009, Mr Pak referred to "the debt owed by the third person to the enforcement debtor" and then deposed as follows:

8. "The debt owed by the Third Person to the Enforcement Debtor is a debt representing monies outstanding and owed to the Enforcement Debtor and others, including the Enforcement Creditor, who supplied services, plant, equipment, materials and other goods that formed part of the works, by reason of a sub-subcontract, under the construction contract by and between Third Party and Enforcement Debtor but nevertheless is being withheld from the Enforcement Debtor by the Third Party.

9. The debt sought to be redirected is:
 - (a) The sum of approximately \$110,000.00 an amount acknowledged by the Third Party and confirmed by the Enforcement Debtor as "*Value of Work Completed*" and held within a Trust Account on behalf of the Third Party. During a telephone conversation I had with the Third Party on 8 April 2009, the Third Party acknowledged that the money is still being held within the Trust Account;
 - (b) A debt in which Enforcement Creditor holds an interest, by reason of Enforcement Creditor's supply and performance under a construction contract, as decided by the Adjudicator in Adjudication number 1064504_390 between Enforcement Creditor and Enforcement Debtor at the Third Party's' project; and
 - (c) An amount great than the amount required to satisfied the judgment pursuant to which this re-direction is requested."

Things advanced somewhat with the filing of affidavits by Mr Kline and the current state of affairs is summarised by the enforcement creditor's counsel in his written outline in this way:

[3] "A fair reading of the Third Person's material suggests that the Third Persons is requesting to be relieved of liability because of accumulated setoffs and defective work. The record reflects the following facts:

(1) Mr Pak of the Enforcement Creditor, before the Enforcement Creditor requested the issuance of the Enforcement Warrant--Redirection of Debt, had contacted the Third Person and was informed by the Third Person that the sum of approx \$110,000.00, the value of work completed by the Enforcement Debtor, had been placed in a solicitor's trust account;

(2) A reading of the Third Person's material shows that the representation made to Mr Pak and relied upon by Mr Pak is different than the current position- no monies have been placed in a trust account and Third Person is claiming that no money is owed to the Enforcement Debtor.

[4] The primary issue before this court for determination is the amount of money to be redirected to the Enforcement Creditor."

There is thus no actual or proven debt owing by the third persons to the enforcement debtor, rather only a claim to money owing for work performed. The "primary issue" is not, with respect, the amount of money to be redirected, but whether there is in fact a debt presently owing by the third persons to the enforcement debtor which can be redirected and, on the evidence, I cannot be satisfied that there is or ever was. A claim or allegation that money is owing does not establish that it is a debt and the enforcement debtor's case has never been more than a claim.

It follows then that at the time the enforcement warrant was issued there was in fact no debt certainly payable belonging to the enforcement debtor from the third persons. There is currently no such debt.

The Application as initially framed implicitly suggested that a partial relief from liability may have been an option; it clearly isn't. The written submissions of the third persons further confused matters and confused the enforcement creditor. It was contended that the third persons were entitled to variously counterclaim and setoff against the enforcement debtor the amounts referred to in paragraphs 7, 8 and 9 of the Additional Outline, and claim against the enforcement creditor for negligent tiling work to the extent of extinguishing the enforcement debtor's claim and leaving no money which the enforcement warrant could redirect. Thus attention was directed away from the real issue namely whether there was a debt certainly payable by the third persons to the enforcement debtor which there clearly isn't. This caused the enforcement creditor to refer to and rely on McDonnell & East Ltd v. McGregor (1936) 56 CLR 50 which, with respect, has nothing to do with the present problem.

Counsel for the third persons even went as far as suggesting that if a stay was granted I should, under rule 844(2), direct there to be a trial of the issues between the three parties. This clearly misconceives the position. The third persons unnecessarily complicated what is really a simple issue. Not once, as far as I recall, did the third persons actually submit that there was no "debt certainly payable" by either or both of the third persons.

In the circumstances I have no option but to set aside the enforcement warrant.

I order that that the enforcement warrant issued on the 8th of April 2009 be set aside.

The third persons are entitled to their costs of the application to set aside the warrant but I will hear the parties as to the extent of those costs.

...

HIS HONOUR: I order that within 21 days of today the third persons file and serve any written submissions on costs and that within 35 days of today the enforcement creditor file and serve any reply to those written submissions on costs and that within 42 days of today the third persons file any submissions in reply.

...
