



Précis Paper

Collecting Debt from Reluctant Developers

*Discussion of the recent decision in TJ & RF Fordham Pty Limited t/as TRN Group v Starhill
Property Group Pty Ltd (No 2) [2017] NSWSC 748*

Discussion Includes

- Key facts
- What the sequestrators did
- Complications
- Key takeaways for practitioners

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Collecting Debt from Reluctant Developers

1. In this edition of BenchTV, Roger Marshall SC (Barrister, Ground Floor Wentworth Chambers, Sydney) and Danielle Woods (Barrister, Ground Floor Wentworth Chambers, Sydney) discuss the recent decision in *TJ & RF Fordham Pty Limited t/as TRN Group v Starhill Property Group Pty Ltd (No 2)* [2017] NSWSC 748.

Key facts

2. The plaintiff was an engineering company that was engaged by a developer (Starhill) to do some works on a property. The developer owned the property.
3. The engineering company did a lot of work (running up a bill of \$2.16 million), and first tried to use the security for payments legislation to obtain payment for the money owing, and went through an adjudication process, which was very favourable to the plaintiff.
4. The adjudicator determined that all the amounts were owing. The plaintiff entered judgment based upon the adjudication, which is an administrative process whereby a certificate is registered (in this case with the Supreme Court).
5. Once the certificate is registered as a judgment, it is treated as a judgment in the normal sense, and able to be enforced in the normal way. The day after judgment was obtained, the plaintiff filed various applications for garnishee orders.
6. The plaintiff was aware of the large property being developed that was in the debtor's ownership, and sought a writ for the levy of property. Within only a couple of days after these various applications were filed, a property search was undertaken, and it was discovered that the last known asset of the company in Australia had just sold the day before.
7. The plaintiff was faced with three options:
 - To apply to have a receiver appointed
 - To apply to have a provisional liquidator appointed
 - To apply for a writ of sequestration
8. The plaintiff ended up pursuing the third option. Writs of sequestration are specifically available in the Supreme Court, and are rarely pursued. There was even difficulty in finding the form of the writ.

9. By comparing the sequestrator under the UCPR to a trustee in bankruptcy, for example, parallels were found to exist between the two. The order that Campbell J made in this case vested the property of the debtor in the sequestrators for the purpose of paying the judgment debt, and the sequestrators were to then account back to the debtor for the residue after payment of the judgment debt and their fees. So there were quite a few parallels found to exist between a trustee in bankruptcy (who has the debtor's property vested in him), and the sequestrators in this case (who had vested in them the proceeds of the sale of the property).

What the sequestrators did

10. Two insolvency practitioners were appointed to identify what was left, and to take control of the assets.
11. Fortunately, and surprisingly, there was \$1.6 million left in the trust account, which had not yet been distributed from the proceeds of sale. They sought to get custody of this money, and also asked for the books and records of the company.
12. The sequestrators turned up at the offices of the solicitors in charge of the trust account with the remaining \$1.6 million in it, and demanded immediate payment.

Complications

13. Then the matter took another turn. Starhill had a sole director, who was also the sole director of a related company. The sole director went to the duty judge in equity seeking payment by the law firm of the money held in trust, claiming he had a 'charge' interest in the proceeds from the sale of the property. The duty judge in equity decided to get the funds into Court, and the matter was listed for hearing on an expedited basis.
14. So the creditor, who started off trying to enforce a judgment for \$2.16 million, suddenly found itself involved in a common law division case in which sequestrators had been appointed, and an equity suit to which the same sequestrators had been joined, and, ironically, the judgment debtor (Starhill) was joined to that equity suit as a defendant, notwithstanding the fact that the director plaintiff was the same director of the defendant company Starhill.
15. Two events then followed - one in the equity suit, and one with the judgment debtor. In the expedited equity suit, security for costs was ordered in a certain amount, and was due on a particular day, and that day passed without payment.

16. At about the same time as that amount was due, Starhill (the judgment debtor) appointed voluntary administrators to itself. So a new party was introduced into the already complex matter - the administrators.
17. The administrators tried to get to the bottom of the transactions that had occurred around the sale of the property. It turned out that the property had been sold for about \$10 million.
18. There appeared to be an arms-length secured creditor that was paid out of the proceeds (around \$7 million), and \$800,000 was paid out to the sole director's wife.
19. In essence, all that was going to be recoverable was an amount of around \$1.6 million, which was put up as the basis of a deed fund to back a deed of company arrangement proposal.
20. There were related party creditors that were admitted to vote on the second meeting of creditors.
21. The deed of company arrangement was agreed to by the creditors, which gave non-related party creditors 20 cents in the dollar. Then the big decision for the original plaintiff (the engineering company) was whether to accept what the deed of company arrangement offered, or challenge it. It decided to take the 20 cents.
22. There still remained the question of who was to pay the costs of the sequestrators proceedings. The fees of the sequestrators were agreed to be paid by the administrators out of the funds from the equity suit. The legal costs that had been incurred in obtaining the writ of sequestration had not been dealt with.
23. An application for an order to be made for indemnity costs was lodged before the duty judge (on the basis of the conduct of Starhill and the sole director). The duty judge made an order for indemnity costs for the whole of the proceedings against Starhill.
24. The problem for Starhill was that that amount was not a provable debt in the deed of company arrangement. Starhill is therefore still liable to pay that costs order in full. It is actually a debt that the company owes in its 'new life', post the deed of company arrangement.

Key takeaways for practitioners

25. These takeaways are particularly relevant to practitioners acting for an unsecured builder or engineer who has done a lot of work on a development and is resorting to the law to get paid from a reluctant developer:
 - Collecting the debt should not be left for more than 18 months - two years

- Assets that are known to be held by a debtor should be periodically checked on by the creditor
- It should be remembered that many enforcement options are available

BIOGRAPHY

Roger Marshall SC

Barrister, Ground Floor Wentworth Chambers, Sydney

Roger Marshall has over 20 years' experience as a barrister specialising in corporations and insolvency matters. Roger also practices in equity and has significant experience in partnership dispute, succession, land law matters as well as the law of trusts.

Danielle Woods

Barrister, Ground Floor Wentworth Chambers, Sydney

Danielle has practiced in the areas of commercial litigation and insolvency for over 10 years. Prior to being called to the bar, Danielle worked as a legal consultant to an ASX-listed company, managing and advising on its significant litigation and insolvency matters.

BIBLIOGRAPHY

Focus Case

TJ & RF Fordham Pty Limited t/as TRN Group v Starhill Property Group Pty Ltd (No 2) [2017] NSWSC 748

Benchmark Link

[*TJ & RF Fordham Pty Limited t/as TRN Group v Starhill Property Group Pty Ltd \(No 2\)* \[2017\] NSWSC 748](#)

Judgment link

[*TJ & RF Fordham Pty Limited t/as TRN Group v Starhill Property Group Pty Ltd \(No 2\)* \[2017\] NSWSC 748](#)

Legislation

Uniform Civil Procedure Rules 2005 (NSW)