



Update

Commercial Dispute Resolution

15 November 2011

Enforcing Warrants of Seizure and Sale – Hurdles and Pitfalls



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A question that arises for a successful litigant who has an award in their favour is the question of enforcement. Armed with a court judgment, a judgment creditor in Victoria may apply to the Supreme Court or the County Court for a Warrant of Seizure and Sale. In Queensland (QLD), a Warrant of Enforcement for Seizure and Sale may be issued out of any Court. In New South Wales (NSW), enforcement of this kind is by means of a Writ of Possession or a Writ for the Levy of Property. A Warrant of Seizure and Sale directs the Sheriff to seize and sell the judgment debtor's real estate (land or house) to satisfy the debt owed. There is a general misconception that as long as a judgment debtor owns property then the judgment creditor will be able to satisfy a judgment. Unfortunately, it is not that straight forward. There are a number of hurdles and potential pitfalls which a judgement creditor should be aware of prior to pursuing this course of action against a judgment debtor which should be considered across all Australian jurisdictions.

Process

Upon the application of a judgment creditor, the Sheriff will serve upon a judgment debtor a Warrant to seize and sell their real estate. The timeline usually grants the judgment debtor four weeks to either resolve the debt (or to reach a resolution with the judgment creditor with regard to repaying it), or to vacate the property to allow the Sheriff to sell it. Two weeks prior to the deadline, the Sheriff will generally contact the judgment debtor so as to obtain an update on their situation. One week later, if the debt has not been resolved, the Sheriff will contact the judgment creditor or their solicitors for confirmation that they should proceed with the sale. If instructed to do so, the Sheriff will then put the real estate up for sale by auction. A reserve price is set, based upon a valuation of the property. If the judgment debtor fails to take any action and the sale occurs, the proceeds are paid to the judgment creditor (subject to any competing mortgages or charges), as well as any interest and costs incurred since the date of the judgment. If any money remains, it is paid to the judgment debtor.

In NSW, land cannot be sold under a Writ for the Levy of Property until several steps are undertaken. Firstly, a judgment creditor must file a Judgment Creditor's Notice, with an accompanying affidavit. The Notice advises the judgment debtor of the following:

- that a Writ for the Levy of Property has been registered (this having been previously undertaken by the judgment creditor);
- that the judgment creditor intends to sell the land of the Judgment Debtor after a period of 4 weeks has passed;
- that the judgment debtor is entitled to sell or mortgage the land, but only in accordance with section 113 of the Civil Procedure Act 2005 (NSW); and
- that the judgment debtor may apply for an instalment order (as detailed below).

The judgment creditor must then serve a copy of the Judgment Creditor's Notice on the judgment debtor, and then complete an affidavit of service. Next, a Notice of Sale (Notice) must be filed by the judgment creditor, and 6 copies must be lodged with the Registrar, who will then seal each copy and return it to the judgment creditor. The sealed Notices are then provided to the Sheriff, who should be informed (by the judgment creditor) as to whether anyone is presently occupying the land. The Sheriff will then set a date for the sale of the land at least four weeks after the judgment debtor was served with the Notice. The Sheriff must insert the date into each copy of the Notice, and then return two copies to the judgment creditor. At least one week prior to the sale, the judgment creditor must serve a completed copy of the Notice, with the date inserted, on the judgment debtor. The judgment creditor must also provide the Sheriff with any information about the land available to them including the most recent valuation and any particulars obtained from a recent search.

Next, the Sheriff (or appointed auctioneer) must advertise the sale of the land in the Gazette and district newspaper. The judgment creditor should then serve an affidavit on the Sheriff outlining that the Notice, including the date of sale, has been served on the judgment debtor. They should also include details of the publication of each advertisement, as placed by the Sheriff. The auction will then proceed, as referred to above.

The procedure in Queensland is slightly different again and considerably more time-consuming. A Warrant of Seizure and Sale relating to property, other than land, is enforced much like a Writ for the Levy of Property in NSW. The Warrant can only be issued by the Court of the Registrar at the Courthouse where the judgment was ordered. However, if the Warrant is to apply specifically to the sale of land, it must first be registered against the judgment debtor's land, and then provided to the Department of Natural Resources and Mines (DNRM). Within twelve months of producing the Warrant to the DNRM, the judgment creditor may force a sale of the land by way of public auction. For the first three months after production, the judgment creditor will have priority over any subsequent sales or other dealings with the judgment debtor's land. Once the auction has taken place, the judgment creditor will receive the money owed to them, subject to any priority mortgages or other priority interests.

Instalment Orders

At any time prior to the sale of their real estate, a judgment debtor may make an application to the Court for an Instalment Order. This allows the judgment debtor to pay off their debt to the judgment creditor via instalments. As long as the judgment debtor fulfills their obligations under an Instalment Order, the judgment creditor cannot take any further action to recover the debt. Whilst this usually results in a slower payment arrangement, on the positive side, the initial application for the Warrant is often successful in agitating payment from the judgment debtor. Even if the judgment debtor obtains such an Instalment Order, they will still be liable for the costs of the Warrant. As such, the amount of the warrant should be added on to the total figure to be repaid under the Instalment Order.

Difficulties with Search and Seizure Warrants

One of the inherent difficulties with enforcing a judgment via a Warrant of Search and Seizure is that the Sheriff is only permitted to sell the judgment debtor's interest in the property. If the property is jointly owned, for example by a husband and wife, the Sheriff can only sell the share owned by the judgment debtor. This situation can mean that a sale is very unlikely to happen, as most prospective purchasers are not likely to be keen to purchase half of a house.

If the judgment debtor owns the property independently, their interest is the value of the real estate after the value of any mortgage(s) or charges and outstanding property rates. This may mean that the funds available to the judgment creditor are of a lesser value than the judgment debt. This information can often be ascertained by obtaining mortgages attached to title searches.

The process involved in recouping funds through a Warrant of Seizure and Sale can also be quite time consuming. It can take many weeks, or months for the process to be completed. If the house fails to sell, or if the original judgment was awarded in the Magistrate's Court (in Victoria, as referred to below), the time taken to pursue the debt can be quite lengthy.

If a judgment debt in Victoria is obtained in the Magistrates Court, a judgment creditor must first seek to recover personal property of the debtor. It is only if the Sheriff fails to recover adequate personal property that an application can be made to the Supreme Court to seize the judgment debtor's real estate. This leads to significant expenses for the judgment creditor and adds additional time to the process.

If the real estate fails to sell for the reserve price, the judgment creditor may obtain an Order from the Supreme Court to sell the property without a reserve price, i.e. for any price obtainable. However, a judgment creditor must be aware that a warrant is only valid for three months. If the property fails to sell within that period, the judgment creditor must re-register the warrant with the Titles Office.

This was the problem that arose in the conjoined cases of *Guan Feng Wu v Li Ma and Zhiping Zhou [2011] VSC 208 (Guan)* and *Kousal v Suncorp Metway [2011] VSC 312 (Kousal)*. In *Guan*, the Plaintiff loaned the First Defendant a sum equivalent to AUD96,660 for one year, at 10% interest. Due to non-payment of the debt, the Magistrates Court ordered that the debt be repaid, in addition to interest and costs. After judgment was entered, the Plaintiff obtained a warrant of seizure and sale to be levied by the Sheriff against the property of the First Defendant.

In the related matter of *Kousal*, Mr Kousal, the Plaintiff, attended the auction of the property at the Sheriff's office and purchased the property referred to in *Guan* for \$1,000. Mr Kousal subsequently filed an application against Suncorp Metway, the Mortgagee of the property, to produce the duplicate certificate of title to the Registrar. Suncorp Metway was refused to produce the certificate of title and in the end would not do so without a compelling court order. The main concern of Suncorp Metway was that a transfer of ownership to Kousal would make it difficult for it to enforce its rights under the mortgage.

Despite granting the order to Mr Kousal, Associate Justice Mukhtar reflected that the Rules of Court surrounding this issue should be revisited, potentially allowing for the Court to set a mandatory minimum in regard to the sale price of any seized real estate.

The learning outcomes from *Guan* and *Kousal* is that Judgment Creditor should be aware that, as the law stands, and despite a positive valuation, there is no guarantee that the sale of a Debtor's real estate will produce sufficient funds to satisfy a judgment debt. Overall, an application for a Warrant of Seizure and Sale may be a costly exercise that produces little to no satisfaction, and great care and consideration of alternate enforcement options should be undertaken prior to proceeding with such a course of action.

Alternatives

Some alternatives to a Warrant of Seizure and Sale include:

- Oral Examinations, which involving questioning the judgment debtor under oath regarding their assets and liabilities;
- Issuing bankruptcy proceedings;
- If the judgment debtor is a company, you can take steps to wind it up;
- A Garnishment Order which allows a judgment creditor to garnish, or recover, the income or earnings of a judgment debtor; and
- Waiting. A Judgment Order is valid for 12 years, and sometimes it is beneficial to wait for the judgment debtor's financial position to improve before attempting to enforce a judgement.

Reform

In its paper dated 23 September 2004, entitled "Inquiry into Warrant Powers and Procedures", the Law Institute of Victoria (**LIV**) proposed some amendments to the law relating to Warrants of Seizure and Sale. One suggestion pertained to the laws in the Magistrates' Court, mandating that the Sheriff must first attempt to recover personal property from the judgment debtor prior to the judgment creditor being entitled to uplift the judgment to the Supreme Court to allow them to pursue real estate. The LIV suggested that the law should be amended to remove this restriction. Other suggested reforms considered a judgment debtor's right to refuse the Sheriff entry, as well as the judgment creditor's right to challenge the decision of a Sheriff with regard to what they can and cannot seize.

With the implementation of the Uniform Civil Procedure Rules 1999 in QLD and the Uniform Civil Procedure Rules 2005 in NSW, the law relating to the enforcement of judgments was greatly simplified. The reforms mean that it is not necessary, in those states, to go through the extensive steps required in the Courts in Victoria, as outlined above. Bringing Victoria in line with QLD and NSW would assist in simplifying the processes involved.

With these reforms being recommended, it may be that obtaining a Warrant of Seizure and Sale may be a more satisfactory course of action in the future. However, at present, any party who chooses to pursue this course of action needs to be aware of the hurdles and pitfalls outlined above.

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