Practice and Procedure

Self-executing order – construction – whether further judicial act required for self-executing order to take effect – whether order created issue estoppel or res judicata – application of principles of abuse of process

In *Mango Boulevard Pty Ltd v Spencer* [2010] QCA 207, a self-executing order had been made in consequence of continuing default by parties to the proceedings in meeting their disclosure obligations. The case involved several questions about the construction and implications of the self-executing order. This note focuses on the aspects of the case relating to that order.

Facts

The plaintiff in proceedings in the trial division ("Mango Boulevard"), the first defendant ("Spencer") as trustee of the Spencer Family Trust, and the second defendant ("Perovich"), were parties to a joint venture. The joint venture was to be conducted through the third defendant company, in which Mango Boulevard, Perovich and Spencer in his capacity as trustee all had shares.

Mango Boulevard commenced the proceedings on 9 March 2006. It sought declarations that Spencer and Perovich were in default under the Shareholders Deed to which Mango Boulevard, Spencer (as trustee), Perovich, and the third defendant company were all parties, and also that it was entitled in consequence to options to acquire Spencer's and Perovich's shares. Spencer and Perovich defended the claim and made a reciprocal counterclaim for Mango Boulevard's shares.

Spencer and Perovich failed to comply with several orders requiring them to make proper disclosure of documents relevant to a particular issue in the proceedings. As a result, the Chief Justice made a self-executing order on 3 April 2007. This order provided for the striking out of some paragraphs of their defence, and for judgment for Mango Boulevard on the counterclaim.

The fourth defendant ("Mio Art") subsequently replaced Spencer as trustee of the Spencer Family Trust and in that capacity succeeded to his shares. Mio Art then filed a defence to Mango Boulevard's claim to Spencer's shares and commenced a counterclaim for a declaration that Mio Art was entitled to Spencer's shares and for related orders. Following continued default by Spencer, Perovich and Mio Art to meet their disclosure obligations, on 20 March 2008 Chesterman J ordered that Mio Art's defence (apart from a paragraph which contained admissions) and counterclaim be struck out, with no leave to re-plead. His Honour also gave summary judgment for Mango Boulevard on Mio Art's counterclaim (*Mango Boulevard Pty Ltd v Spencer* [2008] QSC 117). An appeal against that judgment was dismissed: *Mango Boulevard Pty Ltd v Spencer* [2008] QCA 274.

On 3 December 2009 McMurdo J dismissed Mango Boulevard's application for summary judgment. His Honour also varied that part of the 3 April 2007 self-executing order which provided for judgment against Spencer and Perovich [*Mango Boulevard Pty Ltd v Spencer* [2009] QSC 389]. Mango Boulevard appealed against those orders. The respondents to the appeal were Spencer, Perovich and Mio Art.

In the Court of Appeal, separate reasons for judgment were delivered by Fraser and Muir JJA, but those reasons were substantially in agreement. White J agreed with the judgment of Fraser JA, and the further elaboration of particular issues provided by Muir JA.

What steps were necessary for the self-executing order to take effect?

Paragraph 7 of the order of 3 April 2007 provided that unless the first and second defendants had complied with orders in relation to their disclosure obligations by 4pm on 27 April 2007, "Then upon the solicitors for the plaintiff filing an affidavit deposing to the failure of the first and/or second defendants to do so:" parts of the amended defence and counterclaim would be stuck out, and "There shall be judgment for the plaintiff against the first and second defendants on the counterclaim," and an order for costs against the first and second defendants.

McMurdo J had concluded that for this order to operate as a judgment, a separate judgment had to be pronounced and filed under r 661(3)(a) of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR"). His Honour regarded the order as prospective in terms and as falling within a class of self-executing orders which provide that unless the order is complied with, the innocent party has a right to enter judgment. His Honour was disinclined to accept that a judgment could come into effect upon the solicitors for one of the parties filing an affidavit deposing to default on the part of other parties. (*Mango Boulevard Pty Ltd v Spencer* [2009] QSC 389 at [37],[40])

The Court of Appeal reached a different conclusion. Relying on *Goodwin v Southern Tablelands Finance Co Pty Ltd* (1968) 42 ALJR 309 and *Bailey v Marinoff* (1971) 125 CLR 529, Fraser JA stated (at [97]): "a self-executing order may give rise to a judgment upon satisfaction of expressed conditions without any further judicial act." The Court concluded that, upon its proper construction, this was the nature of the order of 3 April 2007: all that was needed for the judgment to take effect was for the solicitors for the plaintiff to file an affidavit deposing to the default in complying with the orders relating to disclosure. It contrasted the terms of this order with orders which provide that a party is or will be at liberty to enter judgment, or which direct the registrar to enter judgment (Fraser JA at [102], [104]; Muir JA at [5]).

The Court of Appeal also found that the former r 661(3)(a) of the UCPR (subrule 661(3)(a) was omitted by r 13 of *Uniform Civil Procedure Amendment Rule (No 1) 2010*), which required an order to be filed if it is a judgment or final order, was satisfied because it was the self-executing order of 3 April 2007 which gave judgment. That order had been filed on 17 April 2007.

Procedure to set aside order

The Court of Appeal found there was a further reason why the order of 3 April 2007 should not have been varied. McMurdo J had concluded that any final judgment which might have arisen under the 3 April 2007 order had its basis in UCPR r 225(2), which provides that if a document is not disclosed the court might give judgment against the party who had been required to disclose it. In the Court of Appeal, however, it was concluded that the order was made under UCPR r 374 (Failure to comply with order). This meant the judgment could only be set aside on appeal: UCPR r 374(8) (Muir JA at [28]; Fraser JA at [108]–[112]).

Did the judgment result in an issue estoppel or res judicata?

The respondents to the appeal sought to defend the Mango Boulevard's claim by raising an issue that Mango Boulevard contended was determined against the respondents by the judgment on the counterclaim under the order of 3 April 2007 order (or under the 20 March 2008 order of Chesterman J).

To deal with this submission it was first necessary to determine whether the judgment resulting from the failure to comply with the disclosure orders gave rise to an issue estoppel or res judicata.

McMurdo J had concluded there was no issue estoppel (see *Mango Boulevard Pty Ltd v Spencer* [2009] QSC 389 at [31]-[43]). The Court of Appeal also concluded respondents on the appeal were not prevented by the doctrines of issue estoppel or res judicata from raising the matter they sought to raise on the appeal.

The Court of Appeal, it was noted that it had long been accepted that it was possible a default judgment or order may give rise to a res judicata or issue estoppel. Fraser JA referred, for example (at [116]), to a judgment based on a default of pleading, which may be explained on the ground that the party in default has or should be taken to have admitted the allegations. Such judgments were distinguished from judgments or orders dismissing proceedings for want of prosecution, or for non-compliance with obligations to disclose documents under procedural rules or pursuant to a court order. Judgments of the latter kind did not involved a decision on on the merits so as to create an issue estoppel or give rise to a res judicata (Muir JA at [55], Fraser JA at [114], [116]).

The Court concluded that in these circumstances, an application for the court to exercise its inherent power to strike out a proceeding as an abuse of process was the appropriate response by a party facing subsequent proceedings, rather than the more inflexible response of res judicata or issue estoppel (Muir JA at [60], Fraser JA at [117]).

Even if it the judgment of 3 April 2007 was otherwise capable of giving rise to an issue estoppel, the Court of Appeal was satisfied the judgment was explicable on a ground which did not involve rejection of the particular defence sought to be raised by the respondents, and it therefore did not preclude the respondents from litigating the point sought to be raised as a defence to Mango Boulevard's claim.

Was there an abuse of process?

It was also argued on the appeal that it would be an abuse of process for the respondents to re-agitate a particular point argued to have formed part of pleadings which had been struck out and in respect of which there was explicitly no leave given to amend.

McMurdo J had concluded that there was no identifiable prejudice to Mango Boulevard from the respondents being allowed to argue the issue they sought to raise by way of defence.

The judgments in the Court of Appeal provide a useful discussion of the concept of abuse of process and of the authorities which have considered some of the matters relevant to a consideration of whether particular conduct constitutes an abuse of process. Though finding that in the particular circumstances before the Court the considerations were fairly evenly balanced, the Court concluded the primary judge was correct in deciding that the mounting of the defence sought to be raised by the defendants was not an abuse of process (Muir JA at [29–[53], Fraser JA at [145]-[155]).

Orders

The Court set aside the order of McMurdo J varying the order of 3 April 2007, but otherwise dismissed the appeal. The appellant was ordered to pay respondent's costs of the appeal to be assessed on the standard basis.

Comment

A self-executing order is a valuable remedy to be sought against a litigant who repeatedly fails to comply with procedural rules or court orders.

This case clearly demonstrates the importance of considering the implications of any self-executing order, and of ensuring clarity in the wording of any such order. In particular, it should be absolutely clear whether a judgment is to come into existence without any further judicial act.

Every step should also be taken to avoid future uncertainty in determining whether judgment has resulted. In circumstances such as those in this case, for example, there may have been doubt as to whether purported compliance with the order for disclosure was actual compliance. Although the respondents would have the opportunity to challenge the existence of any default deposed by the appellant's solicitors, such disputes are undesirable. Uncertainty may be minimised if the conditions which must be met are straightforward and are set out in clear language.