[2002] QSC 086

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No 8996 of 2001

PICO HOLDINGS INC	Applicant
and	
TURF CLUB AUSTRALIA PTY LTD (ACN 088 729 819)	First Respondent
and	
NATIONAL AUSTRALIA BANK LTD (ACN 004 044 937)	Second Respondent

BRISBANE

..DATE 26/03/2002

JUDGMENT

HIS HONOUR: The first respondent company is the registered proprietor of an estate in fee simple in land in Racecourse Drive, Bundall, described as lot 2 on registered plan 817782 in the County of Ward, Parish of Nerang, being all of the land contained in title reference 18660224. The applicant company, which was incorporated in the United States of America, now seeks two declarations: first, that it has an equitable charge dated 4 May 2001 over the land; and secondly, that its equitable charge dated 4 May 2001 has priority over any charge, mortgage, or interest over the land in favour of the second respondent.

The dispute that has given rise to the application arises from dealings in late April and early May 2001 between Mr John Hart, a director of the applicant, and Mr Peter Voss, director of the first respondent and of another company called Dominion Capital Pty Ltd. I said the applicant <u>now</u> seeks the two declarations, because, as the originating application was framed when it was filed on 5 October 2001, those declarations were not sought and the applicant sought foreclosure, or alternatively, an order under s.99 of the Property Law Act 1974 for the sale of the land and other ancillary orders. In the applicant's amended originating application filed by leave on 7 March 2002, it no longer seeks foreclosure, but has not abandoned its application for an order for sale and ancillary orders. That relief is sought in paragraphs 3 to 11, paragraphs 1 and 2 setting out the declarations sought.

On 7 March 2002, consideration of the relief sought in paragraphs 1 and 2 proceeded and consideration of the relief sought in paragraphs 3 to 11 was adjourned to a date to be fixed. The fundamental issues that arise in relation to paragraphs 1 and 2 are, however, the same as those that will arise in relation to paragraphs 3 to 11.

The second respondent claims to have an interest in the land which it asserts was also created in 2001. It relied on two affidavits of Mr Kenneth Collins, the first filed on 5 March 2002 and the second filed the following day, and on an affidavit of Ms Toni Couper filed on 5 March 2002. There was no cross-examination of either deponent. The second respondent's claim is to an interest as equitable mortgagee. An oral agreement between Mr Voss and Mr Collins, a business banking manager employed by the second respondent at Mount Waverley, Victoria, was reached at the end of March 2001 and on 21 May 2001 the first respondent executed a mortgage in favour of the second respondent in registrable form. On 31 January 2002 the second respondent lodged a caveat over the land claiming an equitable interest "as Mortgagee of an estate in fee simple".

In late December 2000 the applicant lent Dominion Capital $US 1,200,000. A non-negotiable secured promissory note dated 22 December 2000 was executed by Dominion Capital and issued to the applicant showing that the $US 1,200,000 principal was to be repaid no later than 5 January 2001 with interest at the rate of twelve per cent. per annum. The

security referred to in the note consisted of share certificates in a company called Dominion Wineries Limited. The common seal of Dominion Capital appears on the note as does the signature of Mr Voss as "CHAIRMAN & CEO".

On 4 January 2001 the applicant, without requiring anything further from Dominion Capital, agreed to extend the date for repayment from 5 January 2001 to 30 April 2001. An addendum dated 4 January 2001, signed by Mr James Mosier as general counsel and secretary of the applicant, was issued recording the extension.

The $US 1,200,000 has not been repaid. From 6 January 2001 to late May 2001 there were numerous telephone conversations and other communications between Messrs Hart and Voss concerning Dominion Capital's failure to repay the loan.

On 25 April 2001, in a telephone conversation, Mr Voss asked Mr Hart that the applicant further extend the loan. Mr Hart told Mr Voss the applicant would require further security if the loan were to be extended. Mr Voss then offered the first respondent's land as security. Mr Hart told Mr Voss that the applicant had "a continuing problem" with its auditors concerning the $1.2 million loan "and the collateral". The applicant would be obliged to write off the loan unless the adequacy of the collateral could be demonstrated to the applicant's auditors, Mr Hart said. Mr Voss then offered to provide the land as security saying it was unencumbered. He said that he would give a recent

valuation report and that the land was worth at least double the value of the loan. It would be easier for the auditors to work out the value of the property than that of the winery, he said. He said he would get the money to the applicant shortly, after "administrative problems" had been resolved. Mr Hart then asked for "additional compensation" for extending the due date of the loan in the form of marketing rights in North America and Mexico to certain waste-water treatment technology. Mr Voss agreed to that. Mr Hart also asked for the title deeds to the land and a recent valuer's report on it. Mr Voss agreed. Mr Hart, on behalf of the applicant, agreed to accept the land as further security for the repayment of the loan, and accordingly, agreed to extend the repayment date from 30 April 2001 to 31 May 2001.

On 4 May 2001 Mr Voss sent a facsimile transmission, dated that day, to Mr Hart at Pico Holdings Inc in California. It was on a sheet with the letterhead "DOMINION CAPITAL PTY LTD", and was signed by Mr Voss as "CHAIRMAN AND MANAGING DIRECTOR". The letter said, formal parts omitted:

> "This letter is to confirm that as consideration for PICO Holdings Inc agreeing to extend the maturity date for the US$1.2 Million loan to May 31st 2001, I will provide additional substitute collateral. The collateral is the deed for property described as Lot 2, Registered Plan 817782, County of Ward - Parish of Nerang, Local Government - Gold Coast (as described in Certificate of Title attached) with a valuation of $3.8 to $4.1 Million. This collateral is in substitute of previous collateral provided which will increase your security to effectively provide you with a loan value ratio of approximately 50 per cent.
>
> My solicitors will immediately provide a letter confirming that the deed is held in trust for the

> benefit of PICO Holdings Inc as collateral. In addition, a copy of the most recent valuation report will be forwarded.
>
> Furthermore, the draft Agreement granting Vidler Water Company the exclusive marketing rights to the BioModule Waste Water Treatment Technology for the US and Mexico is complete and will be sent shortly for your review."

A copy of the certificate of title of the land was attached to the letter.

In early May 2001, after receipt of Mr Voss' facsimile, a second addendum to the promissory note, backdated to 25 April 2001, was made extending the date for repayment to 31 May 2001 and deleting the original provision concerning security (clause 4) and inserting the following:

> "The obligations under this Note shall be secured by a deed for real property, which will constitute at all times a loan to value ratio of 50 per cent. The real property is described in the attached Certificate of Title. Payee shall have a first lien on the real property pledged as collateral for the Note, and no encumbrance or interest senior to Payee's interest in the collateral shall be given or created by Maker."

On 10 July 2001 the applicant lodged a caveat forbidding the registration of any instrument affecting the land until the withdrawal of the caveat and claiming "AN ESTATE OR INTEREST IN FEE SIMPLE AND IN EQUITY" pursuant to "an equitable mortgage arising from the terms of a Non-negotiable Secured Promissory Note dated 22 December 2000 and a letter dated 4 May 2001".

As I have related, Dominion Capital failed to repay the loan, and on 30 August 2001 the applicant obtained judgment against it in the Supreme Court of Victoria for $US 1.2 million and interest from 22 December 2000 to the date of payment.

The caveat lodged on 10 July 2001 lapsed. On 21 November 2001 the applicant obtained leave pursuant to s.129 of the Land Title Act 1994 to lodge another caveat over the land on substantially the same grounds as in the caveat lodged on 10 July 2001, and on 22 November 2001 the applicant lodged a further caveat.

The applicant has formulated its case for the first declaration in two ways: it alleges that the first respondent granted it an equitable charge over the land, or alternatively that the applicant, the first respondent and Dominion Capital, partly orally and partly in writing, agreed that the date for repayment of the loan to Dominion Capital would be extended to 31 May 2001, that the land would be provided as additional security for the loan pursuant to clause 4 of the note, and that the first respondent would cause the title deeds to the land to be delivered to the applicant.

There was, I find, an agreement reached in late April 2001 between Mr Hart acting on behalf of the applicant and Mr Voss acting on behalf of Dominion Capital as recorded in the facsimile transmission of 4 May 2001 and the second

addendum to the promissory note. The first respondent was, however, not a party to the agreement. The facsimile transmission from Mr Voss explicitly in his capacity as chairman and managing director of Dominion Capital bears out that conclusion. It is possible that Mr Voss had some inwardly held notion that he, as director of the first respondent, was making it a party to an agreement with the applicant, but, in my assessment, nothing said or written supports that analysis of what happened. The test of a person's intention 'is not a subjective but an objective one; that is to say, the intention which the law will attribute to a person is always that which that person's conduct bears when reasonably construed by a person in the position of the offeree and not necessarily that which was present in the offeror's own mind': Anson's Law of Contract, 27th ed. 1998, p.31.

Not only was the first respondent not a party to the agreement, it did not create an equitable charge over the land. It was only Dominion Capital that held itself out as doing that. The facsimile transmission bears out that conclusion.

This is not a case in which there was an oral agreement to which the first respondent was a party or an attempt by the first respondent orally to create or dispose of an interest in land, but had such been the case, then the requirements of ss. 59 and 11 of the Property Law Act 1974 would not have been met. There is no written contract or any memorandum or

note of a contract to which the first respondent is a party signed by it by some person lawfully authorized: s.59. (Mr Voss agreed under cross-examination that when he wrote the letter that was sent as a facsimile, he was the sole director of the first respondent and that he had authority as sole director to act on its behalf, and so there is no doubt that he then had authority to offer the land as security. The facsimile itself, however, shows that Mr Voss did not write it on behalf of the first respondent, but on behalf of Dominion Capital.) There is no writing creating an interest in the land executed by the first respondent or by an agent of the first respondent authorized in writing: s.11(1)(a).

Because the first respondent was not a party to an agreement with the applicant, no question of part performance by the applicant can arise. Similarly, no estoppel can be relied on against the first respondent, as the first respondent took no part in the discussions between the representatives of the applicant and Dominion Capital. Section 198E of the Corporations Law, then in force, concerning the powers of sole directors/shareholders of proprietary companies, does not assist the applicant, since on my assessment of the evidence Mr Voss did not exercise those powers.

It follows that the application for the first declaration sought by the applicant must be dismissed and that it is unnecessary for me to consider further the application for the second declaration. There was no challenge to the facts

deposed to in the affidavits relied on by the second respondent, so it is also unnecessary for me to make findings concerning the facts relied on by the second respondent.

I shall invite further submissions on the relief sought in paragraphs 3 to 11 of the amended originating application and on the subject of costs.

...

HIS HONOUR: The application is dismissed.

I order that caveat number 705209617 lodged by the applicant on 22 November 2001 over lot 2 on registered plan 817782 in the County of Ward, Parish of Nerang, being all of the land contained in title reference 18660224 be removed.

I order that the applicant pay to the respondents their costs of and incidental to the application, including reserved costs, to be assessed on the standard basis.
