



Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MACKENZIE J

No S2476 of 2002

SPRING HILL APARTMENTS PTY LTD
(ACN 060 668 840)

Applicant

and

GLOBAL AIR LEASING PTY LTD
(ACN 090 602 118)

Respondent

BRISBANE

..DATE 09/04/2002

JUDGMENT

HIS HONOUR: On the 11th of December 2000 the respondent granted the applicant a mortgage in the sum of \$1,725,000 over a Boeing 747 aircraft, its engines and its maintenance records. The charge was registered with ASIC. It is common ground that a sum in the vicinity of 2 million dollars is now owing and that the mortgagee is in default under the mortgage.

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It is not disputed that notice of default and notice to remedy breach were served on the respondent and Luke Norman Butler, the Director of the respondent. Since then Mr Butler has become bankrupt and his wife has been appointed sole director. A receiver was appointed in July 2001 to the respondent. An application for winding up has been instituted by another creditor about the end of October 2001, although what has become of that is not immediately apparent.

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There is also an action in the Supreme Court of Queensland commenced by the Government of Japan for \$US7.2 million against the respondent. There is also evidence suggesting that a proposal to refinance the engines is being explored.

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According to the information before me the aircraft is presently at Jakarta International Airport. It is deposed that the respondent has told the Director of the applicant, Mr Miller, that expenses have been incurred to the extent of about \$US150,000 and it would cost about \$US100,000 to

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refuel the aircraft and that radio control heads have to be replaced for about \$US60,000.

It is also deposed that the respondent has no funds. It is deposed that Mr Miller was told that leasing the aircraft for charters between France and the Comoros was proposed, although there appeared to be some financial complications involved in that as well on the material before me. A sale and lease back of the engines was under discussion.

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Mr Miller is concerned that if the refinancing proposal is proceeded with the proceeds will not be directed to the applicant but dissipated by the respondent by paying unsecured creditors or upgrading the aircraft. It is obvious from what has been said that the applicant would have the rights of a mortgagee where the mortgagor is in default by reason of the uncontentious defaults.

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However, it is also apparent that the applicant is not inclined to take possession preferring to seek a commercial solution but with safeguards provided by the injunctive relief that is sought today. The broad description of what is sought is a restraint until further order from disposing of or dealing with the aircraft, its engines or maintenance records except pursuant to written consent or direction of the applicant or its solicitors.

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The second relief sought is the restraint until further order from relocating the aircraft and the engines from

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Jakarta International Airport or such other place at which it is presently located except in accordance with the consent or direction of the applicant or its solicitors.

The third relief is an order that the respondent forthwith file and serve an affidavit describing the present location of the aircraft and the engines, all liabilities incurred by the respondent in relation to the aircraft and the engines, location of the maintenance records and all information relating to the current maintenance status of the aircraft.

The fourth order sought is an order that if directed in writing the respondent immediately deliver up possession of the maintenance records or other records relating to the aircraft and its engines as may be specified in the direction.

An affidavit by Mr Conley, the respondent's solicitor, exhibits correspondence acknowledging the applicant's rights under the mortgage, including the right to appoint a receiver. It confirms that the aircraft and the engines are in Jakarta, or that he has been informed that that is the case, together with some technical data, manuals and log books. It was said from the Bar table that this is common practice with regard to aircraft.

The affidavit also asserts that the respondent does not propose to, nor has it, disposed of or dealt with the aircraft other than after consultation with the applicant's

previously, namely that I am not satisfied that given my view as to the original main forms of relief that I ought to embark on granting this ancillary form of relief. Whether liabilities incurred by the respondent in relation to the aircraft and the engines are within clause 27 is not something that I need to consider in any detail for the reasons that I have already given.

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As I have said, it seems that this was really justified on the basis that it was ancillary to Mareva type relief or other equitable relief and I am of the view that it should be refused.

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So far as the relief in paragraph 4 is concerned, that should also be refused for essentially the same reasons that have been elaborated on previously so the application will be refused.

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Yes. Anything else?

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MR FRASER: Well, I'm sorry, your Honour-----

HIS HONOUR: Yes.

MR FRASER: -----there's one matter that you attributed to my submissions which I perhaps should clarify.

HIS HONOUR: Yes. What's that?

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MR FRASER: In paragraph 3.1-----

HIS HONOUR: 3.1, just a moment.

MR FRASER: I actually sought it all disjunctively. It's just that your Honour attributed to my submissions linking the requirements under clause 27 or covenant 27 to the Mareva orders. I had not intended to do that and-----

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HIS HONOUR: Well, I still think that whether it be as an adjunct I - I did think that you had sought at least to provide a conceptual basis for it in the - the sort of extension of the Mareva injunction and to the extent that it simply requires me or seeks that I - if it be put disjunctively, I think the simple fact of the matter is that it is the kind of thing that can be required under the - under clause 27 but it seems to me that it is not the kind of relief that ought to be enforced by injunction in the event of a refusal particularly where there is some other form of remedy available. That's how I rationalise that.

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If I did imply in what I said before that it was only a Mareva type attachment I was not intending to overlook the fact that it was really an attempt in a way to enforce clause 27 by more direct means as well so that's the way I rationalise that, Mr Fraser.

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MR FRASER: I'm sorry. And by making that submission I did not mean at all to cavil with your Honour's-----

HIS HONOUR: No, no, no, no. No, not at all, no.

MR FRASER: -----ruling about it. I just wanted to clarify-----

HIS HONOUR: But I think it's - I think that I should have clarified that. I perhaps have muddied the - the waters a little bit by putting it the way I had and I - I think that you're entitled to have it clear as to how I did in fact approach it given the constraints of time and that sort of thing.

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MR FRASER: Yes.

HIS HONOUR: I thought it was probably better to get the matter out in an elegant form this afternoon than to have people waiting around for days-----

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MR FRASER: Yes. The - the only difficulty-----

HIS HONOUR: -----to get it.

MR FRASER: I'm sorry, your Honour.

HIS HONOUR: Yes. Go on.

MR FRASER: Just to - to finish that, the only difficulty is that we in fact have requested that information under the clause.

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HIS HONOUR: Yes. Yes, well, I - I-----

MR FRASER: And I - I appreciate that the way the relief was formulated sought an affidavit.

HIS HONOUR: Yes.

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MR FRASER: To the extent that we - events have overtaken that in that we now - I have pressed the Court for relief under the clause. We've made a request.

HIS HONOUR: Yes.

MR FRASER: We didn't specifically require-----

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HIS HONOUR: Well, what-----

MR FRASER: -----or amend our relief.

HIS HONOUR: Why - why would you get a mandatory injunction, in effect, in that situation anyway?

MR FRASER: Because-----

HIS HONOUR: Why would you be entitled to a mandatory injunction?

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MR FRASER: Because it's a current obligation which is not going to be complied with according to the material before your Honour, that is, the only offer to us is that we can go to Indonesia and look at the plane to see if the maintenance records are current. And the concern that I have now in - in view of what your Honour intimated-----

HIS HONOUR: Yes.

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MR FRASER: -----is that having made the request, having sought relief, it'll be said against us that we can't renew this request.

HIS HONOUR: No, I'm not - not implying that at all.

MR FRASER: Well-----

HIS HONOUR: Not implying that at all.

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MR FRASER: -----I suppose that the - the secondary concern is that-----

HIS HONOUR: It - yes.

MR FRASER: -----having raised it-----

HIS HONOUR: Has it been specifically requested under clause 27 or not? 50

MR FRASER: Yes, your Honour.

HIS HONOUR: It has, yes.

MR FRASER: It was in the - in schedule 2 set out specifically terms-----

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HIS HONOUR: Yes. It did too. You're quite right. Yes, I recall that. Yes. Well, I - I'm - yes, well, I - I'm not inclined to - to require it to be - to be given, Mr Fraser.

MR FRASER: All right.

HIS HONOUR: It seems to me that it's something that you can pursue in any further negotiations.

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MR FRASER: Well, your Honour, your Honour's formed a view about whether we're entitled to relief on this - on the application.

HIS HONOUR: Well, I'm afraid that's it, yes.

MR FRASER: Well, your Honour, I - I was just concerned that as we'd raised the issue that we - it might be said against us that as a matter of discretion we should not get the relief if we ask-----

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HIS HONOUR: No.

MR FRASER: -----for it separately.

HIS HONOUR: Well-----

MR FRASER: That's a concern, I suppose, that is now raised.

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HIS HONOUR: Well, I'd - if - I would hope that some commercial common sense would take hold and that that wouldn't happen but whether that will or not I - I can't predict.

MR FRASER: Thank you, your Honour. I've - I've raised-----

HIS HONOUR: Yes, you've raised it.

MR FRASER: -----the concerns I had.

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HIS HONOUR: And it's on the record if you - it's on the record. That's all I can say. Right. Okay.

MR CONLEY: I'm instructed to seek costs on that basis, your Honour - on the ordinary basis, of course.

HIS HONOUR: Can you resist that?

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MR FRASER: Well, yes, your Honour, because in my submission this matter is covered by clause 10 of the mortgage debenture and at the time we brought the proceedings-----

HIS HONOUR: Clause 10.

MR FRASER: Yes, your Honour.

HIS HONOUR: Have you got that? It's - what is it? It's KM2, isn't it?

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MR FRASER: Yes, KM2, your Honour. Yes.

HIS HONOUR: Thank you. Clause 10. Which - which part of clause 10?

MR FRASER: Your Honour will need to go to page 12.

HIS HONOUR: Page 12. Yes, yes. Okay.

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MR FRASER: And, your Honour, to the extent that I suppose the expenditure of money to - for the purpose of enforcing the covenant if ultimately we fail in the discretionary exercise it would be unfortunate if there were an inconsistent result.

HIS HONOUR: Well, what are you asking? That it be reserved?

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MR FRASER: Well, your Honour, ultimately the fate of the aircraft may affect how a discretion would be exercised about costs but, in my submission-----

HIS HONOUR: Well, it may, yes.

MR FRASER: -----you know, we've made an-----

HIS HONOUR: Well - well, you've got another application, haven't you?

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MR FRASER: Yes, your Honour. We have a - an application which seeks relief generally in relation to the rights under the mortgage-----

HIS HONOUR: Well, if you win - if you win that you - you will - if I reserve costs, you'd get your costs under the rules as they are, wouldn't you?

MR FRASER: Unless some other order is made-----

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HIS HONOUR: Yes.

MR FRASER: -----at the time, yes.

HIS HONOUR: Does a clause of that sort extend to unsuccessful legal proceedings?

MR FRASER: Well, your Honour, in terms it doesn't deal with the costs incurred by the respondent but the only point for raising it is-----

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HIS HONOUR: Yes.

MR FRASER: -----that there would be an inconsistency of the result because what the respondent has done is agreed that any of these costs will be - if we bring an application then there will be ultimately a question of whether the costs we incur are - form part of the-----

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HIS HONOUR: Yes.

MR FRASER: The mortgage security. So in the end we have a - a situation where your Honour has identified a legal right but indicated that obviously on discretionary grounds-----

HIS HONOUR: You see.

MR FRASER: -----your Honour would not proceed to enforce those rights as against the respondent because of the approach taken otherwise in relation to seeking further relief.

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Your Honour, ultimately how that affects matters would of course perhaps be influenced only marginally by the end result but, in the circumstances, in my submission, it would be appropriate that we have achieved quite a lot by bringing the application, that is confirmation of where the plane is. 20

HIS HONOUR: Yes.

MR FRASER: We've received advice and in fact our learned friend during the course of submissions informed the Court in open Court that there's no risk to the - to the aircraft where it presently is and that-----

HIS HONOUR: Yes.

MR FRASER: -----the - and confirmed that they don't intend to deal with it inimically to the interests of the mortgage-----

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HIS HONOUR: Yes.

MR FRASER: Of the - the security so, to that extent, we are further advanced than we were when we brought the proceedings.

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HIS HONOUR: Yes. All right. Well, I propose to reserve the costs not order them at this point so application is refused. Costs are reserved to whoever finally resolves the matter.

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representative. It may be that that is actually contained in a document which is annexed rather than asserted by Mr Conley.

The thrust of the respondent's argument is that there is no basis for the injunctive relief sought in the circumstances now existing. It is complained that it is, in effect, an attempt to enlarge rights which the applicant would not otherwise be entitled to under the agreement.

On the 2nd of April 2002 there was apparently a meeting between the parties. A copy of an email from the respondents solicitor to the applicant's solicitors dated the 3rd of April 2002 is exhibited. It notes the applicant's concern about his position vis-a-vis third parties and his wish to be "in a position that is as close to a receiver as possible". The respondent also suggests that the respondent's concern is that third parties not consider the applicant to have constructive possession or to be in possession.

The proposal was put which had the following essential elements; that the respondent would agree not to dispose of or deal with the mortgage property without consent, which consent would not be unreasonably be withheld by the applicant; and that the respondent would give access to the books. This has, according to the evidence, happened to such an extent as was useful although it was perhaps not as useful as it may have been since documents such as tax

returns and other financial documents were said not to exist and, as has already been remarked, some of the documents relating to the aircraft were with the aircraft.

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The third element of the agreement which was, one might think, a real sticking point, was that it was suggested that there should be a moratorium on action by the applicant for the duration of the agreement, proposed as three to six months, as long as the agreement was not breached.

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This proposal was then rejected by the applicant citing, amongst other things, the failure to keep the applicant informed as required by the mortgage agreement of acts of default such as the sequestration order against Mr Butler, the filing of the winding up petition, the appointment of the receiver and not providing specific information requested in reliance on the terms of the mortgage. It was after that request that some access to information was given.

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The respondent's reply to the correspondence that I have just referred to asserted that the applicant did not want to appoint a receiver but wanted to further secure its position in the event that a third party sought to improperly deal with the asset in a way inconsistent with the client's mortgage. It was argued that it was an attempt to establish new rights and that it was said that that approach was rejected.

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The proposition that there were commercial reasons for not exercising rights under the mortgage was referred to again. It was alleged also that Mr Miller knew the underlying facts related to the receiver being appointed and the sequestration order from personal contact and dealings with Mr Butler.

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It is not suggested that the location of the aircraft in Jakarta is, in itself, a breach of the terms of the mortgage nor that there is any ulterior motive in its being there at this point, although perhaps in that connection Mr Fraser's reference to the defence in the Japanese litigation may be thought to cloud the situation somewhat.

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There is no evidence or sufficiently based suspicion that the respondent will collude with third persons to the detriment of the applicant. There is a conceded breach. The applicant has a remedy under the security for the breach although, for commercial reasons, it appears, it does not wish to exercise it.

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It is easy to understand that in a case of this kind of asset and the situation in which the parties are that a commercial solution rather than insistence on legal rights may well be preferable.

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However, in my view, that does not justify the injunctive relief of the kind sought in paragraph 1. The same may be said of the relief sought in paragraph 2.

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With respect to paragraph 3, this is based on an alleged failure to comply with clause 27 and, in particular, an obligation to furnish such information as the mortgagor may reasonably request relating to the aircraft. It requests that the information be given in affidavit form, which, of course, is beyond anything that is required by the agreement. The particular relief sought is really sought, according to Mr Fraser's submissions, as an ancillary kind of attachment to Mareva type or other equitable relief.

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In my view, a case is not made out for that relief. What was requested was all liabilities incurred in relation to the aircraft and the engines, the location of the maintenance records and information relating to the current maintenance status of the aircraft.

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With regard to that, the aircraft seems to be without any dispute apparent on the material in Jakarta. The maintenance records, according to the information now before me, seems to be either available or with the aircraft itself.

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With regard to the information relating to the current maintenance status of the aircraft, that may well be something that could be requested by the applicant under that clause but it seems to me that that and the issue of the financial liabilities or liabilities incurred by the respondent in relation to the aircraft and the engines fall into the same sort of difficulty as I have mentioned

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