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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MUIR J

No S2339 of 2002

LYNTON NOEL CHARLES FREEMAN — Plaintiff

and

NATIONAL AUSTRALIA BANK LIMITED
(ACN 004 004 937) — Defendant

BRISBANE

..DATE 07/05/2002

JUDGMENT

HIS HONOUR: This is an application for summary judgment by the defendant pursuant to rule 293 of the Uniform Civil Procedure Rules. In order for the application to succeed I must be satisfied that the plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim and there is no need for a trial of the claim or part of it.

The plaintiff's claim is for damages against the defendant bank for sale of mortgaged property at under value. The defendant, upon receipt of the statement of claim, informed the plaintiff that the claim had no substance as the defendant had not exercised power of sale and that in consequence there had been no breach of section 85 of the Property Law Act.

It was pointed out that the sale was effected by receivers appointed by the defendant. The plaintiff's response was to amend the pleading to allege that the receivers had acted on the direction of the defendant and that in particular the defendant directed the receivers to sell the land on the basis of an estimated reserve value placed on the land by the defendant in the sum of 770,000 and otherwise intermeddled in the sale of the land.

Mr C Wilson, who appears for the plaintiff, relies on the expression of principle of Sir Richard Scott VC in Medforth v. Blake and in particular that part of it in which it was said:

> "If a mortgagee establishes a relationship with a receiver he has appointed under which the receiver exercises his powers in accordance with instructions given by the mortgagee, I can see the force of an argument that if the receiver is liable to the mortgagor then so will the mortgagee be liable... If the mortgagee refuses to instruct the receive to carry on the business in a manner that is in breach of the receiver's duty to the mortgagor, it seems to be quite right that the mortgagee, as well as the receiver should incur liability."

He also relied on a passage from the judgment of Lord Denning MR in Standard Chartered Bank v. Walker (1982) 1 WLR 1410 at 1416.

Mr Perkins, for the defendant, submitted that there was no factual foundation for the plaintiff's contentions and that the defendant was merely on a fishing expedition. He relied also on an affidavit of an officer of the defendant who had sworn to not directing the receivers to sell on the basis of an estimated reserve value of $770,000 and to not otherwise directing the receivers or intermeddling with the sale.

He further swore that the defendant's file had at all times been under his control and that he would have been aware had anyone acted differently in relation to the receivership. It seems to me that the case is something of a borderline one.

The extent to which there must be "intermeddling" in order to render a mortgagee liable is not clearly charted in the authorities in State Bank of New South Wales v. Chia (2000) New South Wales SC 552 at 885.

Einstein J referring to the law of company receiverships in Australia and New Zealand, second ed. 1984, paragraph 3.04, stated that:

> "The intervention of a mortgagee will have to be serious before that mortgagee is found liable for the defaults of the receiver and, in particular, it will have to go beyond mere consultation or the communication of preferences by the mortgagee."

Those observations, with respect, appear to me to be correct. Notwithstanding that though, in my view, there is sufficient evidence here to warrant the plaintiff's being allowed to go to trial. I am not prepared to find that the plaintiff has no real prospect of succeeding on part of his claim and that there is no need for a trial of at least part of the claim.

My reason for that conclusion arises out of the following evidence -

(a) The plaintiff's sworn report of a conversation between him and a Mr Lloyd, a member of the Corporate Recovery Section of KPMG (the firm of which the receivers are members or employees);

(b) A fax dated 10 January 2001 from the Corporate Recovery Branch of KPMG to the defendant and a fax dated 27 March 2001 to the defendant from Mr Lloyd.

Those matters taken together provide the basis for a contention that the relationship between the receivers and the defendant was such that the principles expressed by Denning MR and Sir Richard Scott VC to which I have referred have some potential application. The principles are imprecise in nature and their application difficult to assess in the absence of an established factual matrix.

In my view the plaintiff should be permitted in this matter to go to trial or, at least, to have disclosure. Accordingly, I dismiss the application.

I order that the costs of and incidental to the application be reserved. I do that because it seems to me that if, at the end of the day, it turns out that there is no substance at all in the allegations on which the plaintiff relies (and even that the plaintiff's evidence about the conversation is not accepted) then it would be inappropriate for an order for costs to be made in the plaintiff's favour.
