[2004] QSC 176

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Date: 27 May, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 10384 of 1999

WARREN THOMAS BROWN — Plaintiff

and

DONALD GORDON OGLE — Defendant

BRISBANE

..DATE 20/05/2004

JUDGMENT

th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HER HONOUR: This is a matter of Brown v. Ogle for judgment. The applicant/plaintiff seeks a Mareva injunction. The proceedings were commenced on 22nd November 1999. The trial is to commence on 12 July 2004 and is anticipated to take five days.

The defendant is a land developer. At all material times he has been the owner of a property in the Pine Rivers Shire referred to as the Mount O'Reilly property and containing 440.768 hectares.

The plaintiff is a consulting engineer. In about 1995, there was a mortgagee in possession of the Mount O'Reilly property. There was litigation between the present defendant, Mr Ogle, and the mortgagee, as the result of which Mr Ogle ultimately recovered possession of the property. The present plaintiff, Mr Brown, assisted Mr Ogle by providing about $162,500 which was spent in legal costs.

On 5 August 1995, the present plaintiff and defendant entered an agreement referred to as "the first agreement" for the development of the land. On 10 September 1998, they entered a "second agreement" which provides as follows:

> "This agreement relates to the property at Mount O'Reilly, area 1,089 acres. This agreement cancels all other agreements between Ogle and Brown concerning the Mount O'Reilly property and this agreement is enforceable from this date.
>
> Ogle agrees to pay Brown the sum of $A2 million in full settlement of any claims Brown may have against the Mount O'Reilly property.

Terms of Settlement

> The settlement is subject to Ogle selling the property with the normal Pine Rivers Shire Council subdivisional approval for not less than $A5 million plus legal costs already paid up to $160,000."

In the present proceeding, the plaintiff seeks specific performance of the second agreement or alternatively damages, as well as restitution in the sum of $2.16 million and damages for breach of a provision of the Trade Practices Act.

The litigation has been going on since 1999. On 5 April 2004, I ordered that the defendant's signature on the request for trial date be dispensed with.

In this application the plaintiff seeks orders that the defendant be restrained from dealing with his assets located in Australia until judgment in the trial of the proceeding; alternatively, that the defendant pay into Court or alternatively his solicitor's trust account, the sum of $1.2 million being the difference between the proceeds of the sale of the property and the total amount for which the property is encumbered; alternatively, that the defendant pay into Court or alternatively to his solicitor's trust account, the proceeds of sale of the Mount O'Reilly property.

A Mareva injunction has been described as a drastic remedy. Certainly an application for such an order is approached with considerable caution by the Court. In Cardile v. LED Builders Pty Ltd (1998) 198 CLR 380 at 404, the High Court endorsed a view expressed earlier by the New South Wales Court of Appeal:

> "A [Mareva order] is an interlocutory order which, if granted, imposes a severe restriction upon a defendant's right to deal with his or her assets. It is granted at the suit of a plaintiff whose status as a creditor is in dispute and who need not be a secured creditor. Its purpose is to preserve the status quo, not to change it in favour of the plaintiff. The function of the order is not to 'provide a plaintiff with security in advance for a judgment that he hopes to obtain and that he fears might not be satisfied. Nor is it to improve the position of the plaintiff in the event of the defendant's insolvency.' Many authorities attest to the care with which Courts are required to scrutinise applications for [Mareva orders]."

There are presently two contracts for the sale of the Mount O'Reilly land. One was entered into by the defendant, Mr Ogle, on 7 April 2004. It is with a company Samford Nominees Pty Ltd which was incorporated a day or two before that. The purchase price is $15 million. Of that amount $5.9 million is to be paid on the "settlement date". That was to be 30 April 2004. The balance of the purchase monies are to be paid in stages: their payment depends on the subdivision of the land, which in turn depends on the outcome of a proceeding pending in the Planning and Environment Court. The settlement date has passed with no monies being paid. The contract is apparently still subject to finance.

The other contract is one made by the mortgagee in possession, Elliott and Harvey Mortgage Securities Ltd. It is for $5 million with completion due on 11 June 2004.

The Mount O'Reilly land is heavily encumbered. The amounts secured against it total about $6.7 million. Mr Ogle provided a schedule of the amounts owing as follows:

Creditor	**Purpose of Debt**	**Date of Security**	**Payout Figure**
(a)Elliott & Harvey Mortgage Securities Limited	Original financier	18 December 2001	$4,889,161.38
(b)Baseline Consulting Pty Ltd	Consulting Engineers	19 September 2001	$800,000.00
(c)Direct Finance Corporation Pty Ltd		15 March 2002	$200,000.00
(d)Setglade Pty Ltd	Development company related to Baseline Consulting Pty Ltd	7 February 2002	$150,000.00
(e)Hole In One Investments Pty Ltd			$522,918.11
(f)Clarke & Kann partnership	Legal fees on, inter alia, development approval		$110,000.00
(g)Hogan & Associates	Legal fees on this matter		$44,732.92
		TOTAL	$6,716,812.41

Messrs Clarke and Kann, solicitors, caveated on 23 April 2004 to protect their claim for $110,000. There is also an unregistered mortgage in favour of O'Dea and others, executed by Mr Ogle on 5 March 2004.

A company, ARAF Captial Funding Pty Ltd lodged a caveat on 13 April 2004. It has a claim for $316,800 which is the subject of a proceeding in this Court. There is dispute about the claim. It relates to the engagement of that company to find capital in about March 2004.

The defendant's other assets consist of his family home and some land at Mango Hill. The family home is at Bridgeman Downs. The valuation evidence before the Court is to the effect that it is worth $1.1 million. The first mortgagee has obtained a default judgment against the defendant. The debt owing to it is approximately $640,000. If the mortgage is not paid out by 31 May 2004, the first mortgagee intends selling the property. There are other registered security interests against the family home. From perusal of the title deeds, it appears that the securities may be cross collateralised.

The Mango Hill land consists of three lots with a total value of about $780,000. There is a first mortgage to Goldfinger Enterprises Pty Ltd which was registered in May 2002. The defendant is obliged to pay monies owing under that mortgage into Court pursuant to orders in proceedings unrelated to Mr Ogle. There are other security interests registered against the Mango Hill land. Again there may be cross collaterisation of securities.

For present purposes, I am satisfied that there is a serious question to be tried with respect to the specific performance/damages claim, although I am less confident about the restitution and Trade Practices Act claims.

The real issue in this application for a Mareva injunction is that of the balance of convenience. Counsel for the applicant/plaintiff submitted that there is a risk of

dissipation of assets between now and judgment and that I should infer this from the history of dealings with the land.

The defendant is a land developer. He has given a number of mortgages over a number of years. The most recent activities seem to be the dealings in March 2004 with ARAF, the incurring of legal costs owing to Clarke and Kann in association with the development of the land, and the granting of the mortgage to O'Dea and others.

The position is that the Mount O'Reilly land is already heavily encumbered. If the Samford Nominees contract does not "settle" as to the first tranche, the mortgagee will sell. If the mortgagee sells for $5 million, there is no prospect of any funds for unsecured creditors.

The family home was mortgaged to the first mortgagee in March 2002. That first mortgagee has default judgment and has issued an ultimatum that it will sell if it is not paid by 31 May 2004, but again, there are other mortgages and there does not seem any prospect of a surplus. With respect to the Mango Hill property, the defendant is obliged to make payments due to the first mortgagee into Court and there are other mortgages.

In all of the circumstances, I am not prepared to infer that there is a substantial risk of dissipation of assets between now and trial. There seems to me little there to dissipate.

In any event, the Samford Nominees contract is the only hope for there being an eventual surplus.

I consider that that is enough for me to dismiss the application. Were it necessary to consider the worth of the undertaking as to damages which has been proffered, I would take into account the defendant's estimate of damages if the Samford Nominees contract is not settled in the sum of $5 million, and that Mr Brown, the plaintiff, has sworn to having assets in excess of $1 million. Of course, the estimate of damages may be inflated, but there is reason for concern as to the capacity of the plaintiff to meet a damages award.

In all the circumstances, I dismiss the application with costs.

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