[2004] QSC 399

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Transcript of Proceedings

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Date: 1 November, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No BS 9052 of 2004

NEO LIDO PTY LTD ACN 095 065 928	First Plaintiff
and	
NEO LIDO HOLDINGS PTY LTD ACN 1902 472 015	Second Plaintiff
and	
RICHARD WILLIAM SPENCER	Third Plaintiff
and	
SILVANA PEROVICH	Fourth Plaintiff
and	
3 POINT FINANCE PTY LTD ACN 110 218 678	First Defendant
and	

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

SCOTT PHILLIPS Second Defendant

and

CHRISTOPHER JOHN CONLEY Third Defendant

and

JOHN RICHARD PARK Fourth Defendant

and

LACHLAN STUART McINTOSH Fifth Defendant

BRISBANE

..DATE 28/10/2004

JUDGMENT

HER HONOUR: The first plaintiff is the registered proprietor of a number of lots in Annie Street, New Farm, on which it is developing 12 townhouses which are valued at approximately $8.5 million and which are nearing completion. The second plaintiff is a company associated with the third and fourth plaintiffs, Richard Spencer and Silvana Perovich and their interests. Mr Spencer and Ms Perovich are directors and shareholders of the first plaintiff. Those companies are part of a wider group of companies known as the Neo Lido Group. The first plaintiff is a developer of a number of properties throughout Queensland.

The first defendant, 3 Point Finance Pty Ltd., is a company engaged in money lending. The second defendant, Scott Phillips, was and is its authorised attorney. The third defendant, Christopher Conley, is a solicitor who practices under the firm name Morgan Conley and is the solicitor for the first defendant. John Park and Lachlan McIntosh, the third and fourth defendants respectively, were appointed by 3 Point Finance as receivers and managers of the first and second plaintiffs under certain securities.

The first plaintiff had arranged to purchase a certain property at Mango Hill but the finance arranged failed to eventuate. With the assistance of a Mr Eddy Galea, a finance broker, the first plaintiff was introduced to a Mr Wayne Sultan of Australian Money Lenders who in turn introduced the first plaintiff to 3 Point Finance for the provision of short term money.

On 19 August 2004, the first and second plaintiffs entered into an agreement with 3 Point Finance for a loan of $210,000. The loan was to be repaid on 20 September 2004. Interest was payable in advance at 10 per cent per month with a default interest of 15 per cent. The loan included the first interest payment of $21,000; broker's fees of $30,000; legal fees of $2,377.20 and stamp duty and other fees. The amount advanced to the first plaintiff was $155,000.

To secure the loan the first and second plaintiffs entered into mortgage debentures over their assets and undertakings and fourth registered mortgages over the four blocks of land constituting the Annie Street development. As the time approached for the repayment of the loan, the first and second plaintiffs did not expect to be able to make repayment on 20 September and asked Mr Galea to seek a two week extension. Mr Conley notified that 3 Point Finance would do so provided two weeks' interest was paid on 20 September in the amount of $8,820 with the principal to be paid in full by 4 October.

Surprisingly, no one on behalf of the plaintiffs contacted Mr Conley or 3 Point Finance on or before 20 September, the due date for the repayment of the loan. Mr Conley emailed Mr Galea on 21st September that if the matter of the extension could not be resolved by 12 noon, 3 Point Finance was likely to consider the loan in default. Ms Perovich responded immediately accepting the terms of the offer of the two week extension and that interest would be paid in the next 24 hours; that did not occur. Mr Conley sought payment

overnight; failure to pay would put the loan in default. Approximately 24 hours later on 22nd September, Ms Perovich emailed Mr Conley that the funds to pay the interest had been delayed until Friday; that is 24 September. Mr Conley in reply, early the next day, noted that such an extension had not been granted.

At about 3.00 p.m. on 24 September, Mr Spencer saw a letter delivered to the first plaintiff, signed by Mr Conley, noting that the loan was in default and demanding $242,000 being the principal, one month's interest at the default rate of 15 per cent per annum, being $31,500 and legal costs of $500. Included was a notice exercising power of sale.

At an unspecified time, which Mr Spencer deposes was "at about the close of business," he received a telephone message purportedly from Mr Conley which read, "Don't panic about the letter just delivered; call him." It is not entirely clear if Mr Spencer was in the South Brisbane office of the first and second plaintiffs at the time but at about 4.45 p.m., Mr Phillips and Mr Conley attended at those offices wanting to discuss the non-payment of interest.

Ms Perovich spoke with them and deposes that, during discussions, she said that the principal and interest would be paid by 29 September. She says no objection was made and Mr Conley added, "Wednesday would be fine." Mr Phillips deposes that this was not said in his presence. Mr Conley has sworn no affidavit.

On Sunday 26 September, Mr Galea told Ms Perovich that Mr Conley had contacted him to say that 3 Point Finance was interested in lending up to $500,000 to the first plaintiff. Ms Perovich wanted a proposal in writing. After further discussions, Ms Perovich sent the financial statements to 31st December 2003 for the corporate plaintiffs and other companies in the group to Mr Conley on 27 September in order for 3 Point Finance to consider if it was interested in lending more funds.

At about 3.30 p.m. that afternoon, Mr Conley sent an email to Mr Galea, Mr Spencer and Ms Perovich stating that the corporate plaintiffs were in default and had not paid the two weeks' interest as agreed, He went on to ask about the group's further funding requirements. Ms Perovich responded that she had told them on 24 September that principal and interest would be paid by Wednesday 29th and that the plaintiffs wanted no further finance from 3 Point Finance.

At about 5.00 p.m., Mr Phillips, Mr Conley and John Park and his assistant, Ms Smith, attended at the South Brisbane offices. Discussions occurred over an approximately six hour period. They are at the heart of the plaintiffs' claim of unconscionable conduct. Mr Park handed to Mr Spencer a document appointing him and Mr McIntosh receivers and managers to the corporate plaintiffs. Mr Park indicated that the outstanding loan was to be finalised that night.

The details of the conversations that evening need not be set out here. Mr Spencer and Ms Perovich have sworn affidavits doing so. Mr Spencer, in the earlier part of the evening, seems to have left the negotiations to Ms Perovich but both have deposed to what took place. Mr Conley, who was present through the evening, has not sworn an affidavit and neither has Mr Park. Mr Conley was instructing Mr Hackett who appeared for the first and second defendants throughout most of this hearing. Mr Guy Edgecombe for Mr Conley, Mr Park and Mr McIntosh, attended the hearing but made no submissions.

Mr Phillips' affidavit, apart from describing Ms Perovich as being calm and collected, does not contradict their account. Both Mr Spencer and Ms Perovich were shocked at the appointment of receivers in the context of their understanding about the arrangement that 3 Point Finance was interested in lending more money and that payment could be effected on 29th September. It is conceded by the plaintiffs that any variation of the loan agreement of 19 August had to be in writing and it is not relied on as an agreement to extend time but merely to explain the plaintiffs' approach to the repayment of the loan.

Mr Park told Mr Spencer he had placed a security guard over the almost completed Annie Street development to prevent access but that, if matters were resolved that night, he would have the guard removed.

During the evening Ms Perovich was told by Mr Phillips and Mr Conley that if payment of principal and interest was not made that night the site at Annie Street would remain locked to prevent building work being carried on; that Suncorp, the Group's principal financier had been contacted by Mr Phillips and would call in its loans promptly; that Mr Park had sent notices to all banks advising of his appointment; that The Courier-Mail had been put on notice to publicise the appointment of the receivers the next day; that the receivership would take six months to complete and cost in the vicinity of $700,000; that the companies would be wound up; and that Mr Spencer and Ms Perovich would be bankrupted.

After discussion about properties owned by the first plaintiff, which might be conveyed to 3 Point Finance to discharge the loan Mr Phillips and Mr Conley said that they had inspected the Annie Street development that day and had selected townhouse number 10 which the first plaintiff had intended to retain for itself. It had a value of approximately $750,000. Ms Perovich offered to pay all the money owing the next morning but this was refused.

Ms Perovich discussed the situation with Mr Spencer. They were extremely anxious to prevent the collapse of the Group which they saw as imminent in the face of the conduct and proposed conduct by the defendants and agreed, they depose, under duress, to the arrangements proposed by Mr Phillips and Mr Conley and, to a lesser extent, by Mr Park.

Ms Perovich deposes that she told Mr Conley to draw up the terms of the agreement but Mr Phillips said that it would be unwise for the defendants to do so as it might look like unconscionable conduct with which sentiment Mr Conley concurred. Accordingly, over the ensuing hours, Mr Spencer, who had been a solicitor for many years although no longer in practice, prepared various drafts of the extension agreement which was ultimately executed by 3 Point Finance, the receivers and the plaintiffs.

The agreement is couched in terms of an advance of $750,000 to be repaid on 18 December 2004, that the first plaintiff would transfer title to House 10 free from encumbrances and completed with the specifications of the balance of the development in discharge of the advance of $750,000 to be completed by 18 December 2004 and that the plaintiffs would pay $20,000 to 3 Point Finance for lawyers' and receivers' costs by 11 October 2004. In return, 3 Point finance would instruct the receivers to notify the withdrawal of the receivership to all the banking institutions and financiers already informed of their appointment and would withdraw the security guards from the Annie Street development and withdraw the receivers.

By the concluding clause of the agreement - 5.8 and 5.9 - the plaintiffs agreed that they had entered into the agreement willingly and without duress after considering and taking legal advice and had negotiated the terms on terms they

considered reasonable and commercial having regard to the circumstances.

As to the legal advice, in the course of the evening, Mr Spencer had discussed the negotiations with a solicitor, Mr Peter Townley, by telephone at his home. Mr Townley had some interest in the Group companies.

On Wednesday 20 October Mr Phillips arrived at the South Brisbane offices of the first plaintiff calling out that he had come to inspect the books and records of the companies in accordance with the entitlements of 3 Point Finance under the securities. He proceeded to take photographs. Mr Phillips deposes that he was doing so because he was concerned that records may be removed. He was refused entry. Photographs were taken of Mr Phillips taking photographs. They speak for themselves. Police were called and Mr Phillips and his companion left.

On two occasions, on 14 and 22 October, the plaintiffs attempted to tender what they considered the amount due under the original agreement of 19 August without acceptance. On 25 October a bank cheque for $244,420 was tendered and accepted subject to an entitlement to claim $750,000. The plaintiffs have paid the $20,000 for legal and receivers costs.

The plaintiffs have filed and served a statement of claim; there is no defence as yet. The plaintiffs' claim is put on two principal grounds. They contend that the receivers were

not validly appointed and that accordingly the defendants engaged in misleading and deceptive conduct pursuant to section 52 of the Trade Practices Act when Mr Park showed his and Mr McIntosh's appointment to Mr Spencer and Ms Perovich and in reliance on the purported valid appointment, the plaintiffs entered into the extension agreement. Alternatively, that the plaintiffs' entry into and execution of the extension agreement was procured by unconscionable conduct by 3 Point Finance.

There are a number of bases on which the plaintiffs submit that the receivers and managers were not validly appointed. They contend that there was no written demand as required by clause 8.1.1 of the agreement and the other security documents of 19 August. 3 Point Finance contends that no written demand was required and that the email correspondence was sufficient compliance in any event. Alternatively, it is contended by the plaintiffs that the demand was not made to the first, second and third plaintiffs.

The plaintiffs allege that the amount of interest in the letter of demand was overstated on the proper construction of the loan agreement. 3 Point Finance denies that that is so. This, in my view, is not a strong construction argument for the plaintiffs. The plaintiffs further argue that, pursuant to clause 7 of the standard terms incorporated into the loan agreement, the first plaintiff was the tenant at will at the Annie Street property. In an event of default, 3 Point

Finance might end the tenancy and in that circumstance take possession of the property.

The plaintiffs allege that the tenancy at will had not ended and that 3 Point Finance had taken no steps to end that tenancy. Because the terms of the loan agreement and the security documents did not provide that any receiver or receiver and manager appointed by 3 Point Finance was to be or was deemed to be the agent of the first or second plaintiffs, the effect of the document appointing Mr Park and Mr McIntosh was that 3 Point Finance had purported to appoint them to take possession of the property. There was no entitlement to do so since the tenancy at will had not ended.

Mr Hackett contends that there was no taking possession by 3 Point Finance but there is a good argument that they did so. Mr Hackett contends that, by showing his deed of appointment, Mr Park was not representing that he had been validly appointed but it is difficult to see what else he was doing.

The plaintiffs further allege that certain clauses of the loan agreement and the security documents are inconsistent and irreconcilable and accordingly void for uncertainty. Clause 12 of the mortgage debentures provides that, before 3 Point Finance may appoint a receiver, it is to give notice that there has been an event of default while clause 13 provides that no notice need be given before the appointment of a receiver.

National Australia Limited v Budget Stationary Suppliers Pty Ltd BC 9701417, unreported decision of the Supreme Court of New South Wales in the Court of Appeal of the 23rd of April 1997 referred to by Mr Stewart held that, where two clauses are irreconcilable and where neither could be construed as subservient to the other, the contract was void for uncertainly. It will, however, be necessary to develop this argument further. They appear to be inconsistent but whether they are separable has not yet been argued.

The first and second defendants contend that, in any event, the first plaintiff was otherwise in default by not notifying that litigation had been instigated against it by a number of parties and further that there had been a failure to pay rates and land taxes (which have since been paid).

The plaintiffs contend that by reason of 3 Point Finance representing that it had validly appointed Mr Park or Mr McIntosh as receivers and managers of the Annie Street property, they entered into and executed the extension agreement on 27 September in order to avoid the consequences of the receivership. These arguments about the appointment of the receivers and the construction of the instruments raise arguable issues but it is the alternative basis for setting aside the extension agreement upon which most argument has been focused.

The alternative basis by which the plaintiffs seek to avoid the extension agreement is that their entry into the further agreement was procured by unconscionable conduct on the part of 3 Point Finance.

The unconscionable conduct is alleged to have consisted in the misrepresentation that the receivers and managers had been validly appointed, that it was not reasonably necessary for the protection of 3 Point Finance's interests to require a resolution to be reached on the evening of 27 September, that 3 Point Finance, through Mr Phillips, used unfair tactics and pressure in engaging in the conduct that evening, that those tactics and that pressure were applied without any warning that receivers might be appointed and it occurred shortly after it was understood by the plaintiffs that 3 Point Finance would wait until 29 September for payment and wished to lend further funds to the first plaintiff and accordingly, had ambushed the plaintiffs.

The plaintiffs allege that the conduct was likely to and did seriously affect their ability to make a judgment as to what was in their best interest and by insisting upon the agreement and by entering into the agreement in those circumstances 3 Point Finance took unconscientious advantage of the plaintiffs. It is further alleged that the purported appointment of the receivers was not for the purpose of enforcing the securities but for the extraneous purpose of applying pressure to the plaintiffs to accede to such an agreement.

The plaintiffs contend that notwithstanding 3 Point Finance's position as holder of a fourth mortgage, there was still sufficient equity in the Annie Street property for the loan and interest to be paid. The evidence of Mr Spencer, who was cross-examined by Mr Hackett on this application, was that the first and second mortgages related to a loan for $5.5 million; a third mortgage had been given to the builder which would extend up to $400,000; the 12 townhouses, which would shortly be advertised for sale, were valued at $8.4 million.

Mr Hackett contended that Mr Spencer, being a solicitor of some 16 years practice and experience over a number of years in the field of property development, and Ms Perovich's wide experience in property sales and development, together with their conversations with Mr Townley that evening would suggest that they made a commercially realistic decision to enter into the further agreement.

The statement by McHugh JA, as his Honour then was, in *Crescendo Management Pty Limited v. Westpac Banking Corporation* (1988) 19 NSWLR 40 is regarded as the modern Australian statement of the law in this regard. His Honour said, at 45-46:

> "A person who is the subject of duress usually knows only too well what he is doing but he chooses to submit to the demand or pressure rather than to take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and ask whether that pressure went beyond what the law is prepared to countenance as legitimate. Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct but the categories are not closed. Even overwhelming pressure, not amount to unconscionable or unlawful

> conduct, however, will not necessarily constitute economic duress."

His Honour quoted with approval from the dissenting advice of Lord Wilberforce and Lord Simon of Glaisdale in *Barton v. Armstrong* (1973) 2 NSWLR 598; [1976] AC 104 at 634, 121:

> "...in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as illegitimate. Thus, out of the various means by which consent may be obtain - advice, persuasion, influence, inducement, representation, commercial pressure - the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion."

The plaintiffs allege that the conduct of 3 Point Finance through Mr Phillips and the involvement of Mr Conley took unconscientious advantage of the vulnerable commercial position of the plaintiffs. Mr Stewart SC, who with Mr Wilkins appeared for the plaintiffs, particularly points to the striking disparity in the value of consideration passing between the parties. He quoted a passage from the 13th Edition of Storey's "Commentaries on Equity Jurisprudence" at paragraph 246:

> "...there may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence, and in such cases courts of Equity ought to interfere upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience and amount in itself to conclusive and decisive evidence of fraud. And when there are other ingredients in the case of a suspicious nature or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."

Mr Hackett, for the defendants, submitted that this supposed gross inequality between the loan of 19 August and the extension agreement of 27 September disappears when compound interest at the default rate of 15 per cent per month is calculated and reaches $770,000 in eight months. The position at the time the agreement was entered into suggests a significant disparity between what was then owing by the first and second plaintiffs to 3 Point Finance and what was agreed to.

The plaintiffs paid the $20,000 required by the extension agreement for the lawyers' and receivers' costs. Mr Hackett contended that that amounted to affirmation of the impugned agreement. Mr Stewart pointed to the obligation to pay receivers' costs under clause 4.1(b) of the first agreement. Mr Spencer agreed in cross-examination that the sum had been paid as stipulated in the extension agreement.

There is no sense that this was an affirmation of the extension agreement as, for example, in *The Atlantic Baron* (1979) QB 705. As Mr Spencer commented, the plaintiffs were still trying to "put out bushfires" and taking legal advice. As Cooper J observed in his article, "Between a Rock and a Hard Place: Illegitimate Pressure in Commercial Negotiations" in (1997) 71 ALJ 686 at 694 the question becomes one of the appropriate delineation of the boundary between commercial or financial pressure of the kind that operates in a market economy as a factor or function of economic liberty, and commercial or financial pressure which is impermissible and

which calls out for the intervention of the Courts. Clearly the jurisdiction is not to relieve parties from hard bargains but I am persuaded that the evidence presently before the Court demonstrates that there is a serious question to be tried. Clause 5.8 and 5.9, although to be taken into account, are hardly determinative of the question of unconscionability since they are part of the same impugned agreement.

As to the balance of convenience, Mr Hackett submits that the corporate plaintiffs are not solvent. There are no consolidated audited accounts for the Group before the Court but the fact that the first and second plaintiffs needed to resort to 3 Point Finance and brokers with onerous interest rates and fees, would suggest, at the least, cash flow difficulties.

Nonetheless the bank statements for the first plaintiff show that on the 14th of October, the date of the first tender, it was in funds to satisfy the cheque tendered. Since 3 Point Finance is a secured creditor, on the material before the Court there is sufficient available in the secured property to meet its claim should the extension agreement be upheld.

Mr Hackett further submits that as a condition of the injunction the Court should require a payment in of the disputed amount of $750,000.

He referred to the general rule expressed in Inglis v. The Commonwealth Trading Bank of Australia [1972] 126 CLR 161 that

an injunction will not be granted restraining a mortgagee from exercising powers conferred by the mortgage unless the amount of the mortgage debt, if disputed, is paid into Court.

That was a very different case where damages were claimed as a set-off against the mortgage debt. Here it is contended that the extension agreement is void or voidable.

An amount which the first and second plaintiffs say is due under the first agreement has been tendered and accepted. No more is required.

Accordingly, the injunction sought by the plaintiff is granted on terms to be settled by counsel, and unless there are submissions to the contrary I would order that the costs of this application be costs in the cause.

Mr Wilkins and Mr Hackett, are you able to settle a draft order?

MR WILKINS: I have a draft. I'll show it to my learned friend.

HER HONOUR: You have one? That's good. Have you seen that, Mr Hackett - or you've got it now, I take it.

MR HACKETT: I've only got it now, your Honour. Has your Honour seen it?

HER HONOUR: Not yet. I'm waiting.

MR HACKETT: I certainly won't agree to an order in those terms. I'm at your Honour's - in your Honour's hands; but, in my submission, it's just far too broad.

MR WILKINS: I haven't yet changed the costs order, your Honour. I'll need to do that.

HER HONOUR: I don't think that's the point.

MR HACKETT: No. Your Honour will appreciate that my client has other rights under the securities which don't involve enforcing the securities.

HER HONOUR: Yes.

MR HACKETT: But for example right to information, access to books and records, the like, this order would preclude all of those. For example, your Honour knows that the Annie Street development, if it reaches completion shortly, notwithstanding it was supposed to be completed in February I think, and is sold, my client will need information in relation to that and potentially to release its securities for settlements to occur.

HER HONOUR: Well, that's true. There's no doubt about that. There's an agreement which is not contentious, that's the agreement of 19th of August; and I'm not quite sure whether the amount that was offered - that was tendered and received actually paid the entire amount under the 19th of August-----

MR HACKETT: No.

HER HONOUR: -----my impression was that there was still some interest that was outstanding.

MR HACKETT: Correct. That was my calculation of the 319 - and ignoring legal costs.

HER HONOUR: Yes.

MR WILKINS: Well, we disagree with the calculation, your Honour.

HER HONOUR: You might do but as things stand there are entitlements under those original mortgages. I have some doubt about your entitlements under the impugned contract simply because it's impugned and therefore it's-----

MR HACKETT: But speaking out loud pending trial-----

HER HONOUR: Yes.

MR HACKETT: -----on any sale, my client will not release its securities until it's secured to $750,000 plus costs.

HER HONOUR: You would think that.

MR HACKETT: Yes.

HER HONOUR: Yes, all right. Why don't you go away and start talking about this. I've got the callover in about 15 minutes and you might be able to come up with something that's a little more manageable.

MR WILKINS: Thank you, your Honour.

HER HONOUR: Can you do that? All right. If you can settle something you can slot yourselves in at any time in the morning, otherwise you can argue about its terms before me at some time today.

MR WILKINS: Yes, your Honour.

MR HACKETT: Thank you, your Honour.
