[2004] QSC 469

State Reporting Bureau

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Transcript of Proceedings

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Date: 11 January, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

BS10085 of 2004

CATALYST SECURITIES PTY LTD (ACN 082 758 861) AND HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109)	Applicant
and	
ELINI PEGG	Respondent

BS10086 of 2004

CATALYST SECURITIES PTY LTD (ACN 082 758 861) and HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109)	Applicant
and	
IAN DURIE	Respondent

BS10087 of 2004

CATALYST SECURITIES PTY LTD (ACN 082 758 861) and HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109)	Applicant

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

JULIE TAGG AND SELWYN TAGG — Respondent

BS10088 of 2004

CATALYST SECURITIES PTY LTD (ACN 082 758 861) and HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109) — Applicant

and

DARREN BAIN — Respondent

BS10089

CATALYST SECURITIES PTY LTD (ACN 082 758 861) and HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109) — Applicant

and

MONSTERBABE INDUSTRIES PTY LTD — Respondent

BS10090 of 2004

CATALYST SECURITIES PTY LTD (ACN 082 758 861) and HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109) — Applicant

and

R J AND Y T WOODGATE — Respondent

BS10091 of 2004

CATALYST SECURITIES PTY LTD (ACN 082 758 861) and HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109) — Applicant

and

ANN O'BRIEN — Respondent

BS10092 of 2004

CATALYST SECURITIES PTY LTD (ACN 082 758 861) and HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109) — Applicant

and

COOLWOOD PTY LTD — Respondent

BS10093 of 2004

CATALYST SECURITIES PTY LTD (ACN 082 758 861) and HOSKIN & ASSOCIATES PTY LTD (ACN 100 388 109) — Applicant

and

PRMREALESTATE.COM PTY LTD Respondent

BRISBANE

..DATE 17/12/2004

JUDGMENT

HIS HONOUR: There are some nine applications to set aside the statutory demands served upon the applicants who are Catalyst Securities Pty Ltd and Hoskin and Associates Pty Ltd. The applications arise from respectively nine statutory demands. The creditor, or alleged creditor is different in the case of each demand and therefore there is a different respondent to each of these applications.

The respondents are represented by the same lawyers and the same issues arise, broadly speaking, in relation to each of these demands. There are some differences which I will mention but ultimately those differences are not important to the outcome of each application.

The starting point in a discussion of the facts of the matter is the content of two documents to which the relevant parties were the applicant companies here and the various respondents. The first of those documents is a loan agreement which is exhibited as WDH4 to an affidavit sworn by Mr W D Hoskin in each of the applications. That loan agreement is one for which the parties were stated to be the present applicants as "the borrower", and "the lender" who was identified at the beginning of the document by the words "the parties whose names appear as lenders in the attached schedule".

The schedule to this agreement is headed "Lenders" and it then contained the following description:

"Julie Tagg, Selwyn Tagg, Monsterbabe Industries, Ann O'Brien, Gary Brell, Coolwood Pty Ltd, R.J. Woodgate, Y.T. Woodgate, Ian Durie, Darren Bain, PPM Real Estate.Com, Elini Pegg & GLB Investments Superannuation Fund in shares as to 7.5/265, 7.5/265, 10/265, 15/265, 70/265, 7.5/265, 25/265, 25/265, 25/265, 7/265, 10.5/265, 10/265 & 45/265 respectively."

The agreement then recited that "the lender has agreed, at the request of the borrower, to provide a loan facility to the borrower" and that "the lender and the borrower have agreed to enter into this agreement to set out the terms and conditions of the loan facility".

Clause 1 of the agreement contains some relevant definitions. Firstly, it defines the term "advance" as meaning "an amount of $265,000 and/or such other additional amounts as agreed to between the parties from time to time to be advanced by the lender whilst this agreement remains on foot". The term "draw down date" was defined to mean "such date as the lender and the borrower agree but not later than 10 September 2003".

The term "event of default" was defined as "any of the events, omissions or occurrences specified in clause 9(2)". The term "loan" was defined to mean "the principal amount of the advance plus interest outstanding at that time". The "repayment date" was defined to mean the "loan repayment date which shall be 10 January 2004 being the date of completion of the term of the loan" (which was defined to mean "the period between the draw down date and the repayment date").

Clause 3 of this agreement, headed "Provision of Advance", provided "the lender shall, upon request by the borrower, provide the advance to the borrower by way of cash advance on the draw down date on the terms and subject to the conditions set out in this agreement". Clause 5.1 provided that "the borrower must repay the loan in full to the lender on the repayment date". Clause 8.2 headed, "Events of Default", provided that certain events would be events of default including "if the borrower fails to repay the loan on the repayment date".

The other relevant document signed at this time was a mortgage, a copy of which is exhibited as GJB4 to an affidavit sworn by Mr G J Barry in each of the applications. This was a mortgage to be registered under the Land Title Act 1994 over certain land described in the schedule to that mortgage. The "mortgagor" was stated to be the two applicant companies. In the schedule on the first page of the mortgage instrument under the term "mortgagee" were typed the words "See attached panel". That is a reference to what appears on the next page of the schedule in which the following appears under the heading "mortgagee" and I here set out what appears:

"Mortgagee Given names & Surnames & Company Names	(include tenancy if more than one)
Julie Tagg, Selwyn Tagg, Monsterbabe Industries, Ann O'Brien, Gary Brell, Coolwood Pty Ltd, R.J. Woodgate, Y.T. Woodgate, Ian Durie, Darren Bain, PPM Real Estate.Com, Elini Pegg & GLB Investments Superannuation Fund	as tenants in common in the shares, 7.5/265, 7.5/265,10/265,15/265, 70/265,7.5/265,25/265, 25/265,25/265,7/265, 10.5/265,10/265 & 45/265 respectively "

It can be seen that the names appearing in that panel correspond with the names under the heading "lenders" in the schedule to the loan agreement.

It can also be seen that the respective shares of each of those persons are identical from one document to the other. The mortgage refers to the mortgagees as "tenants in common in (those shares)". Returning to the first page of the mortgage under the heading "description of debt or liability secured" were typed the words "the sum of $265,000" and by clause 6 of that schedule it was provided as follows:

> "The mortgagor covenants with the mortgagee in terms of document number 7031459 and the terms of the loan agreement entered into between the mortgagor and the mortgagees dated 9 September 2003 and charges the estate or interest in the land with the repayment/payment to the mortgagee of all sums of money referred to item 5".

(Item 5 being that I have just mentioned in which the words "the sum of $265,000" have been inserted).

The loan agreement referred to in this clause 6, it is clear, is the loan agreement to which I have already referred. The other document referred to in clause 6 is one containing the relevant terms of the mortgage which is itself registered or recorded under the Land Title Act.

That document contains a number of what might be described as standard terms for the real property mortgage. It contains a number of clauses under the heading "Powers on default" which

entitle "the mortgagee" to act after "any event of default". It itself defines "event of default" in its clause 36.9 to mean any of the events referred to in its clause 24. And its clause 24 provides that one such event of default occurs if "the mortgagor does not pay when due the whole or any part of the secured moneys or interest".

In this document the term "secured moneys" is itself defined in clause 36.17 as meaning, amongst other things, "moneys expressed to be secured moneys by this mortgage". That is an apparent reference to the sum of $265,000 expressed within clause 5 of the mortgage on the first page of the schedule under the heading "Description of Debt or Liabilities Secured".

From the terms of each of these documents which I have mentioned it would appear, save perhaps for one matter, that this was a transaction involving but one loan, albeit with a number of lenders and with two borrowers. The possible qualification to that, however, is from the loan agreement's specification of the lenders as persons having certain defined shares as lenders and by the mortgage specifying the mortgagees as persons having certain entitlements to shares in the mortgage as tenants in common.

From those particular descriptions, the various respondents to these applications contend that the documents I have mentioned record not one loan, but a number of loans. On the respondents' behalf it is submitted that the loan agreement is one under which, for example, the first named lender, who is Ms Julie Tagg, has made a loan of seven and a half thousand dollars to the applicants as borrowers.

The submissions of the respondents at one point did not seem to go that far, but ultimately that is how I understood the respondents' argument for it was conceded on behalf of the respondents that where a debt is owed to two or more creditors, then a statutory demand for that debt must be one which is given by all creditors, that is that they all must join in the same notice. See, for example, Re A & K Holdings Pty Ltd 1964 VR 257 Manzo v. 555/225 Pitt Street Pty Ltd 1990 21 NSWLR 1.

Accordingly there is a threshold question of whether in this case there was but one loan and therefore one debt, or whether there were several loans and, as the respective statutory demands would suggest, several debts. If there was but one loan then the fact that the parties have at various times dealt with each other as if there were several loans would not be in itself sufficient to displace the operation of the relevant documents as being for one loan only.

The terms which I have set out from the loan agreement speak in terms of a single loan and not several loans. For example, the loan agreement defines the term "advance" as meaning the advance of the amount of $265,000. It does not refer to a number of distinct advances. It defines the term "loan" as meaning the principal amount of the advance plus interest. It does not refer to several loans and it refers to a repayment date as a date for the completion of the term of the loan. Again a reference to a single loan rather than several loans.

By clause 3 it refers to the provision of one advance, that is the advance of $265,000. I accept, as was submitted on behalf of the respondents, that clause 3 of the loan agreement, which casts obligations upon the "lender" would be a provision to which section 54 of the Property Law Act 1974 would apply. As it presently appears then, the obligation of the various persons named as "lender" in the schedule would be one which was owed jointly and severally, but that is not to say that there were, indeed, several loans. Rather it is to say that it is an obligation for which several persons were responsible and which, once it was performed, would give rise to a transaction of loan.

Again the mortgage is, in my view, one which results in a security for but one loan, rather than several loans. It seems to me that, taken to its ultimate conclusion, the respondent's argument would permit but one of the persons named as mortgagees to act without the concurrence of any other mortgagee to enforce the various default powers in the

event of some default referable to the suggested loan agreement between that person alone and the applicant companies. In other words, it would permit, for example, Ms Tagg to take steps to sell the mortgaged land to recover such amount as is owing on her advance of $7,500 whether the other mortgagees considered that to be in their interest or otherwise.

As I read the loan agreement and the mortgage, it seems to me that they evidence but one loan and a security for but one loan. It might be thought that it was desirable for the various parties on the lender's side of the transaction to have their respective shares in the loan and in the mortgage specified, as they were within these documents, so as to avoid any controversy between them as to their respective entitlements, but in my view had the intention been that there be several distinct loans and therefore debts, the transactions would have been quite differently recorded.

Now, in that respect the material shows that those on the lender's side of the transaction sought to have some further loan agreement prepared which would represent that there in truth were several loans. So the evidence shows in relation to each of these applications that the relevant respondent has put its name to another version of the loan agreement but one which differs from that signed by all of them and which I have described.

The affidavit in support of the statutory demand in each case purports to exhibit what is described as a loan agreement between the person who has made the statutory demand and the applicant companies. For example, in the case in which the respondent is Monsterbabe Industries Proprietary Limited, a director of that company has sworn that on or about 9 September 2003 (which is the date of the loan agreement referred to at the commencement of these reasons, which is that signed by all respondents) "The creditor loaned the debtor companies the sum of $10,000 under a loan agreement", and he further swore that "This loan agreement is exhibited hereto."

Attached to the affidavit is a form of loan agreement dated 9 September 2003 which is an alteration of a copy of the agreement signed by the applicants and by all respondents. It has been altered, at least in these respects: at the commencement of the agreement against the term "parties" has been inserted a reference to Monsterbabe Industries Pty Ltd and its address as the "lender".

In the definition of "advance" the amount of $265,000 has been crossed out and the figure of $10,000 has been inserted in handwriting and initialled. There is an alteration to the date for repayment which need not be further discussed. The various pages which provide for the signature of all of the respondents to these applications contains, as this version has been produced, only the signatures of the applicant companies and those on behalf of Monsterbabe Industries. No

change was made to the description in the schedule under "lenders".

The evident intent of this document as exhibited to the affidavit in support of the statutory demand - or accompanying the statutory demand - was to make it appear that there was a distinct agreement between the person who issued that demand, in this case Monsterbabe Industries, and the applicant companies. What I have said applies equally to each of these applications, because in each case a similar document was compiled which would make it appear that the person or entity issuing the statutory demand had made a distinct written agreement with the applicants.

Clearly, those documents do not bind the applicants. There was an argument advanced on behalf of the applicants that the manufacture of these loan agreements, as they appear in the affidavits accompanying the statutory demands, was such as to result in an alteration to the loan agreement which required the application of Picket's case, 1614 11 Co.Rep 26B. There was argument as to the extent of the operation of this rule in Australia, but it is not necessary to explore that question in this case.

The relevance of these versions of the loan agreements is that they starkly demonstrate the difference between the operation of the true loan agreement, as I see it, and the operation of that agreement according to the interpretation for which the various respondents now argue. In my view, as I have said,

the loan agreement actually made was one which provided for but one loan and one debt, albeit a debt to which the respective respondents had different entitlements and in respect of which they saw fit within the loan agreement and the mortgage itself to record those entitlements.

If, contrary to the view I have of the proper interpretation of this agreement and its related mortgage, there is some ambiguity as to the matter of whether there is one loan or several loans, it seems to me to be undesirable to attempt to resolve that in the present context, which is an application to set aside statutory demands. If there was some ambiguity about the document or documents, it is one for which it is likely that there would be some evidence, which is admissible according to the principles appearing from, for example, Codelfa Constructions, which would be relevant in the resolution of that ambiguity.

That would involve a need to explore facts which, as I have said, would be inappropriate in the present context.

It follows from my conclusion as to there being but one loan agreement, that the statutory demands in each of these applications should be set aside at least because it was not given by all of the creditors. It is no answer to that defect to say that in aggregate there were statutory demands given by all creditors.

There is at least one further defect in relation to demands which is one which appears, even if the respondents' argument that there were several loans, was to be accepted. Upon the premise that there were several loans it would be necessary for each individual lender to give his, her or its own statutory demand but one demand has been given by two of these lenders, who are Julie and Selwyn Tagg, and another demand has been given by two lenders, who are RJ and YT Woodgate.

So if it were clear that the transaction was one of several loans, as the respondents have argued, it would nevertheless follow that those statutory demands at least would have to be set aside.

In the circumstances then there will be an order in each of these applications to set aside the statutory demand. The remaining question is one of costs upon which I have heard already Mr Derrington who appeared for the respondents but I have not heard from you, Mr Wilkins.

...

HIS HONOUR: The remaining question is one of the costs of each of these applications. The starting point is, of course, that the application has been successful. Against that, the particular point upon which the applicants have succeeded is one which was not flagged prior to the making of the application.

It does not appear, however, that that would have served much purpose because the respondents did come here today to argue forcefully for the case that there were several loans. So, to have flagged earlier a problem for these demands from there being one loan is not likely to have made much of a difference. There is a considerable cost in having to apply to set aside some nine demands because a separate application, it is conceded, must be made in relation to each demand and the filing fees alone make that an expensive exercise when the nine applications are considered.

One matter which I think is relevant to costs is the fact that in each case the affidavit accompanying the statutory demand exhibited what was a falsity which was a reconstruction of the loan agreement. I do not mean to conclude now that the respondent in each case did not believe that the true loan agreement operated as one for several loans. It may be that the deponent for each affidavit believed that there were several loans and that the document which was exhibited to the affidavit was no different, in effect, from the true one. However, it does seem to me that the deponent must have known that this was not the agreement between the parties made on 9 September 2003. It was, as I have described, a reconstruction so as to have it appear that there was a distinct instrument between each creditor and, on the other hand, the applicant companies. In other words, that strongly indicates to my mind that the respondent's side of this argument anticipated the argument which I have upheld, which is that there was but one loan.

In all the circumstances, I see no reason why the ordinary rule of costs following the event should not be applied in this case. The order will be, in each matter, that the respondent or respondents to that application pay the applicants' costs of it to be assessed on a standard basis.
