SUPREME COURT OF QUEENSLAND

CITATION:	*Great Northern Developments Pty Ltd v South West Eco Developments Pty Ltd & Ors* [2020] QSC 172
PARTIES:	**GREAT NORTHERN DEVELOPMENTS PTY LTD ACN 094 805 286 (RECEIVER AND MANAGER APPOINTED)** (plaintiff) **v** **SOUTH WEST ECO DEVELOPMENTS PTY LTD ACN 125 672 764** (first defendant) and **QUANTUM ASSET MANAGEMENT PTY LTD ACN 092 833 743** (second defendant) and **MELANIE SAMANTHA GROHOVAZ** (third defendant)
FILE NOS:	BS 3645 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	5 June 2020
JUDGE:	Dalton J
ORDER:	**1. Leave to amend Claim.** **2. Otherwise dismiss the application.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND CONSOLIDATION OF PROCEEDINGS – SEPARATE DECISION OR DETERMINATION – GENERALLY – where there are two related proceedings with considerable overlap – where the plaintiff seeks a preliminary determination under r 483 of the UCPR in one proceeding only – where the plaintiff alternatively seeks summary judgment in one proceeding only – where there are factual questions which must be determined in both proceedings – whether final relief ought to be granted without disclosure

and a trial

COUNSEL: CP Jennings for the plaintiff
CA Johnstone for the defendants

SOLICITORS: Mills Oakley for the plaintiff
Bransgroves Lawyers for the defendants

[1] This is an application in which the plaintiff asks that questions be separately determined between it and the third defendant before the trial of the matter and in the alternative, seeks summary judgment against the third defendant on that same part of its claim which it would prefer to have determined separately before the trial. The plaintiff proposes that the separate questions for determination be decided after a limited hearing where the Court has the pleadings and the commercial documents and title searches, referred to in the pleadings.

[2] Non-controversially the plaintiff asks for leave to amend its claim. I grant that relief. I otherwise dismiss the application. I will now explain my reasons.

[3] Although this application is only made in this proceeding, there are two related proceedings in this Court and there is a considerable overlap as to the parties to them, and in the facts pleaded in each of them. I will now describe the two proceedings. I will call this proceeding the GND proceeding and the second proceeding the Dixon proceeding.

Proceeding 3645 of 2020 – the GND Proceeding

[4] GND sues South West Eco Developments Pty Ltd and Quantum Asset Management Pty Ltd together with a receiver they appointed, Ms Grohovaz. The companies are assignees of debt owed by GND.

[5] In 2005 GND bought land at Skull Road, White Rock for $1.1 million. In May 2016 it borrowed from Ingwersen & Lansdown Securities Ltd (I & LS) to develop the land. I & LS was the Responsible Entity of a fund which made money by lending monies secured by Real Property Mortgages. The loan agreement contained a number of unusual conditions in the lender's favour and many unusual fees and charges. It provided that while the borrower complied with the terms of the loan in every respect, interest would be charged at 9.5%, otherwise it would be charged at 18%.

[6] The loan agreement was for 12 months. It contained a condition to the effect that the subdivision was to be completed within four months. GND pleads that before it signed it told I & LS that the development would never be complete within four months, but was reassured that I & LS would not rely on this clause provided the interest payments were kept up.

[7] In August 2016 a mortgage was given over the land in support of the loan. It provided that the lender could appoint a receiver over all the charged assets. The receiver was to be GND's agent.

[8] By October 2017 the earthworks for the subdivision were complete. In November 2017 SP287210 was registered. It contained 48 lots.

[9] In February 2017 I & LS issued a notice of default because the term of the loan had expired the previous August. GND pleads that it was told interest would not be charged at the higher rate.

[10] On 6 June 2018 GND sold lots 27, 28 and 29 to purchasers named Dixon for $500,000. They paid a $50,000 deposit. On 13 June 2018 that deposit was paid to I & LS. The next day I & LS issued a second notice of default.

[11] GND pleads that on 13 July 2018 the loan agreement was varied as follows. GND was to pay $450,000 to I & LS by 7 August 2018. This was the amount owing under the Dixon contracts. I & LS would take no further action on any alleged default; I & LS would continue charging the low interest rate, and would release lots 27, 28 and 29 from the mortgage so that the sale to the Dixons could be completed.

[12] GND paid the $450,000 to I & LS on time. In May 2019 I & LS released its mortgage over lots 27, 28 and 29 and on 23 May 2019 this release was registered.

[13] Also on 23 May 2019 I & LS assigned the loan agreement and security to the first and second defendants. The Deed of Assignment recited that lots 7, 8 and 9 had been "purportedly sold" on or around 4 July 2018 and the Mortgage was released over those lots. A transfer to the first and second defendants dated 28 May 2019 was registered. It transferred the mortgage over all lots except lots 27, 28 and 29. This transfer was prepared by a firm of lawyers, Bransgroves. That firm acts for the defendants in this proceeding.

[14] In September 2019 Bransgroves, acting for the first and second defendants, asserted an amount owing under the loan agreement with which GND did not agree. In this proceeding GND claims that various provisions of the loan agreement were penalties. It claims that I & LS, and so now its assignees, are estopped from charging the fees and interest they purport to charge by reason of the representations made and the variation of the loan agreement. The relief sought is declarations that various bases for charging GND under the loan agreement are invalid, and that an account be made by it which conforms to those declarations. As well, GND says the conduct is unconscionable within the statutory definitions.

[15] At this point it is convenient to explain what is said in the Dixon proceeding, although it will be necessary to return to the GND proceeding.

BS 5370 of 2020 – the Dixon Proceeding

[16] In this proceeding the Dixons are first and second plaintiffs and GND is the third plaintiff. The defendants are Tailored Developments Pty Ltd, Ms Grohovaz, and Bransgroves. The same solicitors act for the three plaintiffs as act for the plaintiff in the GND Proceeding.

[17] The Dixons and GND plead that GND owned 48 lots on SP287210 and sold lots 27, 28 and 29 to the Dixons for $500,000 on 6 June 2018. It is pleaded that GND's mortgagee, I & LS, agreed to release its mortgage over lots 27, 28 and 29 in return

for being paid the full sale price received from the Dixons. It is pleaded that I & LS received the full sale price payable by the Dixons and provided a release of mortgage which was registered on 28 August 2018.

[18] It is pleaded that Bransgroves had the contracts for sale of lots 27, 28 and 29 to the Dixons at least by 14 March 2019. Bransgroves acted for I & LS and wrote to the Dixons on 14 March 2019 saying that I & LS had "re-lodged its mortgage over the lots". Solicitors acting for GND demanded that the new mortgage be released and it was, on 23 May 2019.

[19] The assignment from I & LS to South West Eco and Quantum is pleaded to have taken place on the same day, 23 May 2019. The Deed of Assignment recites the facts that lots 27, 28 and 29 had been "purportedly sold" and that I & LS's mortgage had been released over those lots, and that then a second mortgage had been registered. It does not recite that the second mortgage had been released.

[20] It is alleged that Bransgroves acted for I & LS and South West Eco and Quantum with respect to the assignment of the mortgage. The schedule to it did not include lots 27, 28 and 29, although it included the other 45 lots on SP287210.

[21] It is pleaded that on 18 July 2019 South West Eco and Quantum appointed Ms Grohovaz receiver and manager of lots 1-26 and 30-48, but not lots 27, 28 and 29.

[22] It is pleaded that by a contract dated 28 February 2020 Ms Grohovaz purported to cause GND to sell lots 27, 28 and 29 to Tailored Developments. On the same day South West Eco and Quantum as mortgagees exercising power of sale entered into a contract to sell lots 1-26 and lots 30-48 to Tailored Developments. It was a special condition of both contracts that Tailored Developments was acquiring "all of the property to complete the subdivision. As such, the purchaser requires to acquire the whole Property in one line" and that the contracts were conditional upon the "exchange of and simultaneous completion" of each other.

[23] The contracts settled and the transfers were registered. Bransgroves acted for Ms Grohovaz as vendor of lots 27, 28 and 29 and South West Eco and Quantum as vendors of the rest of the land. They also acted for Tailored Developments, the purchaser.

[24] The price of lots 27, 28 and 29 under the receiver's contract was $82,000 in total. The lots were allegedly sold without any form of advertising, auction, or the use of a real estate agent.

[25] The plaintiffs plead that Ms Grohovaz was not appointed receiver over lots 27, 28 and 29 because they were not the subject of the mortgage, and because of the terms of her appointment. They plead that she owed GND duties to exercise her powers with a reasonable degree of care and diligence, for proper purposes, in good faith, and in the best interests of GND. Further, that she owed GND a fiduciary duty not to act contrary to its interests or dispose of or diminish its assets to its detriment. It is said she breached all these duties by purporting to sell lots 27, 28 and 29 when she knew that they were held by GND on trust for the Dixons and knew that she was not appointed receiver over them.

[26] It is pleaded that Bransgroves knowingly assisted Ms Grohovaz in her breach of fiduciary duty and breach of trust. Because Bransgroves acted for all the parties to the sales to Tailored Developments, it is pleaded that Tailored Developments had actual or constructive notice of Ms Grohovaz's breaches.

[27] The plaintiffs claim a declaration that Tailored Developments holds lots 27, 28 and 29 on constructive trust for them, or alternatively is liable to compensate them in an amount of $500,000. Further that Ms Grohovaz and Bransgroves are liable to pay compensation to GND in the amount of $500,000. The plaintiffs also claim in the alternative that the register be rectified, although I note that the Registrar of Titles is not a party.

BS 3645 of 2020 – GND Proceeding, continued

[28] GND also seeks relief against Ms Grohovaz in this proceeding. It says that Ms Grohovaz was not appointed as receiver over lots 27, 28 and 29. Furthermore, that she had no authority to sell lots 27, 28 and 29, and that she knew or ought to have known that.

[29] It pleads the terms of her appointment as receiver: that the security was defined to include 45 lots of land with the title references for lots 27, 28 and 29 omitted from the list of lots on SP287210. It is pleaded that on 19 July 2019 Ms Grohovaz lodged a Form 505 appointment of administrator or controller with ASIC. It too provided a schedule of property which omitted lots 27, 28 and 29. However, the pleading goes on to say, on 29 July 2019 Ms Grohovaz caused a second Form 505 to be lodged with a second schedule of property which said that she was appointed over "all the assets and undertakings of the company". It is pleaded that Ms Grohovaz thereby erroneously or falsely purported to be appointed over lots 27, 28 and 29.

[30] It is pleaded that South West Eco and Quantum did not engage a real estate agent, advertise, consult with GND, or obtain any valuation before they sold the 45 lots at Skull Road and thereby achieved a purchase price $900,000 less than they ought to have done. It is pleaded that Ms Grohovaz sold lots 27, 28 and 29 for $82,000 when their value was three times that amount. Further that she too failed to engage real estate agents, advertise, or obtain valuations. Damages are sought for sale at an undervalue.

[31] It is pleaded that Ms Grohovaz owed the duties to take care, and act in the best interest of GND for a proper purpose and in good faith. It is alleged that she breached those duties in entering into the contract for the sale of lots 27, 28 and 29, when she knew or ought reasonably to have known of the previous sale of those lots; the release of mortgage over those lots, and that she had not been appointed receiver over those lots. It is said that in selling lots 27, 28 and 29 Ms Grohovaz rendered GND liable to suit by the Dixons; to repay them $457,000, and perhaps pay them damages together with costs.

[32] It is pleaded that the sale of those lots was misconduct in connection with her functions as a receiver, within the meaning of s 434A of the *Corporations Act.* Part of the relief sought is that Ms Grohovaz cease to act as receiver and manager of GND's property. An enquiry into her performance pursuant to s 43 of the *Corporations Act* is sought, including by cross-examining her and investigating her records. Compensation against her is sought pursuant to the *Corporations Act.*

[33] By way of defence in the GND proceeding, all three defendants say that they did engage a real estate agent and did advertise the properties for sale. They say that the properties were worth no more than they sold for. They raise factual disputes as to the matters relied upon by way of estoppel and unconscionable conduct and legal disputes as to the effect of clauses said to be penal.

[34] The defendants plead that GND had no entitlement to give title to the Dixons except subject to its mortgage because it did not agree to release its mortgage in relation to these lots in return for payment of $450,000. I must say that on the pleadings this contention looks unlikely.

[35] So far as the matter of Ms Grohovaz's appointment as receiver is concerned, all three defendants plead that as well as the real property mortgage, GND provided to I & LS a Deed of Loan and General Security Deed which granted a charge over all GND's present and future interests in real property. The General Security Deed was not listed as one of the securities assigned to South West Eco and Quantum. The Deed of Loan was and the defendants say that this charge was registered on the Personal Property Securities Register. Ms Grohovaz was appointed under this charge, not the mortgage. The terms of all three securities are found in the same document, ie., the registered memorandum of mortgage. There is a contest between the parties as to whether or not the release of the mortgage released the charge over lots 27, 28 and 29 as well. Both parties rely upon *Adams v In Roma Pty Ltd.*[1]

[36] Even if the idea of a separate and enduring charge were to solve the difficulties as to appointment, it is difficult to see how it is an answer to the receiver having sold lots 27, 28 and 29 to Tailored Developments if GND had only a bare legal title to those lots, subject to the obligation to transfer them to the Dixons. No positive case is pleaded by Ms Grohovaz as to this point, although the pleading puts allegations about her knowledge in issue. There also seems to be a considerable difficulty in the way of both Ms Grohovaz and South West and Quantum as to how it was possible for them to have accepted payment of $500,000 (almost the purchase price paid by the Dixons) in return for a release of mortgage over lots 27, 28 and 29 and then accept the amount of a second purchase price ($82,000) for the same land.

[37] While these issues look relatively straightforward on the pleadings, I accept that evidence at a trial might render them less so.

[38] The defendants also say that the plaintiff had no entitlement to sell lots 27, 28 and 29 because, whatever the situation with the real property mortgage, they remained subject to the charge in the loan deed and general security document.

[39] South West Eco and Quantum join the directors of GND as parties by counterclaim, and allege that they are liable according to a guarantee which was assigned to them by I & LS.

Analysis

[40] The part of this proceeding which GND wishes either to have determined by separate hearing ahead of trial, or determined on a summary judgment, are the issues raised by the underlined part of paragraph [32] above.

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1 [2012] QSC 240, [117]-[130].

[41] There are factual questions which must be determined in order to decide if there has been misconduct, and if there has been, whether it is of such a nature as to have Ms Grohovaz removed. These include: whether or not Ms Grohovaz was appointed receiver over lots 27, 28 and 29; whether or not she knew, or ought to have known, of the earlier sale to the Dixons; if so, what exactly she knew, or ought to have known, about that earlier sale; whether or not GND had agreed with I & LS that upon payment of $450,000 the real property mortgage, or alternatively all its security interest in lots 27, 28 and 29 was to be released by I & LS, to allow completion of the sale to the Dixons, and if that agreement was made, what the defendants in this proceeding knew of it.

[42] While the first of these questions may be largely one of construing documents and the application of legal principles, and while it seems at this stage of the proceeding that GND has a strong prima facie case in relation to the second question, the other questions are not suitable to be answered in the type of hearing GND proposes. I am not confident that GND's case is so pellucidly clear, or that Ms Grohovaz's position is so unarguable, that final relief, whether by way of answering separate questions pursuant to r 483, or summary judgment, ought to be granted without disclosure and a trial.

[43] Additionally, to determine these questions would not resolve all the claims GND makes against Ms Grohovaz. It is undesirable that some claims related to the same conduct remain to be determined at trial in this proceeding.

[44] Further, claims against South West Eco and Quantum remain to be determined at trial and are closely related to the claims which I am asked to determine separately or summarily.

[45] Further still, the answers to the questions I am asked to determine early are closely connected to, or in some cases the same as, issues raised in the Dixon proceeding. There are parties to that proceeding who are not before me on this application, and would not be bound by any early determination I might make.

[46] In short, it would not be convenient or just to determine separate questions pursuant to r 483, or to give summary judgment for part of a claim, in circumstances where the issues to be determined are part of a wider, complicated set of facts which are spread between two proceedings in this Court. It is undesirable that some of the factual questions be determined early in one proceeding when there will have to be determinations of fact in relation to the same behaviour of the third defendant in the other proceeding. As well, there are similar or connected allegations concerning the third defendant to be resolved after trials in both proceedings.

[47] Lastly, the third defendant is a chartered accountant and liquidator. The allegations against her involve a serious neglect of her professional duties. It would be undesirable to determine that type of allegation without a hearing in this proceeding.

[48] GND put no material before me to show that having Ms Grohovaz remain as receiver of the plaintiff until trial will cause difficulties. If that were to be the case, there is interlocutory relief available to GND: it could apply for an injunction to have her removed as receiver and manager. While factual matters the subject of the proposed separate questions or summary judgment would feature in any such

application for an injunction, no factual findings would be made; the Court would limit its enquiries as to whether or not there was a serious question to be tried.

[49] It seems likely that both proceedings 3645 and 5370 of 2020 ought to be heard together. Further, having regard to the number of issues and the number of parties involved in the two proceedings, and the fact that the amount at issue is barely over the jurisdictional limit of this Court, it seems to me that there ought to be some arrangements for ongoing supervision and management of this litigation. I will hear the parties as to this and as to costs.