[2002] QSC 039

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 786 of 2002

RYCORP PROPERTIES PTY LTD
(ACN 011 016 925) Applicant

and

COLONIAL PORTFOLIO SERVICES LIMITED
(ACN 066 649 241) First Respondent

and

GRANT DENE SPARKS and RAYMOND WILLIAM RICHARDS AS RECEIVERS AND MANAGERS OF RYCORP PROPERTIES PTY LTD
(ACN 011 016 925)
(RECEIVERS AND MANAGERS APPOINTED) Second Respondent

BRISBANE

..DATE 01/02/2002

JUDGMENT

HIS HONOUR: I have before me an application for an interlocutory injunction to restrain receivers and managers from completing a contract for the sale of mortgaged property. The contract is capable of adoption by the mortgagee and it is conceded by the respondents that in the event that an injunction goes against the receivers and managers it would be proper for it to go against the mortgagee also.

The application arises out of a transaction entered into in 1998 when the mortgagee respondent, Colonial Portfolio Services Limited, lent the applicant $2.55 million. The loan was secured by a mortgage over commercial premises and was for a period of three years commencing 1 July 1998. Interest was payable monthly. The mortgagee also lent a sum of $790,000 to a related company of the applicant. That loan was secured by a mortgage over other land. That fact is relevant only in relation to a repayment proposal propounded by the applicant.

The applicant went into default under the loan by failing to make a payment of interest on 1 February 2000. In consequence, the mortgagee issued a notice of exercise of power of sale on 5 April 2000 and on 23 January 2001 appointed receivers and managers.

About a month later, following negotiations between the parties, a further deed was entered into which took into account the default which had occurred. I assume, from the

way the proceedings have been conducted, that had there been no further breach previous breaches would have been waived or subsumed into this further deed. It required that the applicant pay the respondent mortgagee $100,000 forthwith. It provided for termination of the receivership and required the applicant to re-finance the whole debt owing to the mortgagee by the end of May 2001. That period was subsequently extended to the end of June. Notwithstanding the provision for re-financing and the extension of time the applicant made default. It did not re-finance within the relevant period and did not pay interest.

Not surprisingly, the mortgagee again appointed receivers and managers. That occurred on 11 July 2001. The receivers decided to sell one of the secured properties. They undertook marketing programs using three real estate agents. They commissioned valuers to value the secured property to be sold. Those valuers were named Chestertons and the valuation was received by them on 1 October 2001.

The sale was by calling for tenders for the property and after considerable interest was expressed four tenders were received. The sale process had taken place over some six weeks. Tenders closed on 21 November 2001. Following closure the receivers and managers obtained comments on the tenders and entered into negotiations with the tenderers. In the meantime, the applicant was attempting to obtain further finance to re-finance the whole transaction and to pay out the respondent mortgagee completely.

On 30 November an offer was received of finance from what I will call the primary re-financier, a company known as Perpetual Investments. On 13 December an offer of finance was received from a company which I shall call Mercator to finance the balance of the amount required to pay out the mortgagee. Both offers were subject to a considerable number of conditions though many of those conditions were of a formal kind.

They were immediately referred to the mortgagee. They did not apparently satisfy the mortgagee and having had their negotiations with the tenderers, the receivers decided to accept the highest tenderer's increased offer of $2.605 million.

That took place on 20 December. Precisely why they were not satisfied, does not I think appear in the material, though it might be inferred that having had proposals for refinance fall over in the past and observing the conditions in the offer, they preferred the "bird in the hand".

They were, however, cautious enough to include in the subsequent contract of sale that they entered into with the highest tenderer, a clause which permitted them in the event that an injunction was granted, to extend the time for settlement by up to 90 days. The time for settlement was set for 4 February 2002.

There have been a number of valuations prepared of the subject property. They were all prepared for the purposes of financiers, that is for security purposes. They purport to provide market valuation and as is usual in these things, are to be relied upon only by the person for whom they were prepared.

They are before me in a manner which is less than compliant with the Rules of the Court, relating to the exhibition of hearsay evidence. Nonetheless, despite that, it is not complained that the respondents would wish to cross-examine the valuers.

The evidence of valuation comes from both sides and there is a considerable difference in the amounts of the valuations. The lowest of the valuations was approximately $2.7 million, prepared by Chestertons. That was a revised valuation, apparently after the tenders came in, prepared for the mortgagee and I infer in order to provide protection for the mortgagee, should it choose to exercise the power of sale. It is not far above the sale price.

Non-conformity with the Rules is sometimes a matter of some concern, because particularly if the substance of the evidence is challenged (as it is here) it can result in unreliable material being placed before the Court.

I do not think that is the position at the present time and while of course there is conflict in the valuations, I think

it is appropriate to allow the applicant leave to read and file the affidavit of Colin Gregory Ryan, which provides the evidence of two of the valuations relied upon and objected to on the part of the respondents.

I propose to allow that leave and in the exercise of my discretion, to dispense with the strict requirements of the Rules, to the extent necessary to allow the affidavit to be read. I therefore grant the applicant leave to read and file the affidavit of Colin Gregory Ryan and dispense with the rules relating to affidavits, to the extent necessary to allow that affidavit to be read.

The applicant submits that it demonstrates a good arguable case by reference to the valuations in comparison to the price which the land is being sold for. It submits that the requirements of section 420A of the Corporations Law, are at least arguably satisfied by the inference which ought to be drawn from that discrepancy. That section provides in subsection 1:

> "In exercising a power of sale in respect of property of a corporation, a controller-----" (I interpolate which includes a receiver and manager) "-----must take all reasonable care to sell the property for
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> (a) if when it is sold it has a market value not less than that market value or;

(b) otherwise the best price which is reasonably obtainable, having regard to the circumstances existing when the property is sold."

In the present case it is paragraph (a) which is relied upon. It must be remembered that the test to be applied in circumstances such as the present requires the existence of a serious question to be tried as it is sometimes put or a good arguable case. The production of a variety of valuations, particularly when the one valuer changes his valuation, is some indication that different views may be taken of a key point in the evidence. However, it does not seem to me that I am bound to assume that the lowest valuation will necessarily be the one ultimately accepted at trial. The fact that there are valuations which are substantially higher is I think some evidence of the fact that the price which has been achieved is seriously arguably a long way below the market value of the property.

The fact that a discrepancy exists between the market value or between what is arguably the market value and the sale price does not demonstrate by itself a failure to comply with the section. What the section requires is that the controller take all reasonable care to sell the property for the market value. The applicant must demonstrate a good arguable case or a serious question to be tried on that issue.

The steps which the respondent took to effect the sale have been set out with some particularity although obviously not subjected to the degree of scrutiny that would occur at trial. No direct criticism is made of those steps but rather the applicant submits that where there are clear offers to re-finance the inference should simply be drawn that whatever those steps might look like on their face the steps could not be regarded as all reasonable care because of the discrepancy.

That is a question on which my mind has oscillated during the course of the hearing. It must be said that the evidence on the part of the applicant on this issue is not strong. In the end it seems to me that if it is fairly to be said that there is approved finance available within three to four weeks and that this was known prior to the making of the contract that that fact bears not only upon the balance of convenience but also is relevant to whether the receivers should have examined more closely the appropriateness of the steps that they had taken. For the same reason it seems to me that it calls upon the Court to examine more closely than can be done in the course of the present proceedings the degree of care which has been exercised.

It is noteworthy that the Act says must take all reasonable care. I have not heard argument on whether that is different from reasonable care but if the word "all" does no more than simply give emphasis then it does operate in a way

which provides some assistance to the applicant. By a narrow margin I am satisfied that there is a serious question to be tried.

As regards the balance of convenience, subject to one possible question, I think there is quite a strong case for the issue of an injunction. The delay in settlement which will be imposed on the respondents if the injunction is granted will be no more than four weeks if that time is allowed. For that period of time they have the power to extend the contract without any penalty and the price will not change.

The evidence of finance from arm's length financiers is, despite the fact that there remain some conditions outstanding, quite convincing. The outstanding conditions are largely of a formal nature and seem likely to be met.

Indeed, it seems implicit in the affidavits prepared by representatives of the finance companies that that is the view that they take.

Another practical advantage will be that with the whole of the indebtedness paid out, if that occurs, the litigation between the parties may come to an end without the incurring of further costs.

I was concerned about the absence of any value in the undertaking as to damages which must be given in this case,

but because of the special condition in the contract it seems to me that there is very little likelihood that any damage can accrue to the respondents in the four week period.

One possible exception to that arises out of the fact that they will be held out of the price for the four weeks, that is to say they lose the interest on the value of the price for that period. That figure comes to about $12,000. On the other hand, they will gain the rents and profits from the property for the same period which they would not gain if the transaction were settled on Monday. When I say the rents and profits I mean the net rents and profits after outlays and so forth incurred for the additional four weeks.

If there is any evidence that the net rents and profits are significantly less than $12,000 I would be inclined to impose a condition that that amount be paid by the applicant to the respondent on Monday to stand toward the payout of the mortgage in the event that it does get paid out, but otherwise to stand as compensation for the additional four weeks created by the injunction.

One other matter which has caused me some concern has been the question of delay. However, when it is appreciated that the contract was entered into on the 20th of December and that the present proceedings were commenced on the 22nd of January I have come to the conclusion that delay in

commencing the proceedings is not a factor of major importance. This has occurred in the context of continual negotiations between the parties and has not, I think, occasioned any prejudice.

Subject to the question of the net payment to be made, if any, and to the provision of the usual undertaking as to damages by the applicant and its directors I would be prepared to grant the injunction.

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HIS HONOUR: Costs must be reserved.
