

SUPREME COURT OF QUEENSLAND

CITATION: *Horton Investments P/L v Lex Nominees P/L (in liq) & Ors*
[2003] QCA 233

PARTIES: **HORTON INVESTMENTS PTY LIMITED**
ACN 002 705 446
(plaintiff/appellant)
v
LEX NOMINEES PTY LTD (In Liquidation)
ACN 073 985 903
(first defendant)
RAJENDRA KHATRI & MICHAEL PELDAN
(second defendants/respondents)

FILE NO: Appeal No 10476 of 2002
SC No 5582 of 2002

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 27 May 2003

JUDGES: Jerrard JA, White and Wilson JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE –
QUEENSLAND – PRACTICE UNDER RULES OF COURT
– SUMMARY JUDGMENT – where appellant invested
\$100,000 secured by second mortgage over property pursuant
to investment scheme – where investment scheme went into
liquidation – where appellant claimed priority over first
mortgagee – where appellant sought declaration that a
priority agreement existed – where second defendant’s
application for summary judgment was granted – whether
applications primary judge erred in law in granting
application for summary judgment

Uniform Civil Procedure Rules 1999 (Qld), r 293

Bernstrom v National Australia Bank Limited [2002] QCA

231, [2003] 1 Qd R 469, cited
*Queensland University of Technology v Project
 Constructions (Aust) Pty Ltd (In Liq) & Anor* [2002] QCA
 224, [2003] 1 Qd R 259, cited

COUNSEL: T C Somers for the appellant
 A J Moon for the respondents

SOLICITORS: McKays for the appellant
 MacDonnells for the respondents

- [1] **JERRARD JA:** I have read the reasons for judgment of Wilson J and the order she proposes, and respectfully agree with each. I observe that the declaration the appellant sought in paragraph 31(i)(b) of its statement of claim, which reflected the conduct and correspondence of the parties¹, assumed and was dependent upon a capacity in the appellant as second mortgagee to prevent a sale of each strata titled unit occurring without the appellant first executing a partial release of its second mortgage. That assumption necessarily reflected a sale by the mortgagor. The power of sale the first mortgagee could exercise pursuant to the provisions of Part 7 of the *Property Law Act 1974* (Qld) would not have required the appellant's prior consent or release of its second mortgage.
- [2] **WHITE J:** I have read the reasons for judgment of Wilson J and agree with her Honour that the primary judge was correct when he concluded that the allegations in paragraphs 11 and 13 of the amended statement of claim verified by the affidavit evidence could not support the appellant's contention that there was an agreement that it would be accorded priority as second mortgagee over the first mortgagee on the sale of the property, the subject of the securities, by the first mortgagee exercising its power of sale.
- [3] I agree that the appeal should be dismissed with costs.
- [4] **WILSON J:** This is an appeal against an order giving summary judgment for the respondents (who were the second defendants) against the appellant (which was the plaintiff) pursuant to r 293 of the *Uniform Civil Procedure Rules*.
- [5] Triscott & Associates, a firm of solicitors, conducted a managed investment scheme. Investors' funds were advanced to borrowers against first registered mortgages given by the borrowers to Lex Nominees Pty Ltd (the first defendant in this proceeding). The appellant was an investor in the scheme.
- [6] One of the properties over which the first defendant held such a first mortgage was at Shailer Park. The borrower, Strata Builders Pty Ltd, was in arrears in the payment of interest, and in March 1999, in response to an approach by Mr Triscott, the appellant lent that company \$100,000 secured by a second mortgage over the property. The loan agreement provided for interest at the rate of 29% pa reducible to 25% pa for prompt payment.
- [7] Strata Builders Pty Ltd was developing a 12 unit strata title building on the site.
- [8] The appellant pleaded -

¹ Particularly the letters at AR 25, 29, 31, 33, 35 and 37

- “11. Prior to entering into the second mortgage loan as referred to in paragraph 9 hereof, the plaintiff was induced to enter into such second mortgage loan by the following representations made by Triscott to Horton.

Particulars

- (i) by the provision from Triscott to Horton of a document entitled Mortgage Investment Synopsis dated 24 February 1999;
 - (ii) by a conversation between Triscott and Horton by telephone in late February or early March 1999 to the following effect:
 - (a) Horton expressed concern to Triscott that the plaintiff would be at risk as a second mortgagee through the sale of each individual units [sic] which could result in there being nothing left to support the second mortgage;
 - (b) in response to this concern, Mr Triscott orally informed Horton that the plaintiff would be entitled to an amount from the proceeds of the sale of each of the twelve individual units, and that such amount would be equal to one twelfth of the principal sum of the second mortgage loan;
12. In June 1999, Mr Triscott sought the consent of the plaintiff, as second mortgagee to the strata titling of the said property.
13. The plaintiff agreed to grant such consent on the basis of further oral representations made by Triscott to Horton in June 1999 by telephone as follows:
- (i) Triscott repeated his assurances to Horton that the plaintiff would be paid proportionately from the sale of each individual unit in accordance with his earlier representations;
 - (ii) Triscott informed Horton that he would prepare the necessary Deed of Priority to be executed by the first mortgagee Lex Nominees and the plaintiff”

[9] Between September 1999 and July 2000 four of the units were sold, and in each case in exchange for a partial release of the second mortgage the appellant was paid \$8,333.33 from the sale proceeds.

[10] No deed of priority was ever executed. The first defendant has gone into liquidation. The respondents, who are the liquidators of the investment scheme pursuant to

which a first mortgage was given to the first defendant, have denied the appellant's claim to priority.

[11] By its Statement of Claim, the appellant sought –

“31. [...]

- (i) A declaration that there exists an agreement (“a Priority Agreement”) made between the first defendant and the plaintiff in or about the month of March 1999 on the following terms:
 - (a) that the plaintiff, as mortgagee in respect of Mortgage number 703233374 (“the Horton mortgage”) holds priority over the first defendant, as mortgagee in respect of its registered mortgage number 702557678 (“the Lex Mortgage”) over the property described as Lots 1 to 12 on SP 117778 County of Stanley Parish of McKenzie situated at 44 Bryants Road Shailer Park Queensland registered in the name of Strata Builders Pty Ltd (ACN 071 491 800);
 - (b) that the plaintiff is entitled to an amount equal to one twelfth of the principal amount of its loan (\$100,000.00) to Strata Builders Pty Ltd upon executing a partial release of the Horton mortgage for each of the twelve lots, the subject of the security.
- (ii) A declaration that the first defendant and the second defendants are estopped from denying the existence and validity of the said priority agreement.
- (iii) An order for specific performance by the first defendant and the second defendants of the said priority agreement as follows:
 - (a) by payment from the first defendant and/or the second defendant to the plaintiff of the sum of \$41,666.65 being monies held by the second defendant in respect of the concluded sales of Lots 1, 5, 6, 7 and 11;
 - (b) the payment by the first defendant and/or the second defendant to the plaintiff of an amount of \$8,333.33 in respect of each of the sales yet to be made in respect of each of Lots 2, 3 and 4.
- (iv) Alternatively, \$66,666.68 damages for breach of contract.

(v) Interest on such damages.

(vi) Costs.”

[12] The appellant contends that there was an oral agreement between Mr Triscott on behalf of the first defendant and Mr Horton on its behalf that it should have priority not only on a sale by the mortgagor (Strata Builders Pty Ltd) but also on a sale by the first mortgagee (the first defendant) in the exercise of its power of sale. It acknowledges that such an agreement needed to be in writing, but relies on the doctrine of part performance and alternatively on promissory estoppel.

[13] In order to succeed on an application for summary judgment a defendant must persuade the Court that -

- “(a) the plaintiff has no real prospect of succeeding on all or part of [its] claim; and
- (b) that there is no need for a trial of the claim or the part of the claim.”

See *UCPR r 293; Bernstrom v National Australia Bank Limited* [2002] QCA 231, CA No 9031 of 2001; *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liqn)* [2002] QCA 224, CA No 7943 of 2001.

[14] The primary judge concluded that what was discussed between the representatives of the appellant and the first defendant at the times referred in paragraphs 11 and 13 of the Statement of Claim was the question of the appellant’s rights upon sales by the mortgagor, and that it was not then in the contemplation of the parties that priority would be accorded to the appellant (the second mortgagee) upon the sale of any of the property the subject of the securities by the first mortgagee in exercising its power of sale.

[15] On appeal counsel for the appellant submitted that it is common commercial practice for mortgagees to enter into deeds of priority and that such agreements relate not only to the mortgagee’s respective rights upon sale by the mortgagors but also to their rights upon mortgage sales. He submitted -

“It is axiomatic that a priority agreement has the dual effect as referred to above (i.e. sale by mortgagor/sale by mortgagee) - otherwise a priority agreement would be ineffectual in protecting the interests of a second mortgagee.”

[16] It may well be common for priority agreements to have this dual effect - but whether a particular agreement does so can only be determined by an examination of its terms. In the present case an oral agreement is relied on, and the evidence of its terms is to be found in the following passages in affidavits of Mr Horton –

“9. At that time of entering into the second mortgage loan with Mr Triscott orally informed me that the applicant would be entitled to a proportion of the proceeds from the sale of each of the twelve individual units.

10. On 24 June 1999 a survey plan was lodged at the Department of Natural Resources to create twelve individual strata titled units in relation to the property being secured.”

(Affidavit sworn 18 June 2002)

- “3. I refer to paragraphs 9 and 10 of my affidavit dated 18 June 2002 in which I stated that at the time of agreeing to enter into the second mortgage Mr Triscott told me that the applicant would be paid proportionately from the proceeds of the sale of each of the individual units. That conversation took place in late February or early March 1999 after Mr Triscott had sent me a copy of a mortgage investment synopsis which is exhibit “DJH1” to this affidavit. That document sets out that it was the intention to strata title the property and to sell each of the 12 units separately. I had told Mr Triscott that I was concerned in this context that the applicant would be at risk as a second mortgagee of the whole property being sold down through the sale of each individual unit which could result in there being nothing left to support the second mortgage. It was in this context that Mr Triscott made the promise that I referred to in my previous affidavit.
4. Subsequently, when in June 1999 Mr Triscott, approached me for the Applicant’s consent, as second mortgagee to the strata titling of the of the property, I did so on the basis of Mr Triscott’s repeated assurance that the applicant would be paid proportionately from the sale of each individual unit in accordance with his earlier promise to me. In that same conversation, Mr Triscott told me he would prepare the necessary Deed of Priority for the applicant to execute.”

(Affidavit sworn 5 August 2002).

- [17] The allegations in paragraphs 11 and 13 of the Statement of Claim are consistent with this evidence.
- [18] The facts alleged in the Statement of Claim, even if proved, would not support a declaration in the wide terms sought in paragraph 31(i)(a) of that pleading. Moreover, the evidence would not support such a declaration. The primary judge was correct in his conclusion as to the terms of the priority agreement discussed.
- [19] In the circumstances it is not necessary to consider whether the appellant might have been able to fulfil all of the requirements of the doctrine of part performance or promissory estoppel.
- [20] The appellant had no real prospect of succeeding on the claim, and the primary judge was correct in ordering judgment for the respondents.
- [21] I would dismiss the appeal with costs.