SUPREME COURT OF QUEENSLAND

CITATION:	*Marminta P/L v French* [2003] QCA 577
PARTIES:	**MARMINTA PTY LTD** ACN 060 701 626 (plaintiff/appellant/cross-respondent) **v** **RUSTY FRENCH** (defendant/respondent/cross-appellant)
FILE NO/S:	Appeal No 11719 of 2002 SC No 187 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	Judgment delivered 5 December 2003 Further Order delivered 24 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2003; 19 December 2003
JUDGES:	Williams and Jerrard JJA and Philippides J Judgment of the Court
FURTHER ORDERS:	**1. All applications for variation of the orders made on 5 December 2003 are dismissed** **2. Each party is to bear its own costs of the applications heard on 19 December 2003**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNJUST ENRICHMENT – where respondent paid land tax and rates on land as mortgagee after decision of learned trial judge and before hearing of appeal – where appeal Court ordered specific performance of agreement for appellant to purchase mortgages from respondent – whether respondent entitled to orders that appellant pay it a sum equal to the amount of taxes and rates
COUNSEL:	J F Curran for the appellant/cross-respondent A J Morris QC for the respondent/cross-appellant
SOLICITORS:	Robert Harris & Co for the appellant/cross-respondent Hopgood Ganim for the respondent/cross-appellant

[1] **THE COURT:** On 19 December 2003 this court heard oral argument in support of the written submissions as to the form of the orders and as to costs, presented in accordance with leave granted by Order 3(c) of the orders made on 5 December 2003. In essence the respondent contended that Order 3(b) of those orders should

be amended to include orders that the appellant also pay it a sum equal to the total of land tax of $123,786.13 paid by him in respect of the mortgaged land on 1 August 2003, and the $21,734.52 paid for rates due and owing on 22 June 2001, and thus after the agreement made January 2000. The respondent contended it should also have an order for the payment of interest on those amounts from the date of payment.

[2] The land tax paid was paid after the hearing and the decision by the trial judge and before the hearing of the appeal. The respondent sought leave on its instant applications to file and read an affidavit deposing to the circumstances in which that land tax was paid, namely that the Office of State Revenue was demanding payment of that amount by it as mortgagee, presumably pursuant to the provisions of s 24 of the *Land Tax Act* 1915. The effect of that section is that where the Commissioner so demands a mortgagee pay land tax, the tax paid is added to the principal debt owing to that mortgagee.

[3] Mr Morris QC, appearing for the respondent, readily conceded that the respondent had not asked on the hearing of the appeal for orders for payment of that land tax paid, whereas it could have; and that no application was made then to place evidence of that payment before this court. Nor had any claim against the appellant plaintiff in respect of that land tax so paid been sought to be raised by way of any amended ground of appeal by the respondent. Nevertheless, Mr Morris QC submitted, the mortgaged debt which would be assigned to Marminta by the order for specific performance made 5 December 2003 would be a debt increased by the amount of that land tax, (and of the claimed rates), and the plaintiff would have assigned to it rights as creditor in respect of that larger sum owing, and when the land against which that sum was secured was correspondingly cleared of those same liabilities. The submission made was that since this court was the first to order specific performance the court was obliged to fashion orders which were equitable, and that was all the respondent was asking. To do otherwise would give the appellant a windfall benefit, and more that it had contracted to obtain for $950,000.00; and it would be unjustly enriched at the respondent's expense.

[4] The same submission was made about the identified sum paid for rates after January 2000, and the date for payment of which had been established by evidence. The submission seeking orders recouping payment of rates was not pressed in respect of the $127,154.11 paid for rates in 1999, nor the further amount paid by December 2002 and in respect of which the fact and date of payment had not been established by evidence, although informed to the court on the hearing of the appeal.

[5] The submission made by Mr Morris QC was well presented and rested persuasively on matters of basic principle applied to these particular facts. For the appellant plaintiff, Mr Curran submitted that the respondent's applications were made far too late. He submitted that the respondent had plainly elected not to raise the land tax payment on the hearing of the appeal, and the appellant had presented draft orders for the court, on the assumption that the January agreement was upheld by the court, in which it had consented to orders that interest be paid at the rate of 8% until the date on which it ultimately paid the $900,000.00 to the respondent. Mr Curran submitted that if the court allowed the respondent to raise now the issue of land tax paid and rates paid post January 2000, then the respondent would want to re-open the orders previously agreed. Mr Curran submitted that the appellant had good grounds on a re-opening for opposing an order that it pay interest on the

$900,000.00 after November 2002, that being the date on which it had demonstrably been in a position to perform and the respondent had demonstrably refused to settle. That could reduce the interest to be ordered in the respondent's favour by as much as $80,000.00. He also submitted that on a re-opening the appellant would have an arguable claim for damages for failure to settle in November 2002 which could be measured by loss of interest on the money the appellant would have received from the on-sale of the property. It was pointed out that the total benefits to the appellant if those submissions were accepted would broadly equate the amount claimed by the respondent on the re-opening.

[6] The court was presented draft minutes of orders to which no counsel took objection on the hearing of the appeal. Those orders provided for interest as ultimately ordered and not for the payment of the mortgage debt increased by the land tax and other payments. To that extent they disadvantaged Mr French, but the court would rarely fail to do equity by making orders which parties represented by senior counsel did not dispute.

[7] There is a further consideration. The respondent also conceded that the appellant would be entitled to re-open the terms of Order 3(b) as to interest, if the court contemplated making the orders sought by the respondent. Mr Morris QC submitted that the court could direct that the terms of Order 3(b) be amended by an order which required that only that the $900,000.00 be paid within six weeks of 5 December 2003, and that the remaining terms of the order be remitted to a trial judge for determination. Mr Morris agreed that this would be an unsatisfactory resolution; which it would, since it would prolong even further final orders in these proceedings. One facet of the administration of justice is bringing proceedings to a close by reasoned judgment as promptly as possible, and in the circumstances justice is done and equity is achieved by leaving the orders in 3(b) in the unchallenged form in which they were presented to this court on the appeal, amended slightly as explained in paragraphs [29] and [30] of the reasons for judgment.[1] Mr French is entitled by those orders to less than he might otherwise have had, but gets it sooner; and the future value of the mortgage debt is not absolutely guaranteed.

[8] A suggestion was made in the written submissions that the appellant had offered to pay a little more to the respondent in exchange for an executed release of mortgage, by an offer to settle made on or about 15 November 2002. This court is unable to determine if that is strictly accurate. This is because that slightly larger sum was offered in full satisfaction not only of proceedings between these parties, but also those between QPM and Mr French. The appellant conceded on this instant hearing that there were such proceedings and that it could not really press any argument that it had necessarily bettered that composite offer by the result in these.

[9] The respondent also sought the grant of a certificate pursuant to section 15(1) of the *Appeal Cost Fund Act* 1973, but that application should be refused. The respondent contested on the merits the ground of appeal on which the appellant succeeded, and failed to persuade the court that the order for costs made by Order 3(e) of 5 December 2003 should be varied. No application was made for any order varying Order 3(f), and the submissions made satisfy the court that it is appropriate that

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1 This is the reasoning underlying the decision in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; if there was a full re-opening each party would have to overcome the principle referred to in that case.

Order 3(c) as to the costs of the trial stands, namely that the respondent pay those to be assessed on a standard basis.

[10] The orders of the court are that:

(a) all applications for variation of the orders made on 5 December 2003 are dismissed and the court does not otherwise order as to the payment of the costs of the action and cross appeal; and

(b) each party bear its own costs of the applications heard 19 December 2003.