

SUPREME COURT OF QUEENSLAND

CITATION: *Marminta P/L v French* [2004] QCA 8

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 Further Order

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: Judgment delivered 5 December 2003
Further Order delivered 24 December 2003
Further Further Order delivered 5 February 2004

DELIVERED AT: Brisbane

HEARING DATE: 28 August 2003; 19 December 2003; 5 February 2004

JUDGES: Williams and Jerrard JJA and Philippides J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

FURTHER
FURTHER
ORDER: **Application for variation of the orders is dismissed**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND
PROCEDURE – QUEENSLAND – POWERS OF COURT –
OTHER MATTERS – where original judgment on appeal
ordered specific performance of agreement between parties to
transfer mortgages – where question of whether debts secured
thereby were to be transferred along with mortgages was not
litigated at trial or on appeal – whether order made should be
varied to indicate that the debts secured by mortgages should
be transferred with mortgages

Land Title Act 1994 (Qld), s 62

COUNSEL: J F Curran for the appellant/cross-respondent
P Bick QC, with P E Hack SC, for the respondent/cross-
appellant

SOLICITORS: Robert Harris & Co for the appellant/cross-respondent

Hopgood Ganim for the respondent/cross-appellant

WILLIAMS JA: This Court by judgment delivered on the 5th of December 2003 allowed an appeal against a decision of the learned trial Judge refusing to order specific performance of an agreement which he found had initially been made between the relevant parties. This Court made an order that the agreement in the terms found by the learned trial Judge should be specifically enforced and it made an order accordingly.

There was an application on the 19th of December 2003 to have that order varied but that application was dismissed.

The Court now has before it a further application by the successful appellant to have its order varied by having the words "and the debts secured thereby" inserted on some three occasions into the terms of the order.

It is true that in the statement of claim the plaintiff alleged that the terms of the agreement were for the purchase of the mortgages and the money secured thereby. However, the correspondence which evidenced the formation of that agreement did not contain the words "the moneys secured thereby" and the learned trial Judge limited the terms of the agreement to the purchase of the mortgages and it is that agreement which, as I've said, this Court ordered to be specifically enforced.

Counsel for the applicant today argues that there was a deemed admission on the pleadings that the words "the moneys secured

thereby" were part of any agreement evidenced by the correspondence in question.

Having regard to the specific pleading in paragraph 2 of the defence and counterclaim I am not satisfied that there was such a deemed admission.

The order for specific performance has been perfected and the Court has been told that settlement took place on the 16th of January 2004. The mortgages in question were Torrens Title mortgages. It is not clear whether or not the transfers have been registered, but the transfers are in registrable form.

Once registered section 62 of the Land Title Act 1994, which supplants sections 65 and 66 of the 1861 Real Property Act and which is mirrored in legislation in other States, would have effect. Consequent upon section 62 there is an assignment of the right to sue to recover the debt.

Proceedings have been commenced in the Supreme Court of Victoria by the original lender to recover from the original borrower the moneys secured by the mortgages in question. There is, it seems to me, a legal question as to the effect of section 62 of the Land Title Act on the plaintiff's right in those proceedings to seek to recover the loans, but it is not for this Court to adjudicate upon that issue. That is something which will have to be litigated in the Victorian proceedings if the parties are not ultimately able to agree

upon the significance of the registration of the mortgages and the effect of section 62 of the Land Title Act 1994.

Because the matter in question was not in my view litigated at first instance nor on appeal in this Court, it is not appropriate for this Court at this stage to vary the order of this Court as sought by the application. That application should therefore be refused.

JERRARD JA: I agree.

PHILIPPIDES J: I also agree that the application should be refused.

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WILLIAMS JA: The application is dismissed. No order as to costs.