

SUPREME COURT OF QUEENSLAND

CITATION: *Osaka Enterprises Pty Ltd & Anor v Globe International Ltd*
[2011] QSC 171

PARTIES: **OSAKA ENTERPRISES PTY LTD (RECEIVERS
APPOINTED)**
(first applicant)

PERPETUAL TRUSTEE COMPANY LIMITED
(second applicant)

v

GLOBE INTERNATIONAL LIMITED
(respondent)

FILE NO/S: BS3543/11

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 21 June 2011

DELIVERED AT: Brisbane

HEARING DATE: 25 May 2011

JUDGE: Martin J

ORDER: **Declare that the Amendment dated 31 May 2010 of the
Lease entered into between Osaka Enterprises Pty Ltd
and Globe International Limited dated 6 November 2006
is ineffective against Perpetual Trustee Company Limited**

CATCHWORDS: MORTGAGES – ESTATES, RIGHTS AND LIABILITIES
OF MORTGAGOR AND MORTGAGEE – REPAYMENT
AND TENDER – REPAYMENT – EXTENSION OR
VARIATION – where the first applicant entered into a
mortgage agreement with the second applicant in 2006 to
borrow the sum of \$3,108,000 to purchase a property – where
the mortgage contained a condition that the loan to value ratio
not exceed 70 per cent – where the first applicant
subsequently entered into a lease agreement in that same year
with the respondent with respect to the property - where, in
2010, the second applicant asserted that the property had
declined in value and that the first applicant was in default
under the facility because of the loan to value ratio – where
the breach was not remedied and the second applicant
subsequently demanded all income in relation to the
premises, pursuant to the mortgage – where the second

applicant appointed receivers and managers to the first applicant, who insisted that the respondent pay rent directly to the second applicant – where the respondent declined to pay full amount of the rent on the basis of a lease variation agreement entered into in 2010 with the first applicant - whether the agreement made between the first applicant landlord and the respondent tenant is effective as against the second applicant registered mortgagee

Land Title Act 1994 (Qld), s 66, s 78(2)(b)

Daniher v Fitzgerald (1919) 19 SR (NSW) 260, cited
Lake Eerie Pty Ltd (Receiver and Manager appointed) v Flair Realty Pty Ltd, considered
Magar v Arab Bank Australia Ltd [2010] NSWSC 553, considered
Re Partnership Pacific Securities Ltd [1994] 1 Qd R 410, cited

COUNSEL: DLK Atkinson for the first and second applicants
 D J Clothier for the respondent

SOLICITORS: Hopgood Ganim for the first and second applicants
 MacDonnells Law for the respondent

- [1] The applicants seek a declaration that an agreement to vary a lease made by a landlord and tenant is ineffective as against the registered mortgagee.
- [2] In October 2006 the first applicant, Osaka Enterprises Pty Ltd (Receivers Appointed) (“Osaka”), approached the second applicant, Perpetual Trustee Company Limited (“Perpetual”), with a view to obtaining finance to purchase premises at Mermaid Beach on the Gold Coast. Osaka informed Perpetual that, if it received the finance to purchase the property, it intended to enter into a lease with the respondent, Globe International Limited (“Globe”), and service the loan from the rent received.
- [3] In November 2006 Osaka entered into a facility to borrow the sum of \$3,108,000 from Perpetual. That facility contained a condition that Osaka would not allow the loan to value ratio to exceed 70 per cent. Perpetual advanced the sum, Osaka purchased the property and executed a mortgage over it in favour of Perpetual.
- [4] Later in November 2006, following the registration of the mortgage, Osaka entered into a lease with Globe, and from that time Globe ran a surf wear shop from the premises.
- [5] In September 2010, Perpetual asserted to Osaka that the value of the property had declined and that Perpetual considered Osaka to be in default under the facility because the loan to value ratio exceeded 70 per cent. That breach was not remedied, and in November 2010 Perpetual demanded, pursuant to the mortgage, that all income in relation to the premises be paid to it. Consistent with that, Perpetual wrote to Globe and, relying in part on s 78(2)(b) of the *Land Title Act 1994*, required that Globe pay the rent directly to Perpetual.

- [6] In December 2010, Perpetual appointed receivers and managers to Osaka. Those receivers and managers have insisted that Globe pay rent directly to Perpetual.
- [7] Globe has declined to pay the full amount of the rent on the basis that it had entered into an agreement with Osaka to vary the lease of 31 May 2010 and, by that agreement, the lease was reduced from over \$275,000 a year to \$110,000 a year (“the variation”). In January and February of this year, Globe paid rent at the higher rate but in March and April paid rent at the lower rate.
- [8] Perpetual’s case is that it is not bound by the variation agreed between Osaka and Globe because it did not consent to the variation. It relies on s 66 of the *Land Title Act* 1994 (Qld) (“LTA”) which provides:

66 Validity of lease or amendment of lease against mortgagee

A lease or amendment of a lease executed after registration of a mortgage of a lot is valid against the mortgagee only if the mortgagee consents to the lease or amendment before its registration.

- [9] Globe’s response to that argument is to point to various provisions of the lease and argue that Perpetual has consented to all and any variations to the lease by virtue of the following:
- (a) In clause 2.10, “lease” is defined to include “all amendments to” it; and
 - (b) Perpetual gave its consent to the lease.

Did Perpetual consent to the variation?

- [10] “Lease” is defined in cl 2.1.10 to mean: “this Lease including the Form 7 together with any annexures and schedules and any covenant or agreement expressed to be supplemental to this Lease and all amendments to those documents.”
- [11] Clause 11 of the lease deals with the subject of the mortgagee’s consent. It appears to be incomplete in that cl 11.1.2 obviously has words missing from the end of the sentence. The clause provides:

“Mortgagee’s Consent

In consideration of the Landlord granting this Lease to the Tenant, the Tenant covenants and agrees with the Landlord, for the benefit of all current and future mortgagees of the whole or any part of the Land (the mortgagee), that the consent of the mortgagee to this Lease is subject to the following conditions and provisions:

- 11.1.1 if the Rent is paid strictly in accordance with the terms of this Lease and the covenants, conditions and provisions in this Lease are fully observed and performed the Mortgagee will in the event of the exercise of the power of sale or other power or remedy of the Mortgagee or its’ assigns on default under the relevant bill of mortgage exercise the power subject to the then subsisting rights of the Tenant its’ successors and permitted assigns under this Lease,

- 11.1.2 that so long as the Mortgagee is registered as Mortgagee of the Land, the Tenant will obtain the consent or approval of the Mortgagee or its' assigns in addition to the
- 11.1.3 that upon the Mortgagee or its' assigns giving notice to the Tenant demanding to enter into receipt of the rents and profits of the Land or any part of them, the covenants on the part of the Tenant expressed or implied in this Lease will be deemed to have been entered into by the Tenant with the Mortgagee and its' assigns and all the rights, powers and remedies of the Landlord under this Lease will vest in and be exercisable by the Mortgagee and its' assigns until the notice is withdrawn or the relevant mortgage is discharged, the Mortgagee is in no way bound to perform and will not incur any liability in respect of the covenants and agreements expressed and implied in this lease and on the part of the Landlord to be performed and observed, and
- 11.1.4 the consent will, at the option of the Mortgagee, be void and of no effect if the Landlord or the Tenant fail to observe and perform all or any of the conditions contained in this clause.”

- [12] Globe contends that as “lease” is defined to include “all amendments” to the lease then the variation agreed by it and the landlord is a part of the lease to which Perpetual consented. In other words, this construction of the lease requires a conclusion that Perpetual has given its consent to all and any variations which may be agreed between the landlord and the tenant. That is a singularly unattractive and unlikely conclusion.
- [13] The only variations which can bind the mortgagee in these circumstances are those which have been made in accordance with the lease. The consent of the mortgagee in cl 11 is subject to many conditions. As I have noted above, cl 11.1.2 is incomplete. In the usual course, one would have expected that it would conclude by referring to any amendments to the lease. Notwithstanding that, I do not think that the definition of “lease” can be read so as to create a deeming provision for consent to all future amendments. The definition recognises that amendments may take place but to read it is as suggested by Globe would neuter the effect of s 66 of the LTA.

Is Perpetual entitled to claim the rent?

- [14] The respondent also argues that Perpetual is not entitled to claim the rent. It points to cl 11.1.1 which provides that, subject to the rent being paid strictly in accordance with the lease and Globe otherwise observing its terms, Perpetual would in the event of the exercise of any of its rights on default exercise them subject to the then subsisting rights of Globe under the lease.
- [15] Clause 11.1.3 provides that upon Perpetual giving notice to Globe demanding to enter into receipt of the rents and profits of the land, the terms to be observed by Globe will be deemed to have been entered into by Globe with Perpetual and all rights, powers and remedies of Osaka under the lease will vest in and be exercisable by Perpetual until the notice is withdrawn or the mortgage is discharged.

- [16] There is no dispute about the efficacy of the agreement between Osaka and Globe to reduce the amount of rent payable from 16 October 2009. Between those parties the variation is on foot.
- [17] After the default identified above occurred, Perpetual sought that the rent be paid into an account in its name.
- [18] On 23 December 2010 Perpetual appointed receivers and managers over the property. This included Osaka's rights under the lease with Globe. The appointment was on the usual terms which included that the receivers and managers are the agents of Osaka.
- [19] In January 2011 the receivers notified Globe that all rent was to be paid into an account in the name of "Osaka (Receivers and Managers appointed)". That demand also was for payment to be made at the original rate.
- [20] The practical issue between the parties is whether Osaka (Receivers and Managers appointed) is entitled to recover rent from Globe in accordance with the original sum or in accordance with the rent as varied.
- [21] The receivers and managers who are seeking the payment of the rent are expressly defined to be, and are appointed as, the agents of Osaka. This arises both from the terms of the mortgage and the terms of their appointment. The relief sought in the originating application is a declaration that the variation relating to the level of rent payable is ineffective as against the second applicant (Perpetual) and its receivers. That betrays a misapprehension of the true situation.
- [22] Section 66 of the LTA only invalidates a variation (putting to one side the question of whether the definition of lease incorporates any variations) against the mortgagee who has not consented. It does not state that any variation which is made without a mortgagee's consent is otherwise void. It may be that the variation made without consent was a breach of the mortgage and, also, under the LTA, invalid as against the mortgagee but, neither the mortgage (to which Globe is not a party) nor the LTA render it void as between the parties to the lease. Failure to obtain consent does not invalidate the variation so far as the immediate parties are concerned.¹
- [23] In *Magar v Arab Bank Australia Ltd*², Ward J considered this question in circumstances where receivers were attempting to assert a right to possession inconsistent with that which the mortgagor could assert. Her Honour examined, in some detail, a number of recent authorities and came to the conclusion, with which I respectfully agree, that receivers (being the agents of the mortgagor) cannot assert a right inconsistent with that which a mortgagor could assert. Thus, in circumstances where a mortgagor has entered into a valid variation agreement with a tenant, the receivers of the mortgagor cannot assert that the variation does not bind them. It follows, then, that Globe is not obliged to pay the original rent to Osaka and that Osaka may not sue for that rent.
- [24] The applicants relied upon the reasons of McPherson J (as he then was) in *Lake Eerie Pty Ltd (Receiver and Manager appointed) v Flair Realty Pty Ltd*³. That

¹ See *Daniher v Fitzgerald* (1919) 19 SR (NSW) 260.

² [2010] NSWSC 553.

³ [1992] ANZ ConvR 627.

appeal was decided on a ground narrower than that advanced by McPherson J and the majority's reasons are confined to the facts of that case.

- [25] During argument the focus of the debate shifted from the strict terms of the order sought to the more practical concern of all the parties: who can demand the rent and at what level. Perpetual went out of possession in January 2011 when it appointed the receivers and managers. If it did have a right to recover rent from Globe, it no longer can. In any case, Perpetual, even it was still a mortgagee in possession, has no general right of recovery of rent from a tenant.⁴
- [26] Perpetual still seeks a declaration that the variation is ineffective as against it. I have found that it is ineffective and will make that declaration. The question of entitlement to rent at the higher (pre-variation) level, although not specifically raised in the application, has been decided against the applicants.
- [27] I will hear the parties on any further declarations sought and costs.

⁴ See *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410.