

SUPREME COURT OF QUEENSLAND

CITATION: *Westpac Banking Corporation v Knight Property Investments No. 3 Pty Ltd & Anor (No 2)* [2014] QSC 263

PARTIES: **WESTPAC BANKING CORPORATION**
ABN 33 007 457 141
(plaintiff)
v
KNIGHT PROPERTY INVESTMENTS NO. 3 PTY LTD
ACN 123 215 154
(first defendant)
THOMAS PATRICK HAYES
(second defendant/plaintiff by counterclaim)
BALMAIN NB COMMERCIAL MORTGAGES LIMITED
ACN 074 619 980 trading as BALMAIN COMMERCIAL NB98174924 (NSW) (a firm)
(second defendant by counterclaim)

FILE NO: BS No 7887 of 2009

DIVISION: Trial

PROCEEDING: Hearing

DELIVERED EX TEMPORE ON: 23 October 2014

DELIVERED AT: Brisbane

HEARING DATE: 23 October 2014

JUDGE: Peter Lyons J

ORDER: **Order as per the draft initialled and placed with the file**

CATCHWORDS: PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – ADJOURNMENT – where the second defendant did not appear on the first day of the resumption of the trial – where the second defendant’s son sent an email advising his father was unwell – where the conduct of the trial to date has been characterised by extensive interruptions and constraints referable to the second defendant’s ill-health – what directions should be made in light of the prospect the second defendant may not be able to participate in the future conduct of the trial

COUNSEL: E Goodwin for the plaintiff
S S Monks, with B A Hall, for the second defendant by counterclaim
No appearance by the second defendant

SOLICITORS: Allens for the plaintiff
Minter Ellison for the second defendant by counterclaim
No appearance by the second defendant

- [1] The trial of this matter commenced on 2 December 2013 after a history which I shall set out a little more fully. It was to resume today. Now, the second defendant has not appeared and his son has sent an email relating to his father's health. Although there has been some suggestion in submissions that the trial could proceed and perhaps proceed to finality today, that course is not going to be followed. I propose to make some directions, however, seeking to achieve either finality or some more reliable progress in the case than has occurred.
- [2] When the trial commenced on 2 December 2013, its course was far from smooth. On some days the second defendant did not appear at all. On those days on which he appeared the hearing times were substantially shortened. These things occurred because of the series of health problems which the second defendant apparently experienced. I should add that the second defendant is an elderly gentleman who for most of the time since the trial commenced has been representing himself. I should also record that it is apparent he has been making some substantial efforts within the restrictions posed by his lack of legal qualifications to advance a case.
- [3] The health conditions included stabbing pains in his right arm, elbow and groin associated with spinal problems; spinal problems more generally referred to; bouts of illness, including vomiting, diarrhoea and collapsing of the bowels; psychological problems; hypertension; severe pain in the right leg; stomach collapsing; sciatic nerve problems; depression; and more recently problems with his eyes.
- [4] Regarding the recent problems with his eyes, in an email of 13 October 2014 to my Associate and the legal representatives of the other parties, the second defendant said that he had difficulty with cataracts and that he had suffered an eye injury during a home invasion. He also referred to a cyst, surgery for which had been arranged for 20 October 2014. Until an order was made on 17 October 2014, as a consequence of the second defendant's email and some other communications and a hearing on that date, the trial had been scheduled to resume on 20 October.
- [5] Subsequently, the second defendant provided a document unsigned being in the form of an affidavit dated 17 October 2014, attached to which was a letter from a general practitioner, Dr Matthew Harvey. On 15 October 2014 it recorded that the second defendant had an appointment with an ophthalmologist for 18 November 2014 relating to cataract disease and possible retinopathy. It also recorded that the second defendant was scheduled to see a plastic surgeon for treatment of what was described as a progressive right upper eyelid lesion on 20 October 2014. That seems to be the condition the second defendant described as a cyst requiring removal.

- [6] The letter from Dr Harvey went on to indicate the limitations on the second defendant's current capacity to participate in legal proceedings with very restricted periods during which he could work on a computer and read. The letter indicated that the second defendant would be best able to participate in court proceedings during the mornings. On that basis the matter was adjourned until today with early starts to accommodate the second defendant's condition as advised by Dr Harvey, with the intention that only part of each hearing day would be taken up unless the second defendant's condition improved.
- [7] Notwithstanding what had been notified to the court, it appears that the second defendant did not have the expected operation on Monday this week. No notice of that was given until an email was received from his son today and no explanation was given for the fact that the operation did not proceed. The email from the second defendant's son stated that the second defendant had been awake most of the night and had almost no sleep, that his son feared he was about to have another heart attack or a breakdown, and that medical bookings were being made for him.
- [8] My Associate has within the last couple of minutes received an email from the second defendant's son saying that the second defendant has an appointment with a psychiatrist tomorrow, 24 October 2014, and has been booked into hospital on Monday for the eye operation.
- [9] The conduct of the trial to date therefore has been characterised by extensive interruptions and constraints referable to the second defendant's health.
- [10] I have mentioned the conduct of the trial when it commenced on 2 December 2013, though some of the difficulties to which I have referred related to subsequent occasions when the trial resumed. Inevitably there has been a great deal of expense incurred by the other parties because of the way in which the trial has progressed. It is apparent that the second defendant is without financial resources and that there is little likelihood that costs thrown away in the way I have referred to will in fact be recovered by the other parties.
- [11] In addition, a great deal of court time has been allocated to the hearing of this case, much of which has been wasted, which has meant that such time has not been available to parties in a position to proceed. It seems to me that a point has been reached where very serious consideration must be given as to whether there is sufficient justification for further adjournment of the trial or its continued conduct in the manner in which it has been conducted in the past.
- [12] It is for those reasons that I propose to make a series of directions which I have discussed with the parties who have attended this morning. I also intend to permit the plaintiff to call further evidence-in-chief in the second defendant's absence and to permit some cross-examination of the witness to be called by counsel for the second defendant to the counterclaim.