IN THE COURT OF APPEAL [1997] QCA 102

SUPREME COURT OF QUEENSLAND

Appeal No. 7399 of 1996

Brisbane

[Surfers Paradise Investments P/L v. Devlin & Anor.]

BETWEEN:

SURFERS PARADISE INVESTMENTS PTY. LTD.
(A.C.N. 058 247 064)
(Second Defendant) Appellant

AND:

IAN BARRY DEVLIN
(Plaintiff) First Respondent

AND:

EILAZAK PTY. LTD. (A.C.N. 066 647 863)
(First Defendant) Second Respondent

Fitzgerald P.
McPherson J.A.
Williams J.

Judgment delivered 2 May 1997

Separate reasons for judgment of each member of the Court; McPherson J.A. and Williams J. concurring as to the orders made.

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(1) SET ASIDE SO MUCH OF THE JUDGMENT AND DECLARATION AS IS CONTAINED IN PARAGRAPHS 1, 2, 3 AND 4 OF THE JUDGMENT GIVEN ON 21 AUGUST 1996.

(2) IN LIEU THEREOF, ORDER THAT IT BE DETERMINED WHETHER:

(A) BY REASON OF OMISSION TO GIVE TO THE PLAINTIFF NOTICE OF ANY MEETING OF THE FIRST DEFENDANT; OR

(B) BY REASON OF EXCESS OF POWER OR THE IMPROPER EXERCISE OF POWER OR OTHERWISE -

THE ISSUE AND ALLOTMENT TO THE SECOND DEFENDANT OF 5000 SHARES IN THE CAPITAL OF THE FIRST DEFENDANT IS INVALID OR OUGHT TO BE SET ASIDE.

(3) ALTERNATIVELY, IF THE ISSUE AND ALLOTMENT BE NOT INVALID:

(A) DECLARE THAT, ON UNDERTAKING TO PAY THE AMOUNT, IF ANY, FOUND TO BE DUE ON THE TAKING OF THE ACCOUNT IN PARAGRAPH 3(B), THE PLAINTIFF BE ENTITLED TO REDEEM 5000 SHARES IN THE CAPITAL OF THE FIRST DEFENDANT PURPORTING TO HAVE BEEN ISSUED AND ALLOTTED TO THE SECOND DEFENDANT ON OR ABOUT 9 APRIL, 1996;

(B) ORDER THAT AN ACCOUNT BE TAKEN BETWEEN THE PLAINTIFF AND THE SECOND DEFENDANT OF THE AMOUNT, IF ANY, DUE BY THE PLAINTIFF TO THE SECOND DEFENDANT UNDER A MORTGAGE OR CHARGE GIVEN BY DEED DATED 7 FEBRUARY 1996 OVER THE PLAINTIFF'S SHARE IN THE CAPITAL OF THE FIRST DEFENDANT;

(C) ORDER THAT SUCH FURTHER INQUIRIES BE TAKEN AND DECLARATIONS, JUDGMENTS AND ORDERS BE MADE OR GIVEN AS MAY BE APPROPRIATE.

(4) ORDER THAT THE PLAINTIFF AND JANICE MARIE DEVLIN BE DISCHARGED FROM EACH OF THE UNDERTAKINGS IDENTIFIED AS A "FURTHER UNDERTAKING" GIVEN BY THEM AND RECITED IN THE JUDGMENT; AND THAT THE SECOND DEFENDANT BE DISCHARGED FROM THE UNDERTAKING ALSO IDENTIFIED AS "FURTHER UNDERTAKING" GIVEN BY IT AND RECITED IN THE JUDGMENT.

(5) ORDER THAT THE ACTION BE REMITTED FOR FURTHER DIRECTIONS, IF ANY, AND FOR HEARING AND DETERMINATION IN THE TRIAL DIVISION.

(6) ORDER THAT PARTIES BE AT LIBERTY TO APPLY TO THE SUPREME COURT OR A JUDGE OF THE COURT FOR THE PURPOSES OF THESE ORDERS.

(7) COSTS OF APPEAL AND THE COSTS AWARDED IN THE PROCEEDINGS BELOW TO BE COSTS IN THE CAUSE.

CATCHWORDS:	**CIVIL - MORTGAGE OVER SHARES - REDEMPTION - Clogs on the equity of redemption.**
Counsel:	Mr D. Jackson Q.C., with him Mr D. Campbell, for the appellant Mr R. Chesterman Q.C., with him Mr A. Heyworth-Smith for the respondents
Solicitors:	D'Arcys for the appellant C.A. Sciacca & Associates for the respondents

Hearing Date: 9 April 1997

IN THE COURT OF APPEAL

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Before Fitzgerald P.
McPherson J.A.
Williams J.

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(Second Defendant) Appellant

AND:

IAN BARRY DEVLIN
(Plaintiff) First Respondent

AND:

EILAZAK PTY LTD
ACN 066 647 863
(First Defendant) Second Respondent

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 2 May 1997

This is an appeal from orders made in the Trial Division on a motion for judgment on 21 August 1996. It is desirable to state at the outset that a number of the lawyers who represented the parties on this appeal were not previously involved in the proceeding. Neither the procedure, the evidence, the findings nor the orders are satisfactory, and the respondent conceded that at least one conclusion of the Trial Division Judge could not be supported and that some variation of his Honour's orders is needed. Further, those orders

made do not finally dispose of the action, which is one of a number of proceedings between these and other parties relating to disputes over comparatively small amounts which have been made the subject of complex litigation. Indeed, the action cannot be finally disposed of on the present motion for judgment.

The judgment of McPherson J.A., which summarises a number of the matters raised in the action, explains why it is inappropriate to determine at this stage whether resolutions purportedly passed on behalf of the shareholders and by purported directors of Eilazak Pty Ltd on 21 March 1996, or either of those resolutions, was valid. While the determination of those issues might facilitate the resolution of at least some of the material disputes in the action, this Court could not determine such issues unless it made findings of fact and considered arguments which were not advanced below. Further, this Court is not fully seized of the matter, and cannot be sure that there is no other potentially relevant evidence available or what ramifications the determination of those issues in isolation from the remainder of the action could have upon the parties' overall respective rights and obligations.

However, McPherson J.A. has held that, on giving an appropriate undertaking, the respondent Devlin is entitled to redeem the single share in Eilazak Pty Ltd which was the subject of the security which he gave in favour of the appellant Surfers Paradise Investments Pty Ltd "freed from the incubus of the 5,000 shares allotted to" Surfers Paradise Investments. Accordingly, his Honour proposes certain orders and declarations which are expressed to some extent in the alternative. Further, in part at least, I think, because of his view with respect to Devlin's entitlement to redeem his share, his Honour considers that the costs of the appeal and of the proceeding below should be costs in the cause.

In my opinion, just as the Court should not decide on the validity of the resolutions and for much the same reasons, it should not decide any other issue at this time in the confused circumstances presented. Devlin's entitlement to redeem the single share in Eilazak which was the subject of the security to Surfers Paradise Investments was either not the subject of dispute or peripheral to the main dispute. I consider that the preferable course is for the action to proceed to trial on all issues. Further, since it is the procedure adopted by the first respondent which has caused the costs of both the proceedings below and of the appeal in this Court to be wasted, he should pay the costs thrown away.

I would therefore allow the appeal with costs to be taxed, and set aside the orders made below with an order that the first respondent pay the appellant's taxed costs of and incidental to the motion for judgment.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 7399 of 1996

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REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 2 May 1997

This is an appeal against a judgment for redemption given in action no. 5758 of 1996 instituted by Ian Barry Devlin, who is the mortgagor and the first respondent to the appeal, against the appellant Surfers Paradise Investments Pty. Ltd. ("SPI"), which is the mortgagee. Before the matters giving rise to this litigation, Devlin was a director of and the holder of one of two issued shares in Eilazak Pty. Ltd., to which I will refer as "the Company". At that time, the only other director and shareholder was a Ms. K.J. Ludlow.

In early 1996 the Company was engaged in carrying out a land development project for which it needed further funds. Devlin approached a Mr Hayes of SPI, which agreed to lend him a sum of $20,000 in return for security over his share in the Company. A deed dated 7 February 1996 was prepared and executed by which SPI lent him that sum for a period of 60 days from 8 February 1996 with interest at the rate of 11½% p.a., and, as security for repayment of the loan, took a charge over Devlin's share in the Company. Clause 5 of the deed was as follows:

> "5. Devlin does hereby appoint S.P.I. his lawful attorney to exercise all or any voting rights to the share and S.P.I. shall be entitled to attend any meeting of Eilazak and vote on any resolution put to such meeting as though it were the registered holder of the share. This power of attorney is given by way of security and shall remain irrevocable for so long as the loan amount or any part thereof shall remain outstanding (the term of the loan)."

There was provision in cl.6 to the effect that during the term of the loan, Devlin should not resign as a director of the Company; or vote in favour of any resolution by which the existing shareholding of the company should be altered; or vote in favour of a resolution altering the constitution of the board of directors. Clause 7 required Devlin to give notice to SPI of any meeting of directors or shareholders of SPI.

Devlin initially defaulted in repaying the loan and interest, which, however, have since been paid out in full. His name has throughout remained on the register of shareholders, and he has always had possession of the share certificate relating to his share in the Company . On 6 March 1996 Ms. Ludlow gave written notice resigning from the office of director as from 5 March 1996. On 12 March 1996 Devlin, acting under art.61(1) of the Company's articles of association, appointed his wife Mrs J.M. Devlin to fill the casual vacancy on the board of directors. At the time or shortly afterwards, the validity of this appointment was, it is said, acknowledged by SPI or its solicitor on its behalf.

The loan with interest having been repaid on 16 July 1996, it is at first sight difficult to see why it should have been necessary to proceed with the redemption action. The explanation lies in the fact that during the time when Devlin's share was subject to the charge, SPI did three things. For the purpose of this appeal, it is accepted that SPI acquired from Ms. Ludlow her share in the Company. Then, relying on Ms. Ludlow's share and the power of attorney in cl.5 of the security from Devlin, SPI on 21 March 1996 removed, or purported to remove, Mr & Mrs Devlin from office as directors of the Company, and in their place appointed Mr Hayes and Mr Richardson, who is his solicitor. As directors, on 9 April 1996 they then issued and allotted to SPI a further 5000 shares of $1.00 each in the Company. Devlin's single share in the Company which, before the security was given was one of only two issued shares in the Company, is therefore held by him freed from the charge he gave on 8 February 1996 but is now only one of 5002 issued shares in the Company. On the assumption that that share issue is valid, Devlin is plainly now very much a minority shareholder in the Company. If that state of affairs continues, it is not unreasonable to suppose that his vote will not count for much in the affairs of the Company; and, if it were to declare a dividend or to be wound up, he will receive only a $^{1}/_{5002}$ share of what is distributed.

This to my mind demonstrates the utility of the redemption proceedings by Devlin. SPI still holds the 5000 shares issued to it through its having exercised the power of attorney given by the deed of charge over Devlin's share. In a passage from a judgment of Lord Langdale in *Moore v. Painter* (1842) 6 Jur. 903, 904, which was cited with approval by both Starke J. and Dixon J. in *Southwell v. Roberts* (1940) 63 C.L.R. 581, 586, 591, his Lordship said:

> "There is nothing more necessary for this court to do than take care that a mortgagee in possession shall so deal with the mortgaged property as to be able to restore it to the mortgagor in the same nature as he received it."

The particular question before the High Court in *Southwell v. Roberts* was whether, on the taking of accounts in redemption proceedings, the mortgagee was entitled to be credited with amounts expended on making permanent improvements to the mortgaged property while the mortgagee was in possession. Although the improvements were of considerable value, Nicholas C.J. in Eq. at first instance in the Supreme Court of New South Wales directed that, on the taking of accounts between mortgagee and mortgagor, the mortgagor was not to be charged with the amounts expended on those improvements. His Honour held that in making them the mortgagee had transgressed the rule that "a mortgagee may not clog the equity of redemption": see *Roberts v. Southwell* (1940) 57 W.N. (N.S.W.) 33, at 35.

The rule is relevant to the present case. SPI has not offered or undertaken to transfer or surrender the 5000 shares acquired by it in the character of chargee, or to submit to their being cancelled by reduction of the share capital of the Company. How much, if anything, it paid for those shares is something the record does not disclose. If it did not pay anything, it is difficult to see how it can resist immediate redemption of the shares. If it paid for them, it may be entitled to retain those shares until the sum expended on the shares is repaid to it. Whether it is so entitled depends on whether, stating it in a general way, it was necessary for 5,000 or any number of shares in the Company to be issued in favour of SPI in order to protect its security over Devlin's share.

As to that, the submission on appeal was that it was necessary to issue further shares because at the time it was done the Company was either insolvent or short of funds urgently required to complete the purchase of land forming part of the development project in which it was engaged. This is disputed by Devlin. But if, for the present, SPI's contention to that

effect is accepted, it may be that its claim to be paid something as a condition of surrendering the 5000 shares is founded on an act of salvage of the mortgaged property rather than on any improvement to it. I doubt if it makes any difference which of these alternatives it was, because, according to McTiernan J. in *Southwell v. Roberts* (1940) 63 C.L.R. 581, 600, "the dominant consideration is what is just and equitable between mortgagor and mortgagee". What is clear, however, is that subject to the resolution of that question, SPI is not entitled to insist on maintaining on the share mortgaged by Devlin a clog in the form of the 5000 shares which it acquired in its character of mortgagee only for the purpose of protecting its security.

The usual method of determining such a question in redemption proceedings is to direct the taking of accounts between mortgagee and mortgagor to ascertain what sum, if any, was expended by the mortgagee, and ought to be allowed to it against the mortgagor in those accounts, as expenditure properly incurred in and about the mortgaged property. No such direction or inquiry was sought from or made by the Chamber Judge in the proceedings below. I suspect that that was because, by then, counsel had identified another matter which was said to be decisive in favour of Devlin. It was that the removal of Mr and Mrs Devlin as directors of the Company and the consequential share issue was an excessive or improper exercise of SPI's power as mortgagee. Counsel for SPI, on the other hand, submitted that, as to that question, there was an issue which ought to be tried rather than disposed of summarily in Chambers.

On this point the learned judge accepted the submission of counsel for Devlin in preference to those on behalf of the defendants SPI and the Company. He made declarations that the removal of the Devlins from office and their replacement as directors by Hayes and Richardson were invalid, and he also declared the issue and allotment of the 5000 shares to SPI to be invalid. The operative part of the judgment was preceded by the recital

of a series of undertakings from the plaintiff and Mrs Devlin, one of which was that they would use their best endeavours to cause the Company to repay the consideration, if any, paid to it by SPI for the allotment of those shares.

On appeal, it was submitted for SPI that the judge ought not to have given judgment summarily when there was a triable issue about the validity of the Devlins' removal and the subsequent share issue. The response was that Devlin had not been applying for summary judgment but moving for judgment under O.19, r.4 in an action which was being tried on affidavit : see *Suntown Pty. Ltd. v. Proud* [1979] Qd.R. 336. That may be so; but it was not the way in which the application was presented by the plaintiff to the Chamber Judge; and, in any event, it appears to be the case that, on the question in issue, there were and are matters of fact which called for more thorough investigation and fuller consideration than they received at the hearing.

On appeal, a further possible basis of invalidity of the share issue and directors' removal was identified. It is that Devlin was not given notice of the general meeting of the company at which he and his wife were removed, or of the meeting of directors at which it was resolved to issue and allot the 5000 shares to SPI. The point has a potential to prove fatal to the validity of the disputed share issue. It appears to turn on whether a mortgagor or chargor of shares continues, during the subsistence of the mortgage or charge, to be entitled to receive notice of general meeting. The decision in *Musselwhite v. C.H. Musselwhite & Son Ltd.* [1962] Ch. 961 may be thought to suggest that notice ought to have been given to Devlin and that, without it, the steps taken on 21 March 1996 to replace him and Mrs Devlin as directors and on 9 April 1996 to issue and allot the 5000 shares to SPI were invalid. It was suggested that if, in any event, SPI was independently entitled to the share acquired from Ms. Ludlow, the share allotment might be valid to the extent of half the number of the disputed

shares; but I cannot see how that result could be reached. On any view of it, the 5000 shares were either validly issued and allotted or they were not. There was never any issue or allotment of 2500 shares to anyone.

It was submitted that it was not open to a party seeking redemption to raise questions about the validity of the security he wishes to redeem or, at any rate, that he is not entitled to raise such questions in redemption proceedings. But there is ample authority for that course. See *National Bank of Australasia v. United Hand-in-Hand & Band of Hope Company* (1879) 4 App.Cas. 391, 400-401, which is a decision of the Privy Council affirming a judgment of the Full Court of Victoria reported at (1877) 3 V.L.R.(E) 61, 67, where, in proceedings to set aside a security, Stawell C.J. said that plaintiffs who "failed to establish one case, may, if they have pleaded and proved another, have any relief to which they are entitled if it is comprised specifically or generally within the prayer of the bill". It was a decision given even before the adoption of the Judicature Act in Victoria. A later and perhaps even clearer instance, in which an application to set aside a mortgage was combined with an alternative application to redeem it, is *Hunt v. Worsfold* [1896] 2 Ch. 225, 228, where North J. said of the plaintiff in that case that:

> "As he is entitled without any leave to ask for a declaration that the mortgage deed is invalid, I think he is equally to ask in the other alternative for possession of the land upon payment of what may be found due on the mortgage"

So in this case, it would be open to Devlin to challenge the validity of the share issue; and, in the alternative, to ask for an account to be taken, with or without an inquiry, of what, if anything, may be due to SPI arising out of the share issue. The practice of permitting such claims in the alternative is authenticated by the decisions mentioned, and there is no compelling reason why the court should insist on two separate proceedings when one will do.

It is, however, not fairly open to Devlin to rely for the first time on this appeal on what may be called the notice point as affecting the validity of the share issue. Mr Chesterman Q.C. for the respondent nevertheless sought to retain the declarations of invalidity with respect to the removal of Mr & Mrs Devlin, the appointment of Messrs. Hayes and Richardson, and the share issue, on the basis accepted by the primary judge, which was that SPI had exercised its power as mortgagee improperly. I do not consider that, having regard to the way in which the matter was conducted at first instance, it would be right to dispose of the appeal on that ground. SPI may possibly be able to justify the share issue as an act of improvement or salvage if the matter is more thoroughly investigated. Furthermore, the nature of the account that is needed if the invalidity point fails was to some extent misapprehended at the hearing below, and a proper account-taking is required if SPI is entitled to payment as a condition of its surrendering the disputed shares.

Having formed the view that the share issue amounts to a clog on the equity of redemption, I consider that Devlin is entitled to redeem upon his undertaking to pay the amount, if any, found to be due to SPI. Such an undertaking ought to be pleaded or given expressly: *Adams v. Bank of New South Wales* [1984] 1 N.S.W.L.R. 385, 296; and cf. *Tannock v. North Queensland Securities Ltd.* [1932] St.R.Qd. 285. The joint undertaking recited in the judgment as given by Mr and Mrs Devlin is not expressed in the form required for the purpose of a redemption proceeding. On giving it in the appropriate form, Devlin's right to redeem cannot be doubted. He has already paid out the principal of the loan and interest, and it is SPI that now claims to retain the benefit of something which, unless its claim to be paid more on account of the share issue is made good, remains a constraint on the exercise of the rights he had as the holder of half of the issued share capital in the Company before he charged his share to SPI.

It is nevertheless desirable that the parties be given the opportunity of fully litigating the question whether SPI had and properly or validly exercised a power as chargee of Devlin's share in the Company to remove him and his wife as directors and to make the disputed share issue and allotment. I would therefore:

(1) Set aside so much of the judgment and declaration as is contained in paragraphs 1, 2, 3 and 4 of the judgment given on 21 August 1996.

(2) In lieu thereof, order that it be determined whether:

(a) by reason of omission to give to the plaintiff notice of any meeting of the first defendant; or

(b) by reason of excess of power or the improper exercise of power or otherwise -

the issue and allotment to the second defendant of 5000 shares in the capital of the first defendant is invalid or ought to be set aside.

(3) Alternatively, if the issue and allotment be not invalid:

(a) declare that, on undertaking to pay the amount, if any, found to be due on the taking of the account in paragraph 3(b), the plaintiff be entitled to redeem 5000 shares in the capital of the first defendant purporting to have been issued and allotted to the second defendant on or about 9 April, 1996;

(b) order that an account be taken between the plaintiff and the second defendant of the amount, if any, due by the plaintiff to the second defendant under a mortgage or charge given by deed dated 7 February 1996 over the plaintiff's share in the capital of the first defendant;

(c) order that such further inquiries be taken and declarations, judgments and orders be made or given as may be appropriate.

(4) Order that the plaintiff and Janice Marie Devlin be discharged from each of the undertakings identified as a "further undertaking" given by them and recited in the judgment; and that the second defendant be discharged from the undertaking also identified as "further undertaking" given by it and recited in the judgment.

(5) Order that the action be remitted for further directions, if any, and for hearing and determination in the Trial Division.

(6) Order that parties be at liberty to apply to the Supreme Court or a Judge of the Court for the purposes of these orders.

Logically, the validity or invalidity of the share issue is the first matter to be resolved; but, whether or not that course is adopted, the respondent plaintiff has shown that he has a right, subject to giving the undertaking, to redeem his share in the capital of the Company freed from the incubus of the 5000 shares allotted to the second defendant. I would accordingly order that the costs of appeal and the costs awarded in the proceedings below should be costs in the cause.