

SUPREME COURT OF QUEENSLAND

CITATION: *Theodore v Mistford P/L & Anor* [2004] QCA 90

PARTIES: **MARIE MARGARET THEODORE**
(plaintiff/appellant)
v
MISTFORD PTY LTD ACN 050 406 650
(first defendant/first respondent)
MAX EGERTON VINES AND VALERIE LYNETTE VINES
(second defendants/second respondents)

FILE NO/S: Appeal No 11225 of 2002
DC No 147 of 1998

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Maroochydore

DELIVERED ON: Judgment delivered 24 December 2003
Further Order delivered 2 April 2004

DELIVERED AT: Brisbane

HEARING DATE: 25 August 2003

JUDGES: McMurdo P, Jerrard JA and Philippides J
Joint reasons for judgment of McMurdo P and Philippides J;
separate reasons of Jerrard JA dissenting in part

ORDERS:

- 1. Allow the appeal to the limited extent of setting aside the orders made at first instance on the counterclaim.**
- 2. The Court declares that:**
 - (a) Glen Theodore, with the authorisation of the appellant, deposited a certificate of title to the land described as Lot 65 on RP 817375, County of Canning, Parish of Mooloolah contained in Title Reference 18689094 ("the land") with the solicitors to the respondents and thereby secured by equitable mortgage the amount owing under the contract of sale for the purchase by Mobile Lab Pty Ltd ACN 074 680 194 of the business of Air Monitoring Services together with certain plant and equipment from the respondents pursuant to the contract of sale dated 22 July 1996.**

(b) The appellant is liable to pay ASIC and the second respondents the sum of \$48,100.88, together with interest at five per cent from 1 January 1998 until the date of this order.

3. The appellant is to pay the second respondents' costs, and upon any successful reinstatement of its company registration under s 601AH *Corporations Act* 2001 the first respondent's costs, of and incidental to the counterclaim together with reserved costs and excepting costs previously ordered in the proceedings to be assessed on the standard basis.

4. The appellant is to pay two-thirds of the second respondents' costs, and upon any successful reinstatement of its company registration under s 601AH *Corporations Act* 2001 two-thirds of the first respondent's costs, of this appeal, together with reserved costs, if any, to be assessed on the standard basis.

5. Liberty to apply as to the form of these orders within one month of their delivery with any supporting submissions to be in double spacing and not to exceed 2 A4 pages rendered in type no smaller than 1.8 mm (10 point) font on seven days notice to the other side.

CATCHWORDS: TAXES AND DUTIES – STAMP DUTIES – UNSTAMPED AND IMPROPERLY STAMPED DOCUMENTS – QUEENSLAND – whether contention that equitable mortgage could not be relied on because the provisions of the *Stamp Act* had not been complied with could be entertained by Court in submissions as to costs

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where offer of settlement made – whether costs should be ordered on an indemnity basis

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF ISSUES – where appellant successful on some grounds of appeal but ultimately unsuccessful – whether appellant should bear whole of respondents' costs

CORPORATIONS – PRACTICE AND PROCEDURE – OTHER CASES – where first respondent company deregistered by ASIC after delivery of order at first instance, but before appeal – how costs owing to first respondent should be awarded

Corporations Act 2001 (Cth), s 601AB, s 601AD(2), s

601AH
Stamp Act 1894 (Qld), s 4A, s 65, s 66

Hoggett v O'Rourke [2002] 1 Qd R 490

COUNSEL: D A Savage SC, with M J Taylor, for the appellant
 F W Redmond for the respondents

SOLICITORS: North Coast Law for the appellant
 Klar and Klar for the respondents

- [1] **McMURDO P AND PHILIPPIDES J:** Judgment in this matter was delivered on 24 December 2003 and orders were made allowing the appeal to the limited extent of setting aside the orders made at first instance on the counterclaim and allowing the parties to make submissions as to the appropriate orders to be substituted in the counterclaim and as to the costs of the appeal and trial.
- [2] This Court found that an equitable mortgage was created when Glen Theodore, the appellant's son, with the appellant's authority, lodged the title deeds of the appellant's Buderim land with the respondents' solicitors. That land was then charged in equity as security for the balance of Mr Glen Theodore's purchase of the business, Air Monitoring Services, through his company, Mobile Lab Pty Ltd. When Mobile Lab Pty Ltd defaulted under the contract for the purchase of that business the respondents became entitled, in accordance with the reasons of this Court, to the benefit of the equitable mortgage securing that debt.
- [3] The appellant contends for the first time in its submissions as to these further orders that any mortgage was required to be stamped under s 65 and s 66 *Stamp Act 1894 (Qld)* ("the Stamp Act"); the certificate of title was not produced in evidence at the trial and as the respondents have not established compliance with the provisions of the Stamp Act, the respondents' action fails: see *Hoggett v O'Rourke*.¹ This was not pleaded by the appellant and nor was it raised at trial or in the appeal. The evidence which the learned primary judge accepted and was apparently entitled to accept otherwise established the creation of an equitable mortgage. If the appellant contended that the respondents could not rely on the equitable mortgage because the certificate of title on which the equitable mortgage was founded was not stamped, it was for the appellant to raise this at trial, or at least on appeal, not for the first time after the delivery of the reasons for judgment in the appeal. In the absence of the issue being raised, this Court was entitled to act on the understanding that s 4A *Stamp Act* had no application here. Even at this late stage, there is still no evidence before this Court to establish that s 4A of the *Stamp Act* here nullified the respondents' contention. This eleventh hour contention fails.
- [4] We turn now to the further orders. Since this appeal was heard, the appellant has sold the Buderim land subject to the equitable mortgage and deposited the proceeds of sale in the trust account of the respondents' solicitors. The respondents are entitled to have the amount owing to them under the equitable mortgage paid from these proceeds with the balance, if any, returned to the appellant.
- [5] The learned primary judge ordered on 14 November 2002 that the appellant and the first third party (Mr Glen Theodore) were jointly and severally liable to pay the

¹ [2002] 1 QdR 490.

respondents \$69,904.88 for principal and interest then owing under the contract. This order was based on a mortgage document irrelevant to this Court's decision. The equitable mortgage was to secure the balance of the purchase price of Air Monitoring Services, \$48,100 at the time of default. An equitable mortgage allows for the provision of reasonable interest and in the present circumstances a rate of five per cent is appropriate. The learned primary judge in his reasons noted that Air Monitoring Services and Glen Theodore had been in default since mid to late 1997.² The appellant is therefore liable to pay interest from 1 January 1998 at five per cent.

- [6] On 26 September 2002 the respondents' solicitors made an offer to settle the action for \$60,000 in exchange for them providing to the appellant the certificate of title of the land. The offer was not accepted. In accordance with these reasons, by 26 September 2002 the appellant was liable to pay the respondents less than \$60,000 (\$59,492.45). As the amount recovered by the respondents is less than the offer made by them to settle the action, there is no reason why the appellant should pay the respondents' costs of the trial on anything other than the standard basis.
- [7] Although the appellant was successful on some grounds raised in the appeal, she was ultimately unsuccessful, as she was at trial. In the circumstances, we can see no reason why the appellant should pay more than two-thirds of the respondents' costs of the appeal.
- [8] In preparing these reasons for delivery, our associates became aware that the first respondent was deregistered by ASIC on 15 December 2002 under s 601AB *Corporations Act 2001*; this occurred after the primary hearing, delivery of judgment and execution of the District Court order the subject of this appeal but before the hearing of this appeal. This means that the first respondent's property vests in ASIC: s 601AD(2) *Corporations Act 2001*. On enquiry, the respondents' solicitors have informed the Senior Deputy Registrar (Appeals) that they were unaware of the de-registration, which may be related to a change of accountants, and that their clients intend to apply to reinstate the registration of the first respondent, presumably under s 601AH *Corporations Act 2001*. If that application is made and successful, "the company is taken to have continued in existence as if it had not been deregistered" and "any property of the company that is still vested in ASIC reverts in the company": s 601AH(5) *Corporations Act 2001*.
- [9] We would make the following orders:
1. Allow the appeal to the limited extent of setting aside the orders made at first instance on the counterclaim.
 2. The Court declares that:
 - (a) Glen Theodore, with the authorisation of the appellant, deposited a certificate of title to the land described as Lot 65 on RP 817375, County of Canning, Parish of Mooloolah contained in Title Reference 18689094 ("the land") with the solicitors to the respondents and thereby secured by equitable mortgage the amount owing under the contract of sale for the purchase by Mobile Lab Pty Ltd ACN 074 680 194 of the business of Air Monitoring Services

² Reasons for judgment, [26].

together with certain plant and equipment from the respondents pursuant to the contract of sale dated 22 July 1996.

- (b) The appellant is liable to pay ASIC and the second respondents the sum of \$48,100.88, together with interest at five per cent from 1 January 1998 until the date of this order.
3. The appellant is to pay the second respondents' costs, and upon any successful reinstatement of its company registration under s 601AH *Corporations Act* 2001, the first respondent's costs, of and incidental to the counterclaim together with reserved costs and excepting costs previously ordered in the proceedings to be assessed on the standard basis.
4. The appellant is to pay two-thirds of the second respondents' costs, and upon any successful reinstatement of its company registration under s 601AH *Corporations Act* 2001, two-thirds of the first respondent's costs, of this appeal, together with reserved costs, if any, to be assessed on the standard basis.
5. Liberty to apply as to the form of these orders within one month of their delivery with any supporting submissions to be in double spacing and not to exceed 2 A4 pages rendered in type no smaller than 1.8 mm (10 point) font on seven days notice to the other side.
- [10] **JERRARD JA:** I have read the further reasons for judgment and orders proposed by the learned President and Justice Philippides. Those orders give effect to the majority judgment in this matter. Acknowledging that, I respectfully maintain my dissenting opinion that the actual contract entered into between the respondents and the appellant's son was enforceable, if the representations her son made were accurate, since he as adult beneficiary was in a position to require the appellant to execute a mortgage.³ The terms of that contract provided for the deposit of the duplicate certificate of title; there was no evidence from any witness on behalf of the respondents of any expectation of the creation of any equitable mortgage by that act of deposit; and for my reasons earlier stated I respectfully consider none arises by inference from the conduct of the appellant or her son.

³ As adult beneficiary he was in substance the owner of the property and could direct the trustee as to its disposition. See *Asgard Capital Management Ltd v Maher* [2003] FCAFC 156, judgment delivered 25 July 2003, at [7].