COURT OF APPEAL

DALTON JA

Appeal No 11504 of 2022
SC No 12953 of 2020

SENTINEL PROPERTY GROUP PTY LIMITED **ACN 149 805 489**	**Appellant/Applicant**
v	
ABH HOTEL PTY LTD **ACN 622 296 011**	**Respondent**

BRISBANE

TUESDAY, 11 OCTOBER 2022

JUDGMENT

DALTON JA: This morning I heard an application for an injunction in this appeal, and I made orders in terms of a draft granting an injunction on terms both of the usual undertaking as to damages, and also as to security for that undertaking. I now give my reasons for that decision.

The factual matters underlying the appeal are as follows: the company Oncore (director O'Neill) owned the Airlie Beach Hotel. Oncore sold the hotel and the business of the hotel to the respondent in September 2018. The respondent required two mortgages to complete this purchase. One was from the Commonwealth Bank and was in an amount of $38 million. The Commonwealth Bank, I note, had other financial relationships with the respondent, and the mortgage was an all-moneys mortgage so that it secured moneys other than simply the

$38 million on the Airlie Beach Hotel. The second mortgage was to Oncore. It was in an amount of $4.5 million, essentially vendor finance. The interest was capitalised and the entire amount was repayable in two years.

There was a deed of subordination entered into between the Commonwealth Bank, Oncore and the respondent in June 2020. Oncore's debt was subordinated to that of the Commonwealth Bank.

In October 2020 the Commonwealth Bank advised the respondent that it was aware that it had breached its covenants as to financial performance in terms of its EBITA figures. The bank's attitude was it would monitor the situation, but because of the pandemic, would take no action.

On the 7th of October 2020, by a document entitled Heads of Agreement, the respondent granted to the applicant for injunction and appellant an option to purchase the Airlie Beach Hotel for an amount of $41 million with a lease back for a term of 20 years with three options of 10 years each. The primary judge found that the heads of agreement was a document which had an immediately binding effect, although it required other documents to be brought into being, that is, a formal option document, a sale document and a lease. I notice that there is a notice of notice of contention challenging this finding but, for the purposes of these reasons, I assume that the Heads of Agreement document was immediately binding. It contained a clause as follows:

> "The Call Option Agreement is subject to the Vendor obtaining the consent of its Mortgagee to this transaction within the Due Diligence Period. If the Call Option Agreement is terminated by the Vendor due to its being unable to obtain the consent of its Mortgagee to this transaction, the Vendor agrees to compensate the Purchaser for its reasonably incurred due diligence costs…"

The due diligence period finished on the 13th of November 2020 and, under the clause just extracted, that was the date by which the respondent was to obtain the consent of its mortgagees.

During October, there were negotiations between the respondent and the application as to the terms of the option agreement, the contract of sale and the terms of the lease, and about from 20 October 2020, a multiplicity of other commercial possibilities for further agreement, not contemplated by the Heads of Agreement. On the 9th of November 2020, the respondent contacted O'Neill on behalf of Oncore. On the 10th of November 2020, they met. The trial judge found that the respondent gave O'Neill several documents in order to "entice" him to give his consent, as required, by the clause extracted above.

The next day, 11 November 2020, O'Neill advised the respondent that he was "not prepared to release the second mortgage unless the loan was paid out in full, together with interest."

On the 11th of November 2020, having received that advice from O'Neill, the respondent wrote to the applicant saying that the amendments it was seeking were outside the Heads of Agreement; that the date for the preparation of the formal option and the transactional documents (ie, the sale and lease documents) had passed, but agreement had not been reached on those documents and, lastly, that the second mortgagee did not consent unless paid out. The respondent advised the applicant that it would be unable to pay out the second mortgagee as the Commonwealth Bank required all funds to be repaid across the respondent's group before it discharged its mortgage. That left a shortfall which meant that the second mortgagee was unable to be paid.

The respondent proposed, in these circumstances, that they terminate the Heads of Agreement by mutual consent. The applicant refused.

In the face of that refusal, the respondent sought the Commonwealth Bank's consent, pursuant to the clause extracted above. The Commonwealth Bank refused consent.

The respondent purported to terminate the Heads of Agreement. The applicant refused to accept that the agreement was terminated, waived the breach, called for settlement and, when that did not happen, sued for specific performance and damages in lieu of specific performance in this court.

The matter came before Bradley J. He supervised it for some time. On the 21st of May 2021, he made an order that the applicant file and serve its expert reports for the trial by the 21st of July 2021. In June, the applicant gave a notice to admit. There was no response to that, so the respondent was deemed to have admitted the value of property owned by it at Shute Harbour (another hotel) and the business (only) conducted from the Airlie Beach Hotel ($18 million). That having happened, the solicitors for the applicant wrote on the 14th of July 2021 and the 30th of September 2021, informing the respondent that at the trial they would call no valuation evidence, because the facts as to valuation had been deemed to be admitted because the respondent had not responded to the notice to admit.

In late September, early October 2020, during the preparation for trial, dispute arose between the parties as to including valuations by Knight Frank in the agreed bundle. They were not agreed. On day 1 of the trial senior counsel for the applicant told the Court that the applicant would rely on the Knight Frank valuations as its evidence to support its case for damages in lieu of specific performance. That was opposed, not surprisingly, by the respondent. On day 4 of 5 of the trial senior counsel for the applicant informed the Court that although the applicant had subpoenaed the relevant employee of Knight Frank to attend the Court and give evidence, it had told him he was not required, and it would call no witness but simply tender the Knight Frank documents as company documents under section 1305 of the Corporations Law, which allows books and records of a company to be tendered as prima facie evidence of what they contain. Not surprisingly, that tender was refused on the basis that it cut across the whole basis of the supervised directions made to date, and that this announcement was on the second-last day of the trial. In the face of that, senior counsel for the applicant abandoned the claim for damages in lieu of specific performance and sought leave to amend the claim and statement of claim to reflect that.

The primary judge, Justice Bradley, gave judgment for the defendant respondent declaring that the applicant had no interest in the land which was the subject of the proceeding. At about 4 pm on day 28 after that decision was delivered, the applicant filed a notice of appeal asserting no fewer than 12 errors by the primary judge and five days later filed this

application for an injunction. It sought to restrain the respondent selling or transferring the land pending (an expedited) appeal.

The applicant submitted that it ought to be granted the injunction because it had an arguable case on appeal, and if an injunction was not granted, the appeal would be rendered nugatory, primarily because it had abandoned its damages claim below and its only claim was a claim for specific performance. This was a real issue today, as from the respondent's material it is clear that it has contracted to sell the Airlie Beach Hotel and the business conducted thereat to another person. The sale of the hotel and business is part of a much bigger transaction, the consideration for which is in the region of $160 million.

So far as the idea that the appeal will be rendered nugatory, there are two immediate observations. First, that to no small extent, that is the fault of the applicant in the sense that it abandoned its claim for damages in lieu of specific performance. And, secondly, that as the appeal points and, indeed, the decision of the primary judge were mainly, though not exclusively, points of law, assessment of the prospects of appeal is easier in this case than in most, and it does appear to me that the prospects on appeal are not unarguable but are poor.

Furthermore, even if my view about the prospects of the applicant's appeal is unduly pessimistic, there are difficulties with the idea that it will be granted an order of specific performance. Firstly, the amount which the applicant would be obliged to pay for the Airlie Beach Hotel is less than the amount owing to the current financier, that is, a lender which replaced CBA and Oncore. Its name is Capstone. There are other issues, I think, as to the idea of granting specific performance in a case which will require, inter alia, a 20-year lease from the applicant to the respondent. In any case, I need do no more than mention such matters.

I will give reasons for my view that the applicant's prospects on appeal seem, to me, poor. The applicant really has three main points it wishes to advance on appeal. The first is based on the words of the clause which I extracted above, and in particular:

> "…its being unable to obtain the consent of its Mortgagee."

This state of affairs – the state of being unable to obtain consent – is something which, the applicant wishes to argue on appeal, created an obligation on the respondent – the obligation being to use all possible methods or, in my words, strenuous efforts to bring about the consent of the mortgagees. It seems to me fairly unlikely that a term like that will be implied where there are no clear words. The second point advanced by the appellant was that either that alleged obligation – obligation implied in the consent clause – or the general *Mackay v Dick* obligation at general law, obliged the respondent, as I say, to use strenuous efforts to persuade in particular the Commonwealth Bank to restructure the entirety of the respondent's finances with it, so as to bring about a state where Oncore was paid out and the restructured debt (on the applicant's case) would amount to around $5 million secured by the Shute Harbour Hotel, valued at $27 million. This is put forward as the obligation under the contract.

And it is implied, I suppose, in the argument that had strenuous efforts been used, this state of affairs would have been brought about, notwithstanding that it was the end of 2020 when there was a pandemic which very much affected the turnover of the Airlie Beach Hotel; the respondent was approaching the Commonwealth Bank at a time when it was in breach of the covenants in the mortgage as to its financial performance, and when it had entered into, or proposed to enter into, a sale contract for the hotel, the proceeds of which would not cover all the moneys secured on that hotel. I think, as I say, the prospects of that argument succeeding are poor.

The third point was associated with that one, and it was that the primary Judge erred in deciding who bore the onus of proof as to these issues. The judgment of Robb J in *AI Achrafi v Topic* [2016] NSWSC 1807 [62] was relied upon. It was said that the primary Judge erred in categorising the obligations on the respondent as *Mackay v Dick* type obligations. See paragraphs 1 to 4 of paragraph [62]. Instead, according to the applicant's argument, paragraphs 6 to 11 of paragraph [62] applied because the consent clause should have been construed so as to create an express obligation on the respondent. Then, of course, it had to be shown that the case was so finely balanced that a mistake as to the onus of proof would have made a difference. I must say, I am by no means convinced of either of those things.

There were some factual arguments mounted as to how the applicant says the financial arrangements of the respondents would have played out had it made strenuous efforts to refinance. All of those arguments are really dependent on the idea that the respondent was obliged to make strenuous efforts to refinance, and as I have said, I am sceptical as to the prospects of success of that argument, so I need not go on to discuss the factual arguments.

As well as the prospects on appeal, the respondents resisted the making of the injunction pointing to the contract of sale, which they have sworn is on foot, although, perhaps understandably in the circumstances of this litigation, they were rather coy about it. They said that the rights of third-party purchasers would be interfered with by an injunction, and also the rights of Capstone, and perhaps via Capstone they would be required to pay penalty interest if an injunction was granted. I am satisfied that all interested parties were either served or had the opportunity either to appear today or put their case through the respondent.

All of those matters might have had decisive weight had the matter remained as it was immediately before it was called on this morning, and that was that there was no worthwhile undertaking as to damages offered by the applicant. The material filed as to its undertaking was hearsay. It was not as to the applicant's worth, but as to the worth of a group of companies. The information about that omitted the most basic things, such as what companies comprised the group, what assets they had, and how those assets could properly be available to the applicant. This is in circumstances where ASIC searches show the applicant is worth about $2.6 million and made about $730,000 profit last year.

Nonetheless, at the beginning of the hearing this morning, the applicant offered to submit to orders which gave security for its undertaking as to damages in an amount of $2 million. That is an amount which is adequate when regard is had to paragraph 51 of Mr Hamilton's affidavit. When I say it is adequate, it compensates for wasted transaction costs and increased interest payable to Capstone. It makes no allowance for other loss which the respondent might suffer as a result of the injunction; however, there was no evidence of any persuasive

weight as to that before me. The line item at paragraph 51 of Mr Hamilton's affidavit put it at $25 million, and an earlier paragraph (49(f)) swore to that in very general terms.

I am not prepared in the circumstances to require more security – or I was not prepared in the circumstances to require more security – from the applicant. I think having given that security, however, together with the fact that failing to grant the injunction would render the appeal nugatory, means that in circumstances where there are arguable grounds of appeal, an injunction should properly be granted.

All right. Well, they're my reasons. Now, the 9th and 10th of February you can have your appeal. So unless one of you vigorously objects to that, that'll be, sort of, set in stone.

MR POMERENKE: Yes, your Honour. Thank you.

DALTON JA: Yes. Thank you, Mr Pomerenke. And, sorry, I - - -

MR HAMILTON: Hamilton, initials P.J., your Honour.

DALTON JA: Mr Hamilton.

MR HAMILTON: Solicitor with Morgon Conley.

DALTON JA: There you are.

MR HAMILTON: Save for not knowing Mr Savage's diary, I can't really comment on that date.

DALTON JA: No, but I think where your side in particular, Mr Hamilton, says that the appeal is urgent and ought to be expedited and that you are suffering loss while it's not being heard, I can't imagine that your instructions would be - - -

MR HAMILTON: I appreciate that, your - - -

DALTON JA: - - - to reject the earl – to reject the earliest date offered.

MR HAMILTON: I appreciate that, your Honour, and the correspondence, previous as it were, there was talk about a prior to Christmas appeal, which would have caused - - -

DALTON JA: Yes.

MR HAMILTON: - - - more difficulties on my side. Your Honour, if I might make one comment, just as a practical issue. I do have the original affidavit of Mr Wilson - - -

DALTON JA: Good.

MR HAMILTON: - - - which was an – if that's - - -

DALTON JA: Thank you very much.

MR HAMILTON: - - - appropriate to be handed up now - - -

DALTON JA: Yes. Thank you.

MR HAMILTON: - - - rather than go through the registry.

DALTON JA: Well, I give you leave to read and file.

MR HAMILTON: It's not stapled, unfortunately.

DALTON JA: That's all right. Thank you. All right then. Thank you very much. Nothing further from anyone?

MR HAMILTON: No, your Honour.

MR POMERENKE: No.

DALTON JA: All right.

MR POMERENKE: Thank you, your Honour.

DALTON JA: Thank you very much. We can adjourn the court.