IN THE SUPREME COURT OF QUEENSLAND No. 3221 of 1989

CIVIL JURISDICTION

BEFORE MR. JUSTICE RYAN

BRISBANE, 24 NOVEMBER 1989

BETWEEN:

JOHN DURES ANDERSEN — First Plaintiff

-and-

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED — Second Plaintiff

-and-

MAXWELL ROY LOCKHART, WILLIAM HAMILTON HART, JAMES WILLIAM ALLEY, ROBERT JAMES CUNNINGHAM, DAVID JOHN HERBERT WATT, ROBYN GAE LYONS, ROBERT MAXWELL LOCKHART and WARREN GRANT DENNY, ALL TRADING AS FLOWER & HART (A FIRM) — First Defendant

-and-

DAVID JOHN COLWELL and WENDY ANN WRIGHT, TRADING AS COLWELL WRIGHT & COMPANY (A FIRM) — Second Defendant

JUDGMENT

HIS HONOUR: By notice of motion the following orders are sought.

First, a declaration, or alternatively, a mandatory injunction that the first and second defendants forthwith deliver up to the plaintiff all lease, ancillary and related documents relevant to Caboolture Park Shopping Centre, 16 King Street, Caboolture, in the State of Queensland.

Two, alternatively, a declaration that the first defendant and second defendant are required to forthwith deliver up to the second plaintiff all lease, ancillary and related documents relevant to Caboolture Park Shopping Centre, 16 King Street, Caboolture, in the State of Queensland.

Third, a mandatory injunction that the first defendant and second defendant forthwith deliver up to the first plaintiff and second plaintiff all lease, ancillary and related documents relevant to the Caboolture Park Shopping Centre, King Street, Caboolture, in the State of Queensland.

Fourthly, a mandatory injunction that the first defendant and second defendant forthwith deliver up to the second plaintiff all lease, ancillary and related documents relative to Caboolture Park Shopping Centre, King Street, Caboolture, in the State of Queensland.

A writ seeking this relief was issued on 21 September 1989. An entry of appearance was duly entered for the first and second defendants. The relief is sought pursuant to O.57 r.2 of the Rules of the Supreme Court. The plaintiffs claim to be entitled to instruments of lease relevant to Caboolture Park Shopping Centre. The defendants, who are firms of solicitors, claim a lien over leases prepared by them for Caboolture Park Shopping Centre Pty. Ltd.

According to an affidavit of William Gordon Blair, who is the senior corporate banking manager - credit of Australia and New Zealand Banking Group Limited, one John Dures Andersen was appointed receiver and manager of Caboolture Park Shopping Centre Pty. Ltd. (receiver and

manager appointed) by the A.N.Z. Banking Group Limited on 14 August 1989 pursuant to a debenture dated 10 August 1988. The mortgage debenture in favour of Australian European Finance Corporation Limited was assigned to the second plaintiff on 10 August 1989. Caboolture Park Shopping Centre Pty. Ltd. is the registered proprietor of the property described as Lot 1 on registered plan no.205188, County of Canning, Parish of Canning, being the holder of the land contained in certificate of title vol. 6824. fol.2. Caboolture Park Shopping Centre is erected on that land. The A.N.Z. banking group limited is first and second registered mortgagee over the land pursuant to the registered mortgages no.H904041 and H904042. John Dures Andersen was appointed agent for the mortgagee on 3 August 1989. On 2 August 1989, A.N.Z. Banking Group Limited served a notice of demand on the Caboolture Park Shopping Centre Pty. Ltd. pursuant to registered mortgage no.H904042. On 4 August 1989, A.N.Z. Banking Group Ltd. served a notice of exercise of power of sale pursuant to s.84 of the Property Law Act 1974-1986 on Caboolture Park Shopping Centre Pty. Ltd. It is deposed that the receiver and manager and agent for the mortgagee and his officers have endeavoured to gather all relevant documents associated with the land and shopping centre erected there to enable the effective management of the shopping centre and administration of the company. Since 2 August 1989, no payment has been received by the A.N.Z. Banking Group Limited from Caboolture Park Shopping Centre Pty. Ltd. in response to the notice of demand. On 17 August 1989, Caboolture Park Shopping Centre Pty. Ltd. was served with a notice of appointment of Receiver/Receiver and Manager under the powers contained in an instrument dated 10 August 1988 being a debenture created and issued by Caboolture Park Shopping Centre Pty. Ltd. in favour of Australian European Finance Corporation Ltd. which was now vested in A.N.Z. Banking Group Ltd. and registered in the Corporate Affairs Office under no.BC883328.

The solicitor for the first plaintiff and second plaintiff sent letters to the first and second defendants

on 14 September 1989, requiring them to deliver up all leases and ancillary documentation relating to Caboolture Park Shopping Centre. Failure to comply with this request led to the institution of the present action.

It appears from an affidavit of the solicitor for the first defendants that Caboolture Park Shopping Centre Pty. Ltd. is not in liquidation.

Mr. Lockhart, a solicitor and member of the first defendant firm, has deposed that between March 1981 and August 1989 his firm provided legal services to Caboolture Park Shopping Centre Pty. Ltd. at its request. It has rendered accounts in respect of those services and for disbursements made on its behalf in connection with those services. Those services included work in relation to certain leases of parts of Caboolture Park Shopping Centre for the company as lessor to lessees. It has also, at the company's request and on its instructions, briefed counsel to provide various services to and for the company. Certain documents are held by the first defendant on behalf of the company which came into its possession in the course of, and by reason of, their acting as its solicitors. These are set out in a schedule. The second plaintiff consented to the registration of the leases described in the schedule. Once the leases were prepared by the first defendant they were sent to the second plaintiff for execution of the consent for registration. Once the second plaintiff exercised the consent on each lease, they were returned by the second plaintiff to the first defendant.

The first defendant claims a solicitor's lien over the documents referred to in the schedule to secure payment of the moneys for services it has provided to the company.

Miss Wright, a solicitor and member of the second defendant firm, has deposed that in August 1988, the firm was retained by the company to perform certain leasing work on its behalf. Accounts have been sent for the work but they remain unpaid. The leasing documentation is currently held by the firm, and it exercises a possessory lien over

the files. An employee of the second defendant has deposed that the lease documentation prepared on behalf of and on the instructions of the company relating to a period when the second plaintiff was mortgagee of the company was consented to by the second plaintiff.

It was submitted for the plaintiffs that while the solicitor's lien is good against a client and could be asserted against Caboolture Park Shopping Centre Pty. Ltd., a solicitor could not assert a lien against a person with a right superior to the client, namely the mortgagee, who was entitled to the relevant documents as against the mortgagor. It was said that the mortgagor could not withhold delivery up of documents, and neither could the solicitor who derived his rights from the mortgagor. For the defendants it was submitted that the mortgagee did not have any rights to the instruments of lease.

I was referred by counsel for the plaintiffs to a number of decisions. The first was Blundes v. Desart (1842) 2 Dr & War 405. It was said by Sir Edward Sugden in that case that a solicitor's lien which gave him a right to withhold his documents from his client prevailed generally for all costs between the solicitor and his client but the case was different when it was necessary to consider the rights of encumbrancers.

> "A prior encumbrancer cannot be affected because all the solicitor can insist upon is the right to withhold the deeds belonging to his client; but if the deeds do not belong to the client, his, that is the solicitor's, lien, cannot confer a higher right. If the client possessed the deeds, subject to an encumbrance, the solicitor must take them with the same liabilities."

This decision followed one more directly in point, Smith v. Chichester (1842) 2 Dr & War 892. The head note states:

> "The right to the estate confers the right to the possession of the title deed.

> A mortgagee is entitled to the possession of the title deeds of the mortgaged estate; and the mortgagor cannot, by depositing the deeds with his solicitor, with a view of creating a lien, thereby defeat the right of the mortgagee."

Re Hawkes, Ackerman v. Lockhart (1898) Ch. 1 to which I was next referred, makes it clear that, as Lindley M.R. stated at p.6:

> "A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties, the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the documents in his own possession."

That decision was recently applied in Re Averling Barford Ltd. (1988) 1 W.L.R. 360 in which Hoffman, J. stated a principle as being that:

> "A solicitor's lien entitles him to retain the documents as against his client and includes the right to refuse to produce the documents under subpoena duces tecum at the instance of a client who has become involved in litigation; but this right cannot be asserted against a third party who would be entitled to production as against the client."

These cases establish two propositions: one is that if a client is bound to produce a document in proceedings brought by a third party, then so is his solicitor who has a lien on the document for his costs. That specific proposition does not appear to have much relevance in this case, but the basis underlying it is, that a solicitor cannot claim a lien on documents where his client would not be entitled to withhold the documents against a third party. If, therefore, the mortgagee is entitled to delivery of the documents as against the mortgagor, the solicitors would not be entitled to retain them. The second proposition is that a mortgagee as against a mortgagor is entitled to possession of the title deeds of the mortgaged estate.

Two issues arise for consideration in relation to this second proposition. One is whether it is applicable in the case of a mortgage of land registered under the Real Property Acts. The second is whether it is applicable to instruments of lease executed by the mortgagor. It was submitted for the solicitors that the cases which decided that a mortgagee is entitled to possession of the title deeds followed from the fact that in the case of unregistered land a mortgage was effected by a transfer of the mortgagor's estate in the land to the mortgagee, and that consequently, the mortgagee as owner was entitled to the title deed as against the mortgagor. A mortgage pursuant to the Real Property Acts involves no transfer of title to the mortgagee. The statutory charge described as a mortgage involves no ownership of the land, the subject of the security: ES & A Bank Ltd. v. Phillips (1937) 57 C.L.R. 302 at p.321. Hence the mortgagee is not entitled to the instrument of title.

In my view that submission is correct. There is nothing in the Real Property Acts which confers a right on the mortgagee to the possession of the title deeds. So much was decided many years ago in Clarkson v. Mutual Life Association (1866) 5 Q.S.C.R. 165. It is therefore customary, as is stated in Francis on Mortgages and Securities, 2nd ed., p.35, to include in instruments of mortgage the right of the mortgagee to retain possession of the muniments of title for so long as any money shall remain owing under the security of the instruments. In Bill of Mortgage no.H904042 it is provided in clause 26 that the documents of title shall at all times during the continuence of the mortgage remain in the custody of the bank (the mortgagee).

I do not think that the mortgagee is entitled to claim possession of instruments of lease executed by the mortgagor pursuant to that clause. An instrument of lease does not operate to prove title in the mortgagor to the mortgaged land. But even if the instruments of lease are documents of title, the mortgagee has permitted them to

remain in the hands of solicitors and waived its right under clause 26 to have them remain in the custody of the bank. Moreover, pursuant to clause 24 of the mortgage, it consented to the leases by the mortgagor which were prepared by the solicitors and returned the lease documentation to the solicitors. In these circumstances, the mortgagee will seek in vain in the mortgage instrument to assert any rights superior to that of the mortgagor to recover the relevant documents from solicitors who have a valid possessory lien over them for their costs.

I am therefore of the opinion that the plaintiffs have no right to delivery up of lease documents relevant to Caboolture Park Shopping Centre pursuant to the bill of mortgage. The question then arises whether they have that entitlement under the mortgage debenture. This provides in clause 12 that the mortgagee is entitled to the possession of the title deeds and other documents of title of the land. That does not seem to give the mortgagee any more extensive right than under the mortgage no.H904042. The result of these considerations is that the plaintiff would have no right to delivery of the lease documents under the mortgage or debenture in the absence of default under those instruments. It is necessary now to consider whether there was default, and if there was, what its effect was.

It was submitted for the first defendant that there was no evidence of a default under the debenture. The evidence of Mr. Blair in his affidavit of 29 September 1989 was Mr. Andersen was appointed receiver and manager of Caboolture Park Shopping Centre Pty. Ltd. on 14 August 1989. In his affidavit of 10 October 1989, he deposes that demand was served by the A.N.Z. Banking Group Ltd. for payment of sums of money referred to in a notice of demand dated 2 August 1989, and that since 2 August 1989, no payment had been received in response to the notice of demand. The notice of demand referred to is, however, one which states that failure to pay the amounts set out therein will result in the bank exercising its rights inter alia under registered mortgage no.H904042. There is no

specific reference in this to rights under mortgage no.H904041. It was submitted for the plaintiffs that the effect of appointment of a receiver under the debenture was that the receiver was entitled to delivery up of the documents over which the solicitors had a possessory lien. Reference was made in this regard in Re Averling Barford Ltd. (1988) 1 C.L.R 360 to which I have already referred. That case was, however, concerned not with the delivery up of documents but with their production pursuant to a provision in the Insolvency Act 1986 (U.K.). In the instant case, the appointment of receiver and manager, who is the agent of the mortgagor (see clause 22(C)(d)) would not, in my opinion, entitle him to delivery up of the lease documents from the solicitors who had a lien on them for their costs.

The notice of exercise of power of sale pursuant to s.84 of the Property Law Act 1974-1986 is given on the basis that default had been made under the Bill of Mortgage registered no.H904042. It was addressed to Caboolture Park Shopping Centre Pty. Ltd. It stated that the default was that principal in an amount of $116,708,546 then due and owing was not paid on 3 August 1989 and also the Australian dollar equivalent of $10,255,000 Swiss Francs. The notice of demand dated 2 August 1989 is also addressed to Caboolture Park Shopping Centre Pty. Ltd. and demand is made for payment of the same sum being the amounts of principal interest and other moneys due and payable by Caboolture Park Shopping Centre Pty. Ltd. to the bank on the accounts described in a schedule thereto, the payment of which was secured to the bank inter alia by virtue of registered mortgage no.H904042 given by the Caboolture Park Shopping Centre Pty. Ltd.

In his affidavit sworn on 10 October 1989, Mr. Blair has deposed that as at 27 July 1989 the indebtedness and liabilities to the bank of Caboolture Park Shopping Centre Pty. Ltd. (receiver and manager appointed) were as set out in a schedule which had been extracted from the computer records of the second plaintiff. He deposes further that

since 2 August 1989, no payment has been received by the second plaintiff from Caboolture Park Shopping Centre Pty. Ltd. in response to the notice of demand.

An examination of the schedule shows that the only reference to Caboolture Park Shopping Centre Pty. Ltd. is in respect of indemnities/guarantees. It was submitted on behalf of the defendants that the mortgagor was not obliged to make any of the repayments sought in the notice of demand dated 2 August since it referred only to debts which were not secured by the mortgage. However, having regard to the width of the covenant to pay on demand in writing contained in clause one of the mortgage, I consider that the mortgagor was obliged to make a repayment at least of the amounts set out in the schedule in respect to it.

Accordingly, I am of the opinion that the power of sale conferred by the Property Law Act 1974-1986 has become exercised. The result is that the bank may demand and recover from any person other than a person having in the mortgaged property an estate, interest, lien or right in priority to the mortgagee, all the deeds and documents relating to the property or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him. (See s.89/4 of the Property Law Act.)

I consider that the defendants do not have a lien in respect to the leases in priority to the mortgage which was given in 1985, prior to the preparation of the leases. The question is not whether the defendants had a prior equity or right at the time when the power became exercisable but at the time when the mortgage was given. I consider also that the leases are “documents relating to the property”. The question then is whether a purchaser under the power of sale would be entitled to demand and recover those documents from the mortgagor. In Halsburys Law of England, 4th ed., Vol.32, para.752, it is said in relation to the corresponding provision in the Law of Property Act 1925 (U.K.) that the reference is apparently to the deeds which

the purchaser could recover from the holder of them after the sale.

In my judgment, a purchaser under a power of sale would be entitled to demand and recover from a mortgagor any lease documents relating to the property. Even if that is not so, it should, I consider, be implied in a mortgage by which a power of sale is exercisable, that when it becomes exercisable, the mortgagor will hand over those agreements to the mortgagee so that it can exercise its power of sale. See N.R.M.A. Insurance Ltd v. Individual Homes Ltd. no.SC433 of 1988 (Supreme Court, Canberra per Kelly, J.) That was a right accorded to the mortgagee by the mortgaged instrument prior to the time when the lien in favour of the solicitors arose.

Accordingly, in my opinion, the second plaintiff as the person entitled to exercise the power of sale may demand and recover the lease documents.

Accordingly, I make an order in terms of paragraphs two and four of the notice of motion. I order the defendants to pay the second plaintiff's costs of the proceedings to be taxed. Anything further gentleman?

MR. HACKET: There is the question of reserved costs for a hearing before Mr. Justice Mackenzie which was the date in which the notice of motion was first returnable and an agreement had been reached for the solicitor for the first defendants that we would adjourn the notice of motion as against that defendant, but there was an argument with the second defendant in respect of an adjournment and His Honour reserved the costs of that day. I would ask for the costs of the adjournment.

HIS HONOUR: You are appearing for-----

MR. HACKET: The plaintiffs.

HIS HONOUR: Can you resist that?

MR. DALKIE: Your Honour, I appear for the first defendant. There were certainly costs reserved, I think, on 5 October. It was before Mr. Justice Mackenzie.

HIS HONOUR: Yes.

MR. DALKIE: Your Honour, I am also instructed to request for a stay of judgment.

HIS HONOUR: I will deal with that after the costs. What are you asking for in relation to the reserved costs?

MR. DALKIE: I simply point out to the Court that there were, in fact, reserved costs on 5 October.

HIS HONOUR: I have been asked to include reserved costs in the costs order. Is there any reason why I should not do so?

MR. DALKIE: No.

HIS HONOUR: Well, the costs will include reserved costs. Now, in relation to a stay, I will hear you on that.

MR. DALKIE: Your Honour, I have instructions to request a stay of judgment.

HIS HONOUR: Is that a request for both defendants?

MR. CREEDON: Your Honour, I appear for the second defendant. I have no instructions for that but it may be appropriate for us to follow the course of the first defendant.

HIS HONOUR: It's a question of whether you are asking me to do it or not. Do you wish to get instructions on that?

MR. CREEDON: Your Honour, in the circumstances, yes, I would wish to seek some instructions on that matter, if I could seek that indulgence?

HIS HONOUR: How long would that take?

MR. CREEDON: 35 minutes, Your Honour.

HIS HONOUR: What would be your view in relation to that application?

MR. HACKET: Your Honour, I also would like to get some instructions on that point because given who the defendants are, I think some arrangement may be able to be reached.

HIS HONOUR: Is seems to me these issues are, I might say, not simple. It is clear they are not and it is a matter which might well be considered by a superior tribunal.

MR. HACKET: I have no doubt about that, Your Honour.

HIS HONOUR: And it doesn't seem to me that there would be any real difficulty from the point of view of the second plaintiff, who was the one who had the order made in its favour, since, at least, if there is a condition imposed, access to those documents will be made available to the second plaintiff at its request or at reasonable times, so that you could look at the documents for the purposes that have been outlined in that affidavit which I understand is in order to be acquainted with their terms and be able to make some adjustments in lease rentals.

MR. HACKET: Your Honour, we have that access already. Both defendants are letting us look at the document's copy.

HIS HONOUR: There seems to be a deed - I might be intimating now, and I won't give a formal order until you have received instructions - I am intimating now it could be quite appropriate that there should be a stay.

MR. HACKET: The problem I have is certain leases over the centre have expired and new leases granted without the duplicate original copies which the solicitors hold registration-----

HIS HONOUR: That might be a matter for an arrangement between the parties.

MR. HACKET: That's what I had in mind.

HIS HONOUR: It is better than giving a formal order. I will adjourn this matter. I have another matter I am to proceed with, but I see no reason why you shouldn't interpose in some convenient time in the course of the morning so that I could make an appropriate order in relation to the request that has been made to me.
