

SUPREME COURT OF QUEENSLAND

CITATION: *Beachquest Pty Ltd v Interstate Mortgage and Investment Pty Ltd & Ors* [2002] QSC 238

PARTIES: **BEACHQUEST PTY LTD ACN 082 083 065**
(applicant)
v
INTERSTATE MORTGAGE AND INVESTMENT PTY LTD ACN 009 751 651
(first respondent)
TALGAI INVESTMENTS PTY LTD ACN 009 888 635
(second respondent)
THE WRIGHT BROTHERS (QLD) PTY LTD ACN 068 511 839 (IN LIQUIDATION)
(third respondent)

FILE NO/S: No S 9938 of 2000

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 21 August 2002

DELIVERED AT: Brisbane

HEARING DATE: 19 August 2002

JUDGE: White J

ORDER: **Declare that the first respondent Interstate Mortgage and Investment Pty Ltd has a first ranking priority in respect of monies owed to it by the third respondent The Wright Brothers (Qld) Pty Ltd (in liquidation) in the amount of \$6,744,279.00 as at 19 October 1999, together with simple interest and costs thereon, secured by Queensland registered mortgage number 702935915.**

Order that:

- 1. The application otherwise be dismissed;**
- 2. Caveat number 704442816 lodged by the applicant in respect of Lots 56 and 200 on SP101644, title references 50239149 and 50239169 respectively, be removed forthwith;**
- 3. The applicant pay the first respondent's costs of and incidental to the application as agreed or to be assessed.**

CATCHWORDS: MORTGAGES – MORTGAGES AND CHARGES
 GENERALLY – RIGHTS AND LIABILITIES OF
 MORTGAGOR AND MORTGAGEE – POSSESSION –
 RIGHTS AND LIABILITIES OF MORTGAGEE IN
 POSSESSION – application to determine priority between
 mortgagees – formal orders

COUNSEL: Mr A Tosswill (Manager of Beachquest Pty Ltd) for the
 applicant

Mr C Wilson for the first respondent

SOLICITORS: Halliday & Stainley solicitors for the first respondent

- [1] The applicant, Beachquest Pty Ltd (“Beachquest”), brought an originating application to determine principally the priorities between itself and the first respondent, Interstate Mortgage and Investment Pty Ltd (“IM&I”) as mortgagees and also subsidiary matters relating to future advances and marshalling.
- [2] I delivered my reasons on 18 December 2001 and invited counsel to provide settled orders in light of the reasons and to make submissions about costs. Mr F L Harrison QC for Beachquest then indicated that the parties would probably not require formal orders to be made and would themselves reach agreement. That has not eventuated. IM&I as mortgagee in possession has entered into a contract to sell the secured property. Beachquest lodged a caveat over the property on 23 November 2000 on the grounds of the priority of its mortgage. Mr Tosswill, the manager of Beachquest, has appeared on this re-listing of the matter to settle the orders without objection, to oppose the orders sought by IM&I.
- [3] IM&I seeks a declaration as to its priority and the amount, an order for the removal of the caveat and costs.
- [4] In correspondence between the parties’ solicitors Beachquest’s concern was to have details of IM&I’s contract of sale and any other arrangements it had made with other parties (not parties to this application) and other matters not relevant to the originating application.
- [5] Before me Mr Tosswill seeks in his draft order to have an account taken to determine the quantum of priority between the parties, details of how the amounts of principal and interest owing under the security have been calculated and how the moneys repaid under the mortgage have been applied to the various securities held by IM&I.
- [6] In paragraph 44 of my reasons I referred to Mr Tosswill’s assertion that a considerably greater sum by way of repayments had been received from the third respondent, The Wright Brothers (Qld) Pty Ltd, (the borrower), than IM&I gave credit. I suggested “if necessary, the quantum of the repayments can be established by agreement or by taking accounts”.
- [7] It is not necessary. The account ledger as between IM&I and the borrower is Exhibit MN9 to the affidavit of Mark Newnham filed 13 February 2001. Payments are set out in the document entitled “Current account as between the First Respondent and Third Respondent Borrower – 16/10/98 to 19/10/99” which I

referred to in paragraph 51 of the reasons. No basis for challenging the ledger was advanced. Mr Tosswill is concerned about interest. A perusal of the ledger shows that there was no capitalisation of interest to 19 October 1998.

- [8] The matters of concern to Mr Tosswill have either been disposed of in the originating application or are not relevant to it, and since priority has been determined in favour of IM&I the caveat should be removed and the declaration sought by IM&I made.
- [9] Declare that the first respondent Interstate Mortgage and Investment Pty Ltd has a first ranking priority in respect of monies owed to it by the third respondent The Wright Brothers (Qld) Pty Ltd (in liquidation) in amount \$6,744,279.00 as at 19 October 1999, together with simple interest and costs thereon, secured by Queensland registered mortgage number 702935915.

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