



Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No S5582 of 2002

HORTON INVESTMENTS PTY LIMITED
(ACN 002 705 446)

Plaintiff

and

LEX NOMINEES PTY LTD
(ACN 073 985 003) (in liquidation)

First Defendant

and

RAJENDRA KHATRI and
MICHAEL PELDAN

Second Defendant

BRISBANE

..DATE 21/10/2002

JUDGMENT

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HIS HONOUR: This is an application by the second defendants for an order that the court give judgment for the second defendants against the plaintiff pursuant to rule 293 of the Uniform Civil Procedure Rules.

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That rule provides, in sub-rule (1), that a defendant may, at any time after filing a notice of intention to defend, apply to the court for judgment against a plaintiff. Sub-rule (2) provides that if the court is satisfied the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim and there is no need for a trial of the claim or the part of the claim, the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.

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There were two points argued on behalf of the second defendants. The first was that the plaintiff's case as revealed in its statement of claim filed on 10 September 2002 failed to disclose in what capacity certain representations were made by the Mr Paul Triscott referred to in the pleading. I do not think there is any substance in that point. It appears to me to be clear that what is being alleged in the statement of claim is that at the material times Mr Triscott was acting on behalf of the first defendant, Lex Nominees Pty Ltd.

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The second point, however, is one of some substance. The plaintiff relies for the relief sought on allegations made, in

particular, in paragraphs 11(ii) and 13 of the statement of claim, asserting that what is there pleaded is an agreement made between the plaintiff and the first defendant under which the first defendant would execute a deed of priority upon which the plaintiff could rely, not only on a sale by the mortgagor of the relevant land but also on a sale by the first mortgagee - who at that time was the first defendant - in the exercise of its power of sale.

I have heard lengthy argument on this subject and I have also been taken to references in the affidavit evidence to the alleged agreement. My conclusion is that what was discussed between the representatives of the plaintiff and first defendant at the times referred to in paragraphs 11 and 13 was the question of the plaintiff's rights upon sales by the mortgagor, and it was not then in the contemplation of the parties that there would be priority accorded to the plaintiff, the second mortgagee, upon the sale of any of the property the subject of the securities by the first mortgagee in exercising its power of sale.

I therefore conclude that the second defendants are entitled to the relief they seek. It appears to me that the case as pleaded by the plaintiff has no real prospect of succeeding, and therefore judgment should be entered for the second defendants.

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HIS HONOUR: There will be judgment for the second defendants
against the plaintiff. I order that the plaintiff pay to the
second defendants their costs of and incidental to the
proceeding, including the costs of this application and any
reserved costs.

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