

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No 8870 of 2003

EASTGATE PROPERTIES PTY LTD
(ACN 099 766 215)

Plaintiff

and

J HUTCHINSON PTY LTD
(ACN 009 778 330)

Defendant

BRISBANE

..DATE 21/10/2003

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: The plaintiff and the defendant are parties to a building contract made on 29 May 2003 whereby the plaintiff as owner of the relevant land engaged the defendant as builder to construct a warehouse facility. The development is known as Eastgate Industrial Park.

1

10

On 29 May 2003 the plaintiff granted a mortgage in favour of the defendant over the relevant land to secure the payment to the defendant of the moneys due and payable by the plaintiff from time to time under the building contract. The mortgage was lodged for registration under dealing number 706916975 ("the mortgage") on 22 August 2003.

20

At the time the development commenced the relevant land comprised six separate freehold titles. Those titles are being reconfigured. The development comprises four attached industrial office and warehouse buildings each of which will have a separate title, and a strata titled building that will have eight separate units.

30

The parties were in dispute about various matters, including the fact that the defendant had constructed the works so that they encroached upon two adjoining properties. The parties entered into a deed dated 6 August 2003 ("the deed") that recited the various disputes that had arisen between the parties in connection with the contract and set out obligations described as what the parties had agreed to in order to resolve the matters.

40

50

Recital E of the deed referred to there being a total payable of \$4,353,171 for the building work under the building contract. Clauses 6 to 9 of the deed provide: 1

"6. Removal of Caveat

Hutchinsons shall provide Eastgate with a withdrawal of caveat in exchange for the delivery of a bank cheque made payable to them for the sum of \$3,785,275.00 together with a mortgage over Lot 14 on proposed SP 146462 or Lot 4 on RP 12846 (whichever is the current real property description of the land at that time) ("the relevant land") in immediately registrable form by Eastgate in favour of Hutchinsons to secure the sum of \$567,896.00 ("the balance of the contract price") provided however that upon such payment Hutchinsons shall provide a release of the existing bill of Mortgage over the Eastgate Industrial Park and that the Bill of Mortgage for the balance of the contract price shall rank after the first ranking mortgage to be provided by Eastgate to its financier over the relevant land. 10
20

7. Rectification of Encroachment

Hutchinsons shall undertake all such steps as are necessary to rectify the encroachment referred to in recital H so as to permit the registration of the strata plan for lots 1-8 cancelling Lot 14 on proposed SP 146462 and Lots 98 and 99 on proposed SP 157341 ("the strata plan") within thirty days of the date hereof and Hutchinsons shall pay for all compensation, costs, charges and expenses associated with the rectification of the encroachment including but not limited to legal fees, registration fees, surveyors fees and stamp duty. 30
40

8. Payment of Balance of Contract Price

Eastgate shall authorise the payment to Hutchinsons directly by its financier of the balance of the contract price immediately upon Hutchinson discharging its obligations under Clause 7.

9. No action by Hutchinson

Hutchinsons shall refrain from:- 50

- (a) registering its mortgage;
- (b) taking any action against Eastgate pursuant to its mortgage;
- (c) commencing any proceedings or making any demand

upon Eastgate seeking the payment of any monies under the Building Contract;

1

- until 21 days after the date of this Deed after which time it shall be at liberty to take such action as it deems necessary against Eastgate to recover any monies that it alleges are owing to it by Eastgate pursuant to the Building Contract."

10

The deed does not contain a provision making time of the essence. It is apparent that the encroachments have caused delays in bringing the development to the stage of the issue of the strata titles and the reconfigured titles.

20

On the basis of the material that has been filed on behalf of each party, it is apparent that the parties are now in dispute about the effect of the deed, the construction of its terms and whether, in fact, it remains in operation. For the first time at the hearing on 17 October 2003 the defendant asserted that the deed had been abandoned by the parties.

30

On 16 September 2003 a meeting was held between representatives of each of the plaintiff and the defendant. The defendant alleges that the parties agreed at that meeting to vary the obligations under the deed and/or the building contract. That is disputed by the plaintiff.

40

50

The sum of \$3,785,275 which was due to be paid by the plaintiff to the defendant under clause 2 of the deed within

21 days from the date of the deed in respect of the
defendant's claim under the building contract was paid on 22
September 2003 from moneys advanced by the plaintiff's
financier, Perpetual Nominees Limited ("Perpetual").

1

Under cover of letters dated 25 September 2003 the solicitors
for the defendant forwarded the executed contracts, transfers
and development applications to the solicitors for the
plaintiff relating to the resolution of the encroachment
problem. In those letters it was asserted that the defendant
had discharged its obligations under clause 7 of the deed by
providing those documents to the plaintiff's solicitors. That
is disputed by the plaintiff.

10

20

30

By notice of demand dated 6 October 2003 the defendant, in
reliance on the building contract, the mortgage and the deed,
demanded payment from the plaintiff by 9 a.m. on 7 October
2003 of the sum of \$737,201.35. The plaintiff disputes that
the defendant was entitled to make that demand.

40

This proceeding was commenced by claim filed on 7 October 2003
seeking declarations as to the entitlements arising under the
building contract and the deed and an injunction restraining
the defendant from taking any step in enforcing the mortgage
against the plaintiff. Although the volume of the
correspondence passing between the plaintiff's solicitors and

50

the defendant's solicitors leading up to the issue of the proceeding was extensive, Messrs MacGillivrays declined to accept service of the proceeding and the proceeding was served on the defendant at its registered office.

1

10

The defendant purported to appoint receivers and managers under the mortgage on 7 October 2003 who attended at the property on that day but to whom the plaintiff refused access to the property. The defendant asserts that the receivers and managers were validly appointed. This is disputed by the plaintiff.

20

Undertakings were given to the Court on 10 October 2003 which resulted in orders being made by consent that the oral application for an injunction sought by the plaintiff on that day be adjourned. On that day the plaintiff gave the usual undertaking as to damages. The defendant undertook by itself, its servants, agents and contractors, to refrain from taking any further step in enforcing the mortgage against the plaintiff until 4 p.m. on 17 October 2003 and the receivers and managers undertook to refrain from entering on to or entering into possession of the property pursuant to the mortgage and from taking any other step as receivers and managers of the property pursuant to the mortgage prior to 4 p.m. on 17 October 2003.

30

40

50

Perpetual and Australian Unity Funds Management Limited gave notice to the plaintiff on 16 October 2003 that it considered the appointment by the defendant of receivers and managers constituted default under the various securities held by them and that the plaintiff would be charged penalty rates and legal costs in relation to enforcement of securities pending the outcome of the plaintiff's application for interlocutory relief. The amount owing under the securities is \$4,821,700, which includes an interest reserve of \$521,700 invested in the name of the plaintiff for 18 months.

1

10

20

The application for interlocutory relief was filed by the plaintiff on 16 October 2003. At the hearing on 17 October 2003 it was indicated by the parties that the undertakings which had been given on 10 October 2003 would continue on the same terms, except that the undertakings were offered until trial or earlier order. The issue that was argued at the hearing on 17 October 2003 was whether the plaintiff was entitled to the interlocutory relief sought in paragraphs 3 and 4 of its application, which were in the following terms:

30

40

"3. That upon the undertaking of the plaintiff to pay the sum of \$567,896.00 into an interest bearing account in the name of both the plaintiff and the defendant after the completion of the Contract of Sale entered into between the plaintiff and Propertylink Investments Pty Ltd, the defendant shall deliver to the plaintiff a stamped Release of Bill of Mortgage No 706916975 in registrable form at the time set for completion of the said Contract of Sale.

50

4. The sum of \$567,896.00 in the interest bearing account shall not be disbursed until further order or by agreement of the plaintiff and the defendant."

On 30 July 2003 the plaintiff entered into a contract to sell one lot of land encompassed within the development, for which it was intended to obtain a separate title, including the industrial warehouse constructed on the land, being proposed Lot 12 on Survey Plan 146462, for the sum of \$2,451,500. The Purchaser is Propertylink Investments Pty Ltd.

According to the affidavit of one of the directors of the plaintiff, Mr I.C. George, which was sworn on 10 October 2003 and filed on 13 October 2003, to which a copy of that contract of sale is exhibited, that contract is now unconditional and due for completion within 21 days. The defendant relies on one of the affidavits of Mr McLeod sworn and filed by leave on 17 October 2003, which contains an assertion of being informed by the solicitor for the purchaser that the contract is not unconditional for various reasons, most of which appear to have been met by the plaintiff's material.

In order for the separate title for Lot 12 to issue Survey Plans 146462 and 153026, which have been sealed by the Brisbane City Council and which require consents for registration from the defendant, need to be lodged for registration. The defendant did not in submissions and could hardly seek to oppose the application on the basis that the contract for Lot 12 was unlikely to become unconditional, having regard to the actions required of the defendant to facilitate the issue of a separate title for Lot 12. There is no suggestion in the material that the sale of Lot 12 is not at market value.

It was submitted on behalf of the plaintiff that the proceeds of the sale of Lot 12 will provide sufficient funds to allow the entirety of the amount set out in the deed to be paid into an account pending resolution of the dispute. The plaintiff disputes that it owes any moneys to the defendant pursuant to the building contract or the deed but submits that on the basis of the deed no more than the sum of \$567,896 could be owing by the plaintiff to the defendant and therefore seeks a release of the mortgage upon payment of that amount from the proceeds of sale into an interest bearing account in the name of both the plaintiff and the defendant to be held pending the determination of this proceeding.

10

20

The plaintiff has also entered into contracts of sale for three of the strata titled units which were due for completion on 10 September 2003 and have not yet been completed.

30

The defendant calculates that the amount due and owing by the plaintiff as at 6 October 2003 under the mortgage was \$737,201.35, calculated in the manner set out in another affidavit of Mr McLeod sworn and filed by leave on 17 October 2003. Mr McLeod estimates that legal fees and receivership costs since the issue of the notice of demand on 6 October 2003 to 17 October 2003 would exceed \$50,000 and that interest of at least \$8,598 monthly, which would then be compounding, was accruing on the amount of the demand.

40

50

There is a lack of precision in the material filed on behalf of the defendant as to what sum it seeks in order to discharge the mortgage.

1

The defendant contends that the order sought by the plaintiff should not be made because it is in substance seeking summary judgment for a mandatory order compelling redemption of the mortgage. It was submitted that the defendant would be prejudiced if it could not enforce its right to interest under the mortgage.

10

20

The defendant relies on the fact that it holds a mortgage over all the relevant land and is entitled to insist on its rights as mortgagee arising from the mortgage which was described as creating a "stand alone relationship" between the plaintiff as mortgagor and the defendant as mortgagee.

30

Mr Cooper of senior counsel, who appeared with Mr Quayle of counsel for the defendant, drew my attention to the observations of Hutley JA in *Adams v. Bank of New South Wales* [1984] 1 NSWLR 285 at 296, which were applied by Bryson J in *Equus Financial Services Ltd v. RMBL Investments Pty Ltd* (1996) 22 ACSR 744 at 745 to the effect that a mortgagor can call upon the mortgagee to account only where the mortgagor is prepared to make an offer to redeem.

40

50

In the latter case, however, Bryson J did accept at 747-748 that in an appropriate case where a mortgagor has commenced a redemption proceeding which is not finalised, a Court may, by

interlocutory order, direct a mortgagee to release its security prior to the finalisation of the action, if the interests of justice require an order to that effect.

1

An interlocutory injunction may also be ordered to restrain a mortgagee, if there is a serious question to be tried that there is nothing owing under the mortgage: *Westpoint Finance Pty Ltd v. Chocolate Factory Apartments Ltd* [2002] NSWCA 287.

10

These authorities illustrate aspects of the general rule referred to in *Inglis v. Commonwealth Trading Bank of Australia* (1972) 126 CLR 161 at 164-165, that nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt and the Court will not interfere to deprive the mortgagee of the benefit of the mortgage, except upon terms that an equivalent safeguard is provided to the mortgagee by means of the mortgagor bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.

20

30

From the many factual matters which are in dispute between the plaintiff and the defendant, it is not possible to determine on a summary basis what amount, if any, is owed by the plaintiff to the defendant to enable a complete discharge of the mortgage.

40

It is not disputed by the defendant that there are serious questions to be tried in respect of the claim put forward by the plaintiff. It therefore needs to be considered whether, as a matter of law, the plaintiff can obtain the interlocutory

50

mandatory relief which is sought against the defendant and, if so, whether the balance of convenience favours making such an order.

1

The mortgage that was granted by the plaintiff to the defendant was ancillary to the relationship between the plaintiff as owner of the land and the defendant as builder in respect of the construction of the warehouses by the defendant on the plaintiff's land under the building contract.

10

The deed came into existence as a result of disputes between the plaintiff and the defendant in respect of the payment due under the building contract and in respect of encroachments on the adjoining land caused by the construction undertaken by the defendant.

20

30

Although the parties purported to settle these disputes by the deed and each party has undertaken some obligations pursuant to the deed, the parties are now in dispute on the effect of the deed and the extent of the obligations undertaken by each of the parties under the deed.

40

It is against this background that the defendant wishes to curtail the consideration of what interlocutory relief can be granted to the plaintiff solely to that which can be given in the context of the mortgagee/mortgagor relationship between the parties.

50

I remain of the view that I expressed in the course of argument on 17 October 2003, that it is unrealistic to consider the matter on the basis of a stand alone relationship between the parties under the mortgage.

1

The authorities relied on by the defendant to preclude the discharge of the mortgage without a redemption action can be distinguished on the basis that, to do so, would obscure the true relationship between the parties in this matter which is much more than parties to a mortgage.

10

20

In any case, even if the substance of the relief sought by the plaintiff is treated as a discharge of the mortgage, it is sought on the basis that there is nothing owed by the plaintiff to the defendant which can be characterised as seeking redemption of the mortgage for no further payment. As was recognised in *Equus Financial Services Ltd v RMBL Investments Pty Ltd*, the strict rule that all matters between a mortgagee and mortgagor must be finalised in one proceeding and therefore must include an offer to redeem, is subject to an exception in the interests of justice. The general rules benefiting a mortgagee are not inflexible: *Clarke v Japan Machines (Australia) Pty Ltd (No. 2)* [1984] 1 QDR 421 at 422.

30

40

The parties must have contemplated, as the outcome of this development, that the plaintiff would seek to sell one or more of the titles to be created together with the improvements constructed by the defendant. There is no attack made by the defendant on the proposed sale of Lot 12.

50

The circumstances giving rise to the dispute between the parties, which I have detailed, whether arising out of the building contract, the mortgage, the deed, or subsequent oral agreement or a combination of these dealings are such that, subject to the balance of convenience, the interests of justice may require an interlocutory order.

1
10

The plaintiff offers the usual undertaking as to damages, and there is material which supports a conclusion that that undertaking is worthwhile. The plaintiff sought to have the mortgage totally discharged upon the holding, from the proceeds of sale of Lot 12, of the sum of \$567,896 or such higher amount, as determined by the Court, pending the determination of the dispute between the parties as to what amount, if any, was owed by the plaintiff to the defendant.

20
30

That is not necessary to enable the plaintiff to settle the sale of the proposed Lot 12. It preserves the status quo to limit the relief to a partial release of the mortgage to enable proposed Lot 12 to be transferred to the current purchaser, as the mortgage and the obligations under the mortgage (to the extent to which they govern the relationship between the parties) can then remain extant.

40

It is difficult to fathom the motivations of the defendant for the approach it has taken to dealing with this dispute on an interlocutory basis.

50

The plaintiff has already been prejudiced under its securities with Perpetual by the appointment of the receivers and managers in view of Perpetual's decision to charge penalty interest. There is potential for the plaintiff to be in breach of the contract for the sale of the proposed Lot 12, if it is unable to settle because of being unable to obtain a release of the mortgage over the proposed Lot 12.

Mr George, in his affidavit sworn on 10 October 2003 and filed on 13 October 2003, which exhibits the contract of sale of the proposed Lot 12, deposes to the balance of the proceeds of that sale being in excess of \$1 million and being available to the plaintiff "after payment of 55 per cent of the net proceeds of sale (after deduction of costs of sale)".

I infer that the figure of 55 per cent of the net proceeds of sale is what is required to obtain the release of Perpetual's securities over the proposed Lot 12. The problem for this application, however, is that if that inference is not correct and Perpetual required the entire net proceeds from the sale of Lot 12 to be paid to it, there would be no fund which could be held to preserve the status quo for the defendant. The plaintiff's material is therefore deficient in respect of the requirements of Perpetual in respect of the release from its securities of each parcel of land that is subject to its mortgage.

The plaintiff's material is also deficient in that there is no current title search of the land which will be the subject of

the registration of survey plan 146462 in order to ascertain what the current state of the registered title is. The only title search which is exhibited is of Lot 4 on RP12846 but that title search was obtained on 18 September 2003, before the loan was made by Perpetual.

1
10

There is also insufficient information about the arrangement between the plaintiff and another mortgagee, Yellowrock Pty Ltd, ("Yellowrock") about what its requirements are in respect of the sale of proposed Lot 12. On the one hand, Mr George swears in his affidavit sworn on 8 October 2003 and filed on 13 October 2003, that the plaintiff has entered into a written agreement with Yellowrock that Yellowrock is only entitled to be paid its debt from the proceeds of the lots which, presumably, would include proceeds from the sale of Lot 12. On the other hand, Mr George swears in his affidavit sworn on 10 October 2003 and filed on 13 October 2003 that the plaintiff and Yellowrock have entered into a deed of compromise pursuant to which the moneys advanced by Yellowrock (a shareholder and joint-venturer of the plaintiff) of \$2,000,050 are not "presently payable."

20
30
40

There is insufficient information about the status of the contracts pending the sale of three of the strata titled units and when completion is expected of those sales.

50

The balance of convenience is a critical issue when a mandatory interlocutory injunction is sought: *Bingham v 7-Eleven Stores Pty Ltd* [2003] QCA 402 at paras 106 to 108.

Although I consider that there are factors which favour
granting a mandatory order in respect of a partial release of
the mortgage to allow the completion of the sale of the
proposed Lot 12 on condition that most, if not all, of the net
proceeds of sale after payment out of the amount required by
Perpetual are set aside as a fund, pending the determination
of this proceeding, the matter of balance of convenience
cannot be determined in the light of the deficiencies in the
material to which I have referred.

1
10

It is ordered that:

20

(1) The application for the relief sought in
paragraphs 3 and 4 of the application filed on
16 October 2003 be adjourned to a date to be
fixed.

30

(2) Liberty to either party to apply on one day's
notice in writing to the other.

(3) Costs be reserved.

40

50