[2006] QSC 338

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No BS 9042 of 2006

HENRY MULHERIN AS TRUSTEE FOR THE H D MULHERIN FAMILY TRUST NO 4	Applicant
and	
QUINN VILLAGES PTY LTD (ACN 000 776 180)	Respondent

BRISBANE

..DATE 31/10/2006

ORDER

CATCHWORDS: Property Law Act 1974 s 38 - nature of the Court's discretion - standing of applicant as co-owner based on concessions of the respondent's counsel in argument in another proceeding between the parties (an appeal yet to be determined) accepted, notwithstanding applicant's contrary stance that a joint venture respecting the land (in the respondent's name solely) had terminated - in circumstances which the applicant was asserting entitled him to return of his capital contributions - whether applicant's "equity" might be eroded by future events.

HIS HONOUR: The contentious part of the application relates to the relief claimed in paragraph 3, the terms of which have to be elicited from Exhibit 1, since the first three lines of it were somehow omitted in the typing of the document filed.

Paragraph 3 seeks a standard order under section 38 of the Property Law Act 1974 for the appointment of a trustee for sale. There is no consent of the gentleman indicated before the Court so that the order which I propose to make will in terms be conditional upon a signed consent by him being filed. What is unusual about the application is the nature of the applicant's interest and uncertainty about what might happen to it in the future.

The parties entered into a "development agreement" dated the 13th of June 1999 for purposes of carrying out a development project on land in the Mount Coolum area. By paragraph 4 of that agreement, as its capital contribution towards the project, the respondent was to contribute its interest in the land and, as his capital contribution, Dr Mulherin was required to contribute the sum of $800,000.

By clause 9 the respondent "shall remain the registered owner of the land during this project". The agreement offered two kinds of protection to Dr Mulherin who was, if it matters, participating as the trustee of a family trust. It gave him protection in two respects; he was entitled to a registered mortgage and also to lodge a caveat.

Stage 1 of the project was financially unsuccessful. Dr Mulherin was pursued for contribution towards the loss in an action brought by Quinn Villages in which it succeeded. Chesterman J rejected the contention in the defence that matters had so developed that the joint venture had been terminated at an early stage entitling Dr Mulherin to return of his $800,000. That was the relief sought in his counterclaim.

An appeal has been heard by the Court of Appeal in which it seems that Dr Mulherin's contentions were as they had been before Chesterman J, namely that the project had come to an end and he should get his money back.

His Honour was in no doubt that the project had come to an end but considered this happened at a late enough stage to oblige Dr Mulherin to make contributions, the amount of which was left to be determined by an expert accountant. I hear that exercise is still under way. There is no decision yet from the Court of Appeal.

It is on submissions made there by Mr Jackson of Senior Counsel representing Quinn Villages that the assertion of co-ownership of the land underlying this section 38 application is based. The transcript of the argument is before the Court. Mr Jackson told the Court of Appeal at page 20:

> "Our case is quite simply under clause 27.3. We were entitled to payment of the half of the liabilities and expenses that we made. That the land is still held as a

> jointly held asset is neither here nor there in terms of what the money to which we are entitled for payment is."

On the next page, Mr Morris QC, who appeared then and appears today for Dr Mulherin, said:

> "If what has just been said is tantamount to a concession that my client owns half of the land and my client is therefore entitled to a transfer of the half interest or some security then I don't think there's any thing we need to argue about."

On the following page he recorded his understanding that Mr Jackson had intimated:

> "His client would not rely on anything that has happened in these proceedings as giving rise to an Anshun type estoppel or anything else that would prevent my client from claiming and enforcing a right to half the land."

After an adjournment, in the course of which Mr Jackson was able to take instructions, he informed their Honours:

> "The respondent undertakes that it doesn't rely on his Honour's decision as determining that the appellant has no interest in the land in a way that would create an estoppel. We think that's the meaning of the reasons anyway but we're prepared to make that clear.
>
> And secondly, the respondent instructs me that it will consent to the lodgement of the caveat by consent claiming an equitable interest in the capacity of former joint venturer."

It could perhaps have been clearer, but Mr Hastie, appearing for Quinn Villages today, does not contest the assertion that is clearly made against his client that the applicant has the one-half beneficial interest claimed. What is asserted against the applicant is that the value or quantum of the equitable interest may be eroded by financial obligations

associated with the project to the extent that the equity disappears. Whatever liability may be assessed on the account now being taken, assuming that survives the Court of Appeal's judgment, there are legal costs under current judgments in favour of Quinn Villages (which may go, too) and more significantly there are claims by contractors to the project against Quinn Villages which it says, as things stand, will lead to entitlement to indemnity against Dr Mulherin.

Those propositions are, no doubt, correct, but I think they overlook that he will be entitled to elect whether to see his interest in the land erode or make payments to limit the erosion of his interest in the land. It remains to be seen what will happen. I am not prepared at this stage to assume that the application is a futility or anything like it on the basis that when financial matters are finally sorted out this application might turn out to be pointless.

It seems to me the real objection to it is the contention that Dr Mulherin is taking inconsistent positions. It seems that in the Court of Appeal his position is that - or his preferred position is not that he have an interest in the land but that he be held to have become free of the development project and can get his money back, yet this application is founded on his having an interest in the land based on counsel's concessions. It would be surprising if Dr Mulherin could get his money back and remain a co-owner of the land.

Mr Hastie was accused of attempting to resile from what Mr Jackson said by suggesting in paragraph 15 of his written outline that the point of it may have been "only so as to afford Dr Mulherin additional security with respect to the agreement." If there was any attempt to resile from what Mr Jackson deliberately said, I do not think it is open to Quinn Villages to do that.

Another more practical objection to the order being made under section 38 is that costs will be incurred in a sale which is forced at the instance of Dr Mulherin, who may come out of the picture - costs that would represent pointless expenditure.

That seems to me the full extent of objections made to the sale, it is not suggested that the market is unpropitious at the moment or that Quinn Villages has any interest in retaining the land to make some use of it in the future.

If there is to be a sale it ought to have the right to be the purchaser. That is not proposed in the draft order at the moment, although Mr Morris is not contending there is no entitlement to become a purchaser. I am certainly open to including express provision about that in the draft order and maybe some additional acknowledgement that if either of the parties becomes purchaser there might be appropriate consideration extended by the trustee to acknowledge that party's equity.

In respect of section 38, the willingness of judicial officers to entertain objections to ordering a sale has varied. Some have taken the view that entitlement to force a sale, formerly to have partition, was tantamount to an incident of joint ownership. That is a notion that Connolly J was speaking about in the leading local authority, re Permanent Trustee Nominees (Canberra) Limited [1989] 1 Queensland Reports 314 at 321.

It is clear from that decision that, as the word "may" in the section suggests, there is a discretion which the Court is not bound to exercise in favour of a sale. At 317 Kelly SPJ noted some New South Wales authorities with which he agreed confirming that there is a discretion. His Honour deliberately eschewed defining the matters which would serve to defeat an application.

At 317, he said of the Court's task that the section:

> "certainly gives rise to a discretion which it is then required to exercise as to whether an order should be made. In the present case clause 6 of the management agreement does impose a contractual obligation to give a period of notice before the application is made and where, as is clearly the case here, a notice in compliance with that objection of that obligation has not been given, the making of an order pursuant to such an application would be inconsistent with that obligation."

McPherson J at first instance had regarded the contractual prohibition on a co-owner's applying for sale under section 38 as an impermissible attempt to limit the statutory right or a

fetter on the Court's jurisdiction. The Full Court saw matters differently and as Connolly J said, he saw:

> "no reason why the parties to this agreement should not be permitted to forego by mutual agreement the right to have it partitioned or sold by an order of the court, at least for a limited period."

That case acknowledged the decision in re Bolous [1985] 2 Queensland Reports 167 in which an order was refused because the relevant property was being used for partnership purposes and may be partnership property. Ryan J thought that made it inappropriate to make an order for the appointment of statutory trustees for the sale of it.

The Full Court decision was acknowledged by the New South Wales Court of Appeal in Williams v. Legg (1993) 29 NSWLR 687. There relief was refused where the effect of making it would be to bring to an end a right of residence, to which a gift of the applicant's half interest in the property was subject. An order would have defeated the limitation to which the gift was subject.

The Court said at 693:

> "For present purposes and describing the ambit of the discretion it is sufficient to say that it enables the court to refuse an order for sale where the order would be inconsistent with some proprietary right, or some contractual or fiduciary obligation."

There is another Full Court decision locally in which McPherson J participated of O'Grady v the North Queensland Company Limited [1990] 2 Queensland Reports 243. There the

sale which the primary judge had erroneously ordered was one which boded to destroy a royalty interest in a mining lease and it was also determined to be an order having the effect of sanctioning a breach of contract by the applicant for the order.

Another instance of an unsuccessful application unearthed by Mr Hastie is Club Esplanade Limited v Acott [2002] QSC 256 which arose in the unusual context of a time share development which had outlived its practical usefulness. There were scores, if not hundreds, of respondents, something like 510 interests.

Wilson J refused relief. There was opposition from one person only. Among the problems which her Honour identified was the likely inappropriateness of the only suggestion made for dealing with the proceeds, namely equal division, which she thought potentially unfair to those whose allotted periods fell at busy holiday times and might be assumed to attract special value.

I think that case was so special that no particular principle can be derived from it which is useful today. It is interesting to hear from Mr Hastie his understanding that the application was repeated before another Judge on an occasion when the once hostile respondent, Ms Crichley consented to the order's being made.

Consideration of those cases reveals to my mind that some positive reason against the making of the order for sale has to be demonstrated. I accept that in principle Quinn Villages' points might be seen as deserving recognition in that way, but I am not persuaded that they do or that there is any reason against exercising the discretion in favour of the applicant.

So, I will make an order in terms of the initialled draft but I have to work out what goes in it yet.

...

(The order expressly recognised the parties' right to purchase (s 40) and required net proceeds of sale to be paid into court after certain deductions, including payment of the applicant's costs).

HIS HONOUR: The order is made "upon the applicant's undertaking, by his counsel, not to file the consent referred to below before the 8th November 2006."

...

HIS HONOUR: The other thing I ought to say something about in these reasons is that although I am not persuaded that the inconsistent positions taken by Dr Mulherin affect this application, being of the view that he is entitled to make what he can of Quinn Villages' acknowledgement that he has a

half interest in the land, it may be the case that in some other context he is found to have made some final election. But that is another contest.

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