SUPREME COURT OF QUEENSLAND

CITATION:	*Team Dynamik Racing Pty Ltd v Longhurst Racing Pty Ltd & Ors (No 2)* [2007] QSC 232
PARTIES:	**TEAM DYNAMIK RACING PTY LTD** (plaintiff) **v** **LONGHURST RACING PTY LTD** (first defendant) **ANTHONY LAWRENCE LONGHURST and KAREN NARELLE LONGHURST** (second defendant)
FILE NO/S:	BS 10801/05
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	9 and 10 July 2007
JUDGE:	Muir J
ORDER:	**As per minutes of order to be settled**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – ACCOUNTS AND INQUIRIES – OTHER CASES – where first defendant provided moneys to plaintiff in connection with motor sport licences – where licenses transferred to first defendant – where first defendant resold one licence – where dispute over whether the transfers were by way of sale or secured loan – where court held there was a secured loan and plaintiff was successful in its action for redemption – where account ordered – whether expenses by entities other than the first defendant can be taken into account – principles relevant to the recoupment by a mortgagee of its expenditure in relation to its security – whether first defendant could receive allowance for services provided by racing team manager – whether plaintiff entitled to forgone rents and profits *Supreme Court Regulation* 1998 *Uniform Civil Procedure Rules*, r 532 *Campion v Randwick Municipal Council* (1933) 34 SR (NSW) 167, applied

Cook v Fowler (1874) LR 7, cited
Cook v Thomas (1876) 24 WR 427, cited
County of Gloucester Bank v Rudry Merthyr Steam & House Coal Colliery Company (1895) 1 Ch 629, cited
Hadoplane Pty Ltd v Edward Rushton Pty Ltd [1996] 1 Qd R 156, cited
Hardie v Shadbolt [2004] WASCA 175, cited
Hawkesbury Valley Developments Pty Ltd v Custom Credit Corporation Ltd (1994) 6 BPR 14,053, cited
Industrial Equity Ltd v Blackburn (1977) 137 CLR 567, cited
Israel v Foreshore Properties Pty Ltd (in liquidation) (1980) 54 ALJR 421, cited
Lai v Gong (1997) 8 BPR 15,837, cited
Marriott v Anchor Reversionary Co (1861) 45 ER 846; (1861) 3 De G F & J 177, applied
National Bank of Australasia v United Hand-in-Hand and Band of Hope Company (1879) 4 App Cas 391, distinguished
O'Sullivan v Management Agency and Music Ltd [1985] 1 QB 428, cited
Re Doody; Fisher v Doody (1893) 1 Ch 129, applied
Re Jarvis Dec'd [1958] 1 WLR 819, cited
Re Wallis, ex parte Lickorish (1890) 25 QBD 176, applied
Southwell v Roberts (1940) 63 CLR 581, cited
Walker v Wimborne (1976) 137 CLR 1, cited
Warman International Ltd v Dwyer (1995) 182 CLR 544, applied
West v Diprose [1900] 1 Ch 337, cited

COUNSEL: A J H Morris QC, with him V G Brennan, for the plaintiff
H B Fraser QC, with him M Hoch, for the defendants

SOLICITORS: Hopgood Ganim for the plaintiff
Macrossan Lawyers for the defendants

Introduction

[1] On 30 March 2007 an order was made that an account be taken between the plaintiff and the first defendant of the amount due under a mortgage given by the plaintiff to the first defendant ("Longhurst") on 23 February 2005 ("the first mortgage") over a level one V8 super car franchise licence and under another mortgage given by the plaintiff to the first defendant on 7 September 2005 ("the second mortgage") over another such licence.

[2] The details of the dispute between the parties and an analysis of the nature of the licences are contained in reasons for judgment in these proceedings delivered on 2 February 2007. I do not propose to repeat the contents of those reasons but it is desirable to make some introductory observations.

[3] On the trial Longhurst, which had provided moneys to the plaintiff in respect of the two licences on two separate occasions, contended that the moneys were provided by way of purchase price under agreements for the sale and purchase of the licences. The plaintiff argued that the licences were transferred by way of security for loans thus giving rise to equities of redemption which could not be abrogated even by express agreement between the parties. The plaintiff's contentions were successful.

[4] Pursuant to the order of 30 March 2007, the plaintiff filed a statement of account which was amended by leave on the first day of the further hearing. The defendants, pursuant to r 532 of the *Uniform Civil Procedure Rules*, served grounds of objection to the statement of account. In the account, Longhurst claims for expenditure incurred in the operation of a motor racing business by use of the first licence in the 2006 and 2007 seasons. That business was conducted through a company other than Longhurst and the expenses of the business were incurred by that company and other related companies. The plaintiff contends that no allowance can be made to Longhurst for any of the costs of operating the motor racing business as it was a "hazardous and speculative undertaking" which ought not to have been carried on. Additionally, the plaintiff asserts that even if, contrary to its contentions, such costs are recoverable in principle they are unable to be recovered because they were not incurred by Longhurst.

[5] Before considering the grounds of objection it is convenient to set out facts relevant to the questions in issue.

The conduct of the motor racing business and its expenses

[6] In December 2005 Rod Nash Racing Pty Ltd ("RNR"), a company of which Mr Rodney Nash was the sole director and shareholder, purchased from the second defendants, Mr and Mrs Longhurst, all of the shares in the capital of Longhurst for $1,550,000. The second licence was sold for $1,250,000 plus GST on 7 December 2005 by Longhurst to Nemo Racing Pty Ltd. That licence had been assigned by the plaintiff to Longhurst as security for a loan of $450,000, also repayable on 1 December 2005.

[7] Longhurst continued to hold the first licence until it was assigned to RNR. Mr Nash, through his companies, continued to conduct a motor racing business ("the Business") pursuant to the first licence during the 2006 and 2007 seasons.

[8] Although the first licence was held by Longhurst during the 2006 season, the Business was conducted by Mr Nash principally through Rod Nash Racing Australia Pty Ltd ("RNRA"), another company of which he is and was the sole director and shareholder.

[9] Longhurst had been restrained by order of the court from dealing with the first licence but upon the giving of certain undertakings by it, RNR and Mr Nash, an order was made on 17 November 2006 permitting the transfer of the first licence to RNR. The transfer was approved by Touringcar Entrants Group Australia Pty Ltd

("TEGA"). Consequent on that approval on 10 December 2006 a deed of accession was entered into between Longhurst as transferor, RNR, TEGA and Australian Vee 8 SuperCar Company Pty Ltd.

[10] In the 2006 and 2007 seasons, Mr Nash maintained a team consisting of himself as general manager, a personal assistant, a race driver, a chief engineer and a team manager, together with a crew of five. Mr Nash's spouse was also employed in promotional activities. The services of the team manager and his crew were provided pursuant to an agreement dated 1 March 2006 between RNRA and Independent Race Cars Australia, a firm the proprietor of which was the team manager. Under the agreement RNRA was obliged to pay all costs and expenses of the team and of its racing activities together with an annual service fee of $240,000 including GST.

[11] The chief engineer provided his services to RNRA through a company controlled by him which invoiced and was paid by RNRA. The services of the personal assistant, who was engaged part-time in the motor racing business, were paid for by RNRA from 7 December 2005, except for the period between 15 May 2006 and 28 February 2007 when her wage was paid by another of Mr Nash's companies, High Tech Vehicle Maintenance Pty Ltd ("High Tech"). Three other companies owned and controlled by Mr Nash, Hydro Services Tasmania Pty Ltd ("HST"), Danemar Pty Ltd ("Danemar") and RNR Apparel Pty Ltd ("Apparel"), also contributed to the costs of the Business.

[12] The racing car driver's fees were paid by RNRA under written agreements between the driver and RNRA. Mrs Nash was paid a wage of $961.54 per fortnight by RNRA between 7 December 2005 and 14 May 2006.

[13] On 17 December 2005 RNRA entered into an agreement with Paul Morris Motor Sports Pty Ltd for the purchase of a car chassis and for a "full service" engine package for a term of two years. Under the agreement Paul Morris Motor Sports agreed to provide engines for one car and servicing and transportation of engine spares throughout the season. Moneys due under the agreement were paid by RNRA which also paid for car tyres, fuel and a prime mover used in racing car transportation. Under the Morris agreement RNRA also purchased a car chassis for $263,636 plus GST ($290,000).

[14] In 2006/2007 RNRA paid fees charged by TEGA under its team's licence agreement. RNRA also incurred costs for travel, accommodation and meals of team members and the cost of engaging a second driver for the Bathurst 1000 and Sandown 500 races.

[15] During the period in question RNRA obtained many hundreds of thousands of dollars in sponsorship money from major sponsors, Autobarn and Castrol. Agreements with those sponsors were secured by Mr Nash as a result of Mr Nash's reputation and experience in the industry, his longstanding relationships with the sponsors and efforts in negotiating with the sponsors. For the 2006 season $161,499

was received by way of sponsorship moneys from Autobarn and Castrol. The sponsorship money anticipated for the 2007 season amounts to $893,500.

[16] RNR received $535,433 appearance or prize money in the 2006 season. As at 30 April 2007 RNR had received $161,558 appearance or prize money in respect of the 2007 season. Mr Nash anticipates that a further $415,000 will be received by the end of the season.

[17] On 7 June 2007 Mr Nash resigned as a director of Longhurst. Mr Longhurst was appointed director and the shares in the capital of Longhurst held by RNR were transferred to Mr Longhurst. According to the oral evidence of Mr Nash the transfer was for no pecuniary consideration as it was part of an agreement or proposed agreement under which Mr Longhurst would indemnify Mr Nash and his companies in respect of the costs of this litigation.

Are the expenses of operating the Business recoverable in principle? – Longhurst's submissions

[18] The first licence carried with it the rights and obligations set out in the teams' licence agreement with TEGA and AVESCO. It obliged Longhurst to compete in all competition race meetings during the season in default of which the licence could be resumed and sold. Failure to comply with obligations in relation to racing could also result in an obligation to pay TEGA liquidated damages of $150,000 per race. There was also an obligation on the holder of the first licence to pay fees to TEGA and AVESCO. Conversely the holder of the licence was entitled to receive from TEGA a share of prize money and appearance money. Longhurst, as mortgagee, was under a duty to the plaintiff to incur the expenses necessary to fulfil the above obligations so as to preserve the first licence from forfeiture or downgrading.

May expenses by entities other than Longhurst be taken into account? – Longhurst's submissions

[19] Longhurst submits that it would be manifestly inequitable for the plaintiff to be allowed to redeem the first licence without it being required to account for the expenses of operating the Business, regardless of which of Mr Nash's companies paid them. Alternatively, it is submitted that for the purposes of the account, Longhurst should be treated as having incurred all the expenses claimed in the account even though most of them were paid by RNRA and some were paid by Mr Nash's other companies.

[20] Having regard to the court's finding of a mortgage, the "transfer" of the licence to RNR, and any supposed "supply" of it by Longhurst for RNR or RNRA's use, were ineffective as between mortgagor and mortgagee and should be disregarded, with the appropriate expenses of those companies incurred to preserve the licence brought into the account.[1]

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1 *National Bank of Australasia v United Hand-in-Hand Hope Company* (1879) 4 App Cas 391 at 408.

[21] If it is necessary to establish that Longhurst itself incurred the claimed costs, it may be concluded that it did so as:

- Mr Nash's companies directly incurred the costs pursuant to an implied request to do so by Longhurst;
- That was done for the benefit of Longhurst as mortgagee by way of fulfilling its obligation to Team Dynamik to preserve the licence;
- Longhurst freely accepted the benefit of those payments;
- There was no express agreement between Longhurst and any other company concerning the payments and no expression of any intention by any of the payers to make a gift to Longhurst;
- In the circumstances a gift is negatived.[2]
- It follows that as the moneys were paid by the payers at the implied request and for the benefit of Longhurst which freely accepted the benefits, Longhurst became obliged to indemnify the payers.[3]

Are the expenses of operating the Business recoverable in principle? – the plaintiff's submissions

[22] The right of the mortgagee on an account is based upon the principle that "the mortgagor whose right to redeem is only equitable, must repay all that is equitably due [to the mortgagee]".[4]

[23] A mortgagee wishing to redeem must pay "(i) the principal debt; (ii) the interest thereon; (iii) all proper costs, charges, and expenses incurred by the mortgagee in relation to the mortgage debt or the mortgage security; (iv) the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the security; (v) the mortgagee's costs of the redemption action."[5] Items (iv) and (v) are allowed only if a special case is made out.

[24] This is not a case of a mortgagee in possession managing the mortgaged property with a view to sale and to that end making expenditure for the property's preservation for a short period pending sale.[6]

[25] The order for the account limited the account to "costs reasonably incurred by the first defendant and [RNR] including … the cost of conducting a motor racing operation in accordance with the provisions of the licence from the period from 2

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2 *Schmierer v Taouk* (2004) NSWSC 345 at [58]-[64].

3 *Israel v Foreshore Properties Pty Ltd (in liquidation)* (1980) 54 ALJR 421 at 422; Mason and Carter, *Restitution Law in Australia*, Butterworths Sydney, 1995, paras [11], [216], [841].

4 *Fisher & Lightwood's Law of Mortgage* (*Aus* 2nd ed) at para [19.36], p 473.

5 *Re Wallis, ex parte Lickorish* (1890) 25 QB 176, 181.

6 For example, see *Cook v Thomas* (1876) 24 WR 427 cited in *Fisher & Lightwood's Law of Mortgage* (Aus 2nd ed) at para [19.31], p 469.

December 2005". Recoupment of the costs of entities other than Longhurst and RNR are thus outside the scope of the account.

[26] Insofar as the expenditure of RNR, RNRA and other Rod Nash companies are relevant, they were losses or expenditure that Mr Nash and his companies would have sustained in any event. Prior to December 2005 Mr Nash conducted a racing operation pursuant to a level 2 licence, and, but for his purchase of Longhurst, would have continued to operate through his level 2 licence.

[27] Longhurst elected to retain and exploit the first licence for the 2006 season knowing the likely costs involved, the possibility of penalties and that, from a commercial viewpoint, motor racing is a hazardous and speculative undertaking.

[28] Insofar as moneys have been expended in the carrying on of a motor racing business, Longhurst has speculated with the mortgaged property and must bear any losses so incurred.[7]

May expenditure by entities other than Longhurst be taken into account? – the plaintiff's submissions

[29] Longhurst did not incur any costs in the conduct of the racing operations nor did RNR. Consequently, none of the costs claimed based on the expenditure of other companies controlled by Mr Nash may be taken into account. Any obligations which may exist between any of Mr Nash's companies cannot give rise to an obligation on the part of the plaintiff to Longhurst.

Principles relevant to the recoupment by a mortgagee of its expenditure in relation to its security

[30] A mortgagee is entitled to expend moneys in preserving the secured property and, on an account, such expenditure will be allowed.[8] In that regard the mortgagee may, for example, pay rent to prevent a forfeiture, take up possession to prevent vandalism,[9] carry on mining activities on the mortgaged property if necessary to maintain a going concern or preserve the mortgage property.[10] A mortgagee's equitable obligation on redemption is to give back the property unimpaired.[11] But there are limits to a mortgagee's recoverable expenditure. In *Southwell v Roberts*[12] Starke J said:

> "He has no right to improve the mortgagor out of his property (*Sandon v Hooper*; *Shepard v Jones*. There is nothing, as Lord *Langdale* said in *Moore v Painter*, "more necessary for this court to

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7 See Hanbury and Waldcock, *The Law of Mortgages,* p 150.

8 Fisher & Lightwood's *Law of Mortgage* Australian ed, para [16.1] and the cases there cited.

9 *Campion v Randwick Municipal Council* (1933) 34 SR (NSW) 167.

10 *County of Gloucester Bank v Rudry Merthyr Steam & House Coal Colliery Company* (1895) 1 Ch 629.

11 *32 Halsbury's Laws of England,* 4th ed 704.

12 (1940) 63 CLR 581 at 586.

> do than to take care that a mortgagee in possession shall so deal with the mortgaged property as to be able to restore it to the mortgagor in the same nature as he receives it."

[31] It is stated by the learned authors of *Halsbury*[13] in relation to a mortgagee's right to carry on a business on the mortgaged premises:

> "Where the mortgage security includes a business carried on upon the mortgaged premises, the mortgagee on entering is entitled to carry on the business for a reasonable time with a view to sale."

[32] The mortgagee does not have an unfettered right to carry on such a business irrespective of its profitability and may only carry on business in circumstances in which a prudent owner would have done so.[14]

[33] In *Southwell v Roberts*[15] Dixon J discussing the circumstances in which improvements might be made by a mortgagee in possession at the cost of the mortgagor, observed:

> "The decisions do no more than establish what are the considerations that must be taken into account and leave to be judged on the facts of the particular case the question whether having regard to those considerations the expenditure was fair, reasonable and proper.
>
> The matters upon which this determination is to be made may be stated thus:-
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> The first consideration is the amount of the mortgage debt and the proportion which the expenditure bears to it. A mortgagee is a creditor who enjoys rights in the mortgaged premises only for the purpose of securing repayment. He ought not to be allowed under colour of protecting and effectuating his security to burden the property with a debt out of all relation to the principal sum borrowed or the mortgage moneys owing at the time.
>
> Closely related to this consideration is the effect produced upon the mortgagor's ability to redeem. The mortgagee ought not to be allowed against the mortgagor expenditure so disproportionate to the mortgage moneys and so out of keeping with the value of the security and of the equity of redemption that the mortgagor may be hampered in redeeming the property.
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> Then the character of the mortgaged premises must be considered. Changes are not to be made in buildings or otherwise which radically alter the nature or useful purpose of the property. However much the value is increased, the mortgagor is entitled, on redemption, to have restored to him the substance of the thing he has mortgaged.
>
> A further consideration is the permanence of the improvement. A mortgagee cannot charge expenditure on things, other than maintenance and repairs, which do not or may not outlast his own possession or enure for the actual benefit of the mortgagor and those claiming under him. Then the effect of the expenditure upon the

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13 Volume 32, 4th ed, para 692.

14 *Marriott v The Anchor Reversionary Company* (1861) 3 De GF & J 177 at 186, 189-192.

15 At 597, 598.

> value of the property is important. The mortgagee in possession cannot load the security with expenditure which is not represented in the enhanced value which it has given the premises."

[34] Although these expressions of principle are not precisely in point, they offer some guidance in the assessment of whether expenditure by the mortgagee was "fair, reasonable and proper".

The recoverability in principle of the costs of operating the Business-Conclusion

[35] The circumstances of this case are somewhat out of the ordinary in that the parties' bargain contemplated that after the assignment of the first licence, Longhurst would use it to carry on a motor car racing business. It was in the parties' belief that such a business may well be loss making. But, as Longhurst's counsel point out in their submissions, in order to maintain the first licence it was necessary to run the Business. It was also the understanding of the parties that, in the event that the plaintiff failed to repay its loan, Longhurst could keep the licence and use it as it wished.

[36] No complaint can be made by the plaintiff of Longhurst's failure to sell the first licence as the plaintiff commenced proceedings in December 2005 seeking its redemption and an order was made on 20 December 2005 restraining Longhurst from dealing, inter alia, with the first licence. The plaintiff did not attempt to restrain Longhurst or anyone else from using the licence to carry on the business. It appreciated that the first licence would be at risk if the Business was not carried on and if there was non-compliance with the terms of the first licence. Mr Nash is an experienced and successful businessman who conducted the Business in a businesslike manner. There was no suggestion that the management and operation of the Business fell short of any standards of economy or efficiency prevailing or reasonably to be expected in the industry. There was nothing unreasonable unfair or improper about the way in which the Business was conducted or expenditure incurred.

[37] Putting aside some specific items of cost the subject of challenge by the plaintiff, I cannot see why in the circumstances described above, the plaintiff could insist on redemption of the secured property without accounting to Longhurst for the expenses incurred by it in operating the Business so as to preserve the first licence. Plainly, if Longhurst is to have the benefit of such expenditure it must bring into account any income derived by it from the Business and by virtue of holding the first licence. The problem confronting Longhurst, however, is that the outgoings of the Business were incurred by others. The consequences of this will be discussed shortly.

The claim for the value of services provided by Mr Nash

[38] Longhurst seeks a just allowance for the skill, time and effort of Mr Nash as the general manager of the racing team. His services were valued by an expert called by Longhurst at $250,000 per annum. Additionally, if sponsorship is to be accounted for as income attributable to the licence, Longhurst seeks a just allowance for the skill, time and effort of Mr Nash in obtaining sponsorships. Counsel for Longhurst acknowledged the existence of a line of authority in which it has been held consistently that although a mortgagee may recover payments which he has made for work done in relation to the security, he is unable to charge for work which he has done himself.[16]

[39] Reference was made to *Sandtara Pty Ltd v Australian European Finance Corporation Ltd*[17] in which Cole J said:

> "The cases illustrate that there is no consistent expression of principle as to why a mortgagee may not charge the mortgagor for his personal services, absent contractual entitlement. Nevertheless, whether the reason flows from implicit terms in the contractual relationship between mortgagor and mortgagee, or whether it flows from a quasi trustee position when enforcement of security occurs, or whether it flows from a perception that in truth no costs are incurred by the provision of personal services (whether measurable or not), the long-standing position is that such costs, absent contractual entitlement, are irrecoverable.
>
> I am bound by this long-established line of authority, even though I am unable to detect from it any basis in principle why, if a mortgagor defaults occasioning expense to the mortgagee which otherwise the mortgagee would not have incurred, costs which the mortgagee may incur by payment to third parties are recoverable, but costs which he may incur internally are not."

[40] The principle under consideration is indeed of some antiquity. It is expressed as follows in *Ashburner*:[18]

> "The contract between mortgagor and mortgagee gives the mortgagee a right to indemnity merely. Hence, a mortgagee cannot, in the absence of special provisions in the mortgage contract, charge against his mortgagor, as part of his costs, charges, and expenses properly incurred, remuneration for work done or undertaken by himself personally."

[41] It was submitted that Cole J concluded, only with reluctance, that a mortgagee's internal costs were irrecoverable. It was further submitted that the cases referred to by Cole J were not binding on this Court and should not be followed.

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16 See eg *Re Wallis, ex parte Lickorish* (1890) 25 QB 176 at 180-182; *Re Doody; Fisher v Doody* (1893) 1 Ch 129 at 141-142.

17 (1990) 20 NSWLR 82 at 95.

18 *A Concise Treatise on Mortgages, Pledges and Liens* (1897) at 319 referring to a number of authorities including *In re Doody* (1893) 1 Ch 129.

[42] The true quantum of the claim in respect of Mr Nash's services is far from clear. Ms Bundeson, a partner in the firm BDO Kendalls Chartered Accountants, who assessed the market value of Mr Nash's services, admitted that she had been unable to obtain pertinent information about salaries paid to any other persons in a generally similar position in the motor racing industry. Because of this lack of information, she arrived at a "salary matrix" through striking an average of the salaries of selected executive officers of major clubs and national sporting bodies. Included in the positions taken into account were the executive director of Queensland Rugby, the managing director of Brisbane Broncos, and the chief executive officer and the general manager of a national sporting organisation.

[43] It does not seem to me that the salaries selected by Ms Bundeson form a useful guide to the salary which a person in Mr Nash's position could command. Any such salary will be determined or strongly influenced by market forces. The amount the owner of a motor racing business is likely to pay a person in a chief executive position, having regard to the fact that the team is unlikely to run at a profit, will depend on matters such as: the wealth of the proprietor; the proprietor's aspirations for the team; the proprietor's enthusiasm for the sport and his willingness to spend what is necessary to succeed. Another obvious consideration is the availability of persons with appropriate skills. I find that the evidence does not support a salary greater than $100,000 per annum.

[44] Longhurst has the additional problem that, although Mr Nash ran the motor racing business of RNRA on businesslike lines, he, as a director of RNRA, made no charge for his services. Nor, at any material time, was it in contemplation that a charge would be made by Mr Nash for his services. That is not particularly surprising. He had no expectation that RNRA would make a profit in the years in question. Moreover, RNRA was a corporate vehicle which Mr Nash used to indulge his passion for motor sports and the evidence does not suggest that he had an interest in establishing a commercial relationship between himself, RNR and RNRA.

[45] The question of the recoverability of a mortgagee's internal costs is a matter which may bear re-examination, particularly in the light of contemporary commercial reality and the flexibility of equitable remedies. That flexibility is discussed later. But having regard to my subsequent findings it is unnecessary to consider further whether it would be appropriate by a judge at first instance to overturn such a long established principle. If I am wrong and the plaintiff is entitled to the revenues of and pertaining to the first licence and the Business after allowance for the costs of maintaining the licence, it may be that claims such as the one now under consideration should be taken into account in a general way. The basis for so doing would be the making of due allowance for the time, expertise, skill and assets contributed to the Business.[19]

The recoverability of the costs of operating the Business - Conclusion

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[19] See *Warman International Ltd v Dwyer* (1995) 182 CLR 544, *O'Sullivan v Management Agency Ltd* [1985] 1 QB 428 and *In re Jarvis dec'd* [1958] 1 WLR 819.

[46] Mr Nash incorporated RNRA in February 2002 to conduct his motor racing business. At that time the level 2 licence used by Mr Nash to conduct the business was owned by RNR and it carried on the business. The shares in Longhurst were purchased by RNR but it does not appear to be the case that Mr Nash ever contemplated that RNR operate the motor racing business connected with the first licence. That business was a continuation of the motor racing business conducted by Mr Nash through RNR before February 2002 and after that time through RNRA. It was RNRA which entered into sponsorship agreements, obtained sponsorship moneys, incurred obligations and expended moneys on operating the Business at relevant times.

[47] An account such as this is an account between mortgagor and mortgagee. The just allowances to be made in respect of expenditure to maintain or preserve the mortgaged property are in respect of expenditure of the mortgagee. At least as a general proposition, expenses incurred by a third party for which the mortgagee is not liable cannot be brought into account on the taking of account and set off against the mortgage debt.

[48] Counsel for Longhurst submitted that *National Bank of Australasia v the United Hand-in-Hand and Band of Hope Company* was authority to the contrary. They referred in particular to the following passage from the judgment of the Judicial Committee:[20]

> "The particular objections to the form of the interlocutory decree will now be considered in detail. The first was that it charges the bank as mortgagee in possession from the 6th of August, 1874, the date when *Cuthbert* took possession of the mine. This objection was but faintly pressed, since it is obviously for the interest of the bank that the account should cover the period between that date and February, 1875, when the bank resumed actual possession, inasmuch as the yield of the mine whilst the new company worked it was worth only £7 19s., whilst the sums allowed for disbursements during the same period, and for which the bank got credit in account, amount to £4256 5s. 6d. In any case, however, the direction appears to their Lordships to be correct, because it is consistent with the facts established, and with the claim of the bank to an absolute title in the mine as against the company from the date of the sheriff's sale to *Cuthbert*."

[49] In order to understand the import of this passage it is useful to know that *Cuthbert* was the bank's solicitor to whom the bank, as mortgagee, transferred the mine in trust for the bank. The bank, through *Cuthbert*, subsequently transferred the mine to a new company in a transaction which was described in the judgment as "collusive" and a "contrivance". It is unclear from the report of the case on appeal to the Privy Council and also from its report at first instance[21] what relationship, if any, the new company had with the bank or what liability, if any, the bank had to the new company in respect of disbursements. It would appear that the bank was liable for disbursements incurred by *Cuthbert*. It is also apparent that the mortgagor at first

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20 At 408.

21 2 VLR Eq 206.

instance and on appeal to the Privy Council did not contest the bank's claim to bring into account disbursements incurred whilst the bank was not in possession of the mine. Indeed, whether the bank directly or indirectly made all the disbursements for which it was given credit is unknown. Consequently, I am unable to accept that the case is authority for the proposition advanced on behalf of Longhurst.

[50] The inability of RNRA to recover the net loss (if any) incurred in operating the Business is productive of no injustice. Counsel for the plaintiff point out that in operating the first licence Mr Nash, through his entities, is doing no more than he would have done under the level 2 licence sold by RNR. I doubt though that this is a decisive or even significant consideration. Mr Nash and RNRA have had the benefit of engaging in the super 8 competition. Mr Nash, by means of the first licence, has been able to enjoy his hobby, maintain his contacts with sponsors, potential sponsors and others in the industry. His name and those of RNR and RNRA have been before those participating in the industry. RNRA has continued to operate the Business as it has since February 2002 with some financial assistance from time to time from other companies owned and controlled by Mr Nash. In short, Mr Nash and RNRA have derived substantial benefits, some of which have significant monetary value, from operating the Business.

[51] The evidence does not support the conclusion that, at least as a general proposition, expenses paid by RNRA and other companies of Mr Nash in relation to the Business were paid at Longhurst's implied request for the benefit of Longhurst. The payments made by RNRA were made by it as outgoings of the Business, which business was carried on by RNRA before and after the dealings between Longhurst and the plaintiff concerning the first licence. It is true that Longhurst obtained a benefit from the operation of the Business by RNRA as, had the Business not been conducted, Longhurst would not have been able to maintain the first licence. But it hardly follows that there was an implied request by Longhurst to RNRA that the latter incur the costs of carrying on its own business. Nor does it follow that Longhurst assumed an obligation to indemnify RNRA and other companies contributing to the cost of the Business. None of the books and records of any of the subject companies evidence the existence of any such obligation. Mr Nash who was uniquely positioned to know of, and even to create, such obligations, was silent on the point.

[52] Except to the extent explained above, there was no relevant evidence as to why Mr Nash had acquired the subject corporate entities or concerning his use of them for particular purposes. It may be assumed that what he did in this regard best suited his financial interests. It is plain that he decided to leave the first licence in the name of Longhurst in the short term whilst not otherwise involving it in the operation of the Business. Each of the Nash companies, including Longhurst, whilst its shares were owned by Mr Nash, was a legal entity separate from each other and from Mr Nash. They cannot be regarded at law merely as some emanation of Mr Nash, nor can their respective rights and obligations be treated as interchangeable.

[53] As Pincus JA, with whose reasons Thomas JA expressed general agreement, concluded in *Hadoplane Pty Ltd v Edward Rushton Pty Ltd*,[22] the tendency of Australian authority is against "lifting the corporate veil". His Honour observed that "…it is a familiar notion that the use of a company structure can bring with it complications and disadvantages, as well as the hoped-for advantages".[23] Pincus JA referred to *Walker v Wimborne*[24] and *Industrial Equity Ltd v Blackburn*.[25]

The entitlement of the plaintiff to receipts of the Business

[54] The principal items to which the plaintiff makes claim are the payments made to the holder of the level 1 licence by TEGA and the sponsorship income. The TEGA payments amounted to $535,433.74 in the 2006 season and, for the 2007 season, amounted to $161,558.75 as at 30 April 2007.

[55] The plaintiff submits that the sponsorship income was secured by Longhurst's possession of the licence. Furthermore, on the authority of *National Bank of Australasia v United Hand-in-Hand and Band of Hope Company*[26] the plaintiff argues that it is entitled to "the receipts of any person into whose possession the mortgagee has delivered the mortgaged property unjustly and in derogation of the mortgagor's rights". The case is authority for the proposition that a mortgagee may be accountable for such receipts but I am unable to accept that a mortgagor in the position of the plaintiff may take the benefits which flow from the wrongful disposition of the mortgaged property without bringing into account the costs of procuring those benefits.

[56] As was said in the joint reasons in *Warman International Ltd v Dwyer*:[27]

> "It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts."

[57] In illustration of equity's flexible approach to the shaping of an appropriate remedy, it was said in the joint reasons that, in the case of a business it may be inequitable to require an errant fiduciary to account for the whole of the profits of a business over an indefinite period. The reasons went on to instance a case in which the profits of the business had been increased by the skill, resources and capital of the fiduciary. The discussion in this regard concluded with the observation that "the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff".[28]

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22 [1996] 1 Qd R 156 at 160.
23 At 162.
24 (1976) 137 CLR 1.
25 (1977) 137 CLR 567.
26 (1879) 4 App Cas 391.
27 (1995) 182 CLR 544 at 559.
28 At 561.

[58] Equity will do what is "practically just in the individual case".[29] In my view it would be quite unjust and it would unjustly enrich the plaintiff if it was able to take the income claimed without bringing into account the costs of generating that income. As the latter exceeds the former, I find that Longhurst is not required to account to the plaintiff in respect of the TEGA payments and the sponsorship income or any other revenue relating to the first licence.

Longhurst 's entitlement to interest

[59] Longhurst claims interest on the loan in respect of the first licence from 2 December 2005 at the rate of 20% per annum. It claims $1,232.87 interest on the loan in respect of the second licence from 2 December 2005 to 7 December 2007.

[60] The interest claim in respect of the first licence is resisted by the plaintiff on the basis that, properly construed, the parties' agreement does not provide for interest payable after 1 December 2005. The parties' bargain in relation to interest from the first mortgage is contained in the memorandum of understanding signed on 23 February 2005. It provides:

> "MEMORANDUM OF UNDERSTANDING
>
> This is to confirm the overriding understanding and agreement notwithstanding the Sale Agreement, Service Agreement and Put and Call Option Deed between the parties:
>
> 1. Longhurst provides $750,000.00 repayable on 1 December 2005;
> 2. TD provides 20% return on the $750,000,00;
> 3. Tony Longhurst to drive during 2005;
> 4. TD to provide a competitive car to Longhurst for 2005;
> 5. Kieran Wills guarantees TD's obligations;
> 6. If TD defaults, Longhurst may retain the licence; and
> 7. The net TEGA funds after racing costs and prize money, to be paid to TD."

[61] I accept the plaintiff's submission that the weight of authority favours the conclusion that, the agreement not having provided expressly for interest to be payable after the duration of the term of the loan, interest after that time is recoverable only as damages for breach of contract.[30]

[62] Counsel for the plaintiff implicitly accepted in written submissions that the appropriate rate of interest is the statutory rate in respect of a judgment debt. That

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29 *O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428 at 466 and 473.

30 *Cook v Fowler* (1874) LR 7; *Lai v Gong* (1997) 8 BPR 15,837; *Hardie v Shadbolt* [2004] WASCA 175; and *Hawkesbury Valley Developments Pty Ltd v Custom Credit Corporation Ltd* (1994) 6 BPR 14,053.

was the rate applied in *Hawkesbury Valley*, *Lai v Gong* and *Hardy v Shadbolt* and I propose to apply it here. The rate is 10% per annum.[31]

[63] It was submitted on behalf of the plaintiff that Longhurst was entitled to interest on $1,200,000 at the statutory rate from 2 December to 7 December 2005. That was at the rate of 10% on the total of $750,000 and $450,000, the rationale for the submission being that the sale price of the second licence was sufficient to discharge the entire principle debt and that interest thereon ceased to run.[32] An alternative submission was that Longhurst was entitled to the statutory rate of interest on $450,000 from 2 December to 7 December 2005 and the statutory rate of interest on $750,000 from 2 December 2005 to the date of judgment. In that event, it was submitted, that the plaintiff was entitled to off-setting interest on the balance of $925,000 wrongfully retained by the first defendant since 7 December 2005.

[64] I find that as there were two distinct loan transactions secured by separate mortgages, the plaintiff has no right of consolidation. I was referred to no principle to the contrary.

[65] I find that:

(a) Longhurst is entitled to interest on $750,000 at the rate of 10% from 2 December 2005 to the date of judgment;

(b) Longhurst is entitled to interest on $450,000 at the rate of 10% per annum from 2 December to 7 December 2005;

(c) The plaintiff is entitled to interest on $925,000 (being the sale price of the second licence of $1,375,000 less the principal debt of $450,000) from 7 December 2005 to the date of judgment. This finding is subject to any submissions the parties may wish to make as to the correct amount of the balance due in respect of the second licence having regard to interest unpaid prior to 2 December 2005 and any other deductible outgoings.

[66] No submissions were made on behalf of Longhurst on this aspect of the case beyond an assertion that the plaintiff did not object to the 20% rate of interest in its objections or attempt to adduce evidence to establish any other appropriate interest rate. It does not appear to me however that there is any injustice in allowing the plaintiff to advance its arguments in this regard. There is no suggestion that had the objection been properly taken Longhurst would have followed a different course or that it was unprepared to meet the plaintiff's contentions.

The cost of re-transferring the first licence

[67] The plaintiff accepts that such costs "are an ordinary incident of redemption" and as such should be allowed. Accordingly, they will be allowed.

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31 *Supreme Court Regulation* 1998.

32 *West v Diprose* [1900] 1 Ch 337.

[68] The plaintiff accepts also that TEGA's administration costs associated with the sale of the second licence are costs properly incurred by Longhurst and should be allowed. Items 464 and 465 in the account will thus be allowed.

Foregone rents and profits

[69] The plaintiff points to the evidence of Mr Petch to the effect that he was willing to pay a leasing fee for the use of one licence for the 2006 season. It is contended that the plaintiff is entitled to the amount of such fee "as a reasonable amount recoverable from the mortgagee as occupation rents".[33] In support of the argument it is submitted that Longhurst could have secured this income from the mortgaged property had it acted in a commercially prudent manner rather than utilising the licence to engage in a hazardous and speculative commercial activity.

[70] I reject the claim. There is no evidence that Longhurst was aware of Mr Petch's position. It was not put to Mr Longhurst that sublicensing was a course which should have been followed. Nor was there any evidence as to TEGA's attitude to such a course. More importantly, the plaintiff obtained an injunction restraining Longhurst from dealing with the first licence and was content to proceed on the basis that either Longhurst or one of Mr Nash's companies held the first licence and conducted the Business by means of its use. As mentioned earlier, the parties always contemplated that the licences would be used in the conduct of a motor sport's business and that any such business was more likely to generate a loss than a profit.

The amended statement of account

[71] Except as discussed above, no challenge was mounted to the individual items in the amended statement of account. It was submitted, however, that on the basis of some evidence given by Mr Nash, if any outgoings of RNRA were to be taken into account, draft accounts of RNRA and RNR for the year ended 30 June 2006 should be referred to in preference to the amended statement of account. With reference to the RNRA accounts, Mr Nash accepted in cross-examination that it looked as if RNRA was "just breaking even". Mr Nash also accepted that the draft accounts contained the "latest and best figures". The draft accounts, however, were the separate accounts of two companies and did not show all relevant expenditure by the group. Furthermore, they dealt only with particular accounting periods. The accuracy of the amended statement of account, prepared carefully on an item by item basis was sworn to. It was subjected to intense scrutiny on behalf of the plaintiff and it does not appear to me that the accuracy of its contents was impeached by the evidence relating to the draft accounts or otherwise.

Conclusion

[72] I will hear submissions on the appropriate form of order and as to costs.

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[33] *Marriott v Anchor Reversionary Co* (1861) 45 ER 846, 852 and *Fisher & Lightwood's Law of Mortgage*, para [19.34].