[2007] QSC 340

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ATKINSON J

No 7442 of 2007

AUSTRALIAN PHARMACEUTICAL INDUSTRIES QUEENSLAND PTY LTD (API) (ACN 050 921 036)	Applicant
and	
IAN DAVID KERR	First Respondent
and	
JOYE MAREE KERR	Second Respondent

BRISBANE

..DATE 01/11/2007

ORDER

HER HONOUR: The first respondent has sought an adjournment of this matter before me on several bases.

The first is that he takes a point about short service of two affidavits which were served on Tuesday the 20th of October, one before 5 and one after 5. Mr Hackett, on behalf of the applicant, has withdrawn reliance on those so there is no point in that.

The next point taken by the first respondent is that he has never received the amended originating application. Since the amended originating application merely substitutes the name of the applicant for the name of the previous applicant and that order was made on 1 October 2007 in the presence of the first respondent. There is nothing in that point.

The next point made by the first respondent was that the order made on 1st October 2007 was said by the applicant to be an order of Martin J, where as it was in fact an order of Chesterman J. That is not correct as a matter of fact; it was an order of Martin J as appears from the index to the file, and it has been accepted now by the first respondent in argument.

The next argument for an adjournment was that an order made by Chesterman J on 12 September 2007 has not been complied with. A copy of that order is found exhibited to Mr Kerr's affidavit, filed 31 October 2007. He submitted that paragraph 4 of that order had not complied with.

It is apparent from the face of his affidavit that paragraph 4(a) of that order has been complied with; as to 4(b), Mr Hackett informed me that because the solicitors now involved in the matter are the solicitors for the substituted applicant and not the solicitors for the previous applicant, he would have his instructing solicitor obtain instructions from the previous solicitors as to whether paragraph 4(b) had been complied with.

He has informed me that it was, and that evidence would be supplied shortly to the Court to that effect. My ruling will be on the basis that that evidence is supplied to the Court; if it is not, then I will revisit the ruling. On the basis that paragraph 4 of the order has been complied with, there is nothing on that point.

The next matter relied upon by Mr Kerr for an adjournment is that the matter is a complex matter and that he has made attempts to compromise the matter. I say that in a summary way, doing the best I can with the oral submissions made. Whether any of those matters are correct is a matter more to do with the merits of whether or not an order ought be made rather than whether or not the matter should be adjourned.

I note that this matter has been adjourned on a number of occasions, and for the reasons I have given, I refuse the adjournment.

...

This is an application by Australian Pharmaceutical Industries Queensland Pty Ltd (API) for orders that, pursuant to a loan agreement and mortgage with the first and second respondents Ian David Kerr and Joye Maree Kerr, dated 9 February 2007, the first and second respondents deliver to the applicant possession of all that land that has a real property description of Lot 9 on Registered Plan 42855, County of Stanley, Parish of Toombul, title reference 12240174 in the State of Queensland; and Lot 1 on Registered Plan 59636, County of Stanley, Parish of Toombul, title reference 12240174 in the State of Queensland (the land), and that the first and second respondents pay the applicant's costs of and incidental to this application on an indemnity basis.

This application is based on a loan agreement and mortgage; the loan agreement was entered into between Business Bridging Finance Proprietary Limited (BBF) and Ian David Kerr and Joye Maree Kerr, the first and second respondents, and Dajem Exploration Proprietary Limited.

The loan agreement, which as its title suggests was "bridging" finance, required payments to be made in the following way: an interest payment of $2,325 on the 9th of February 2007; an interest payment of $775 on the 9th of March 2007; interest of $3,100 to be paid on the 9th of April 2007; and repayment of the principal of $62,000 on the 9th of April 2007.

There is no dispute that the first two payments of interest that were due were made, and there appears to be no real

dispute that the payments due on the 9th of April 2007 were not made.

On the 22nd of March, a real property mortgage was executed as security for that loan over the properties which I have previously referred to as "the land". As I have said, there was default in the obligation on 9 April 2007.

On 23 April 2007, BBF served a notice of default, a notice to remedy breach and a notice of exercise of power of sale on the respondent. No payments have been made pursuant to those notices.

Mr Kerr noted that he has been attempting to make payments but he has not been able to, because on the 27th of August 2007 API, he says, lodged a caveat which they have not agreed to lift.

In doing so, API has acted in accordance with its rights, so the fact that he might have tried to pay it but has not been able to, is not relevant to the question of whether or not the originating application ought be granted.

Mr Kerr also argued that there was a subsequent oral agreement to the loan agreement and mortgage by which there was a variation in the terms of the loan agreement so those monies were not then due and owing. He has provided no evidence of that in any form. First he said that he could get that evidence if he had an adjournment, and I have refused the adjournment for that purpose.

He then said that he had put in a request for a subpoena on a Mr White who might be able to evidence of that. There is no evidence that that subpoena has been served; Mr White is not present, and without evidence of the subpoena having been properly served, I would not rely upon that.

But more importantly, there is provision in the agreements themselves against those agreements being able to be varied orally

On the 23rd of August 2007, BBF served a notice of demand for possession of the land on the first and second respondents, and the respondents have failed to deliver possession of the property; they have disputed this application.

On 27 September 2007, API and BBF were parties to a deed of assignment of debt and cause of action pursuant to which the BBF mortgage and this proceeding were assigned to API, and API was substituted as the applicant by an order made on 1 October 2007 with the consent of the respondents.

The relevant law is set out in the submissions of Mr Hackett and is relatively simple in scope and can hardly be disputed. Pursuant to Section 78(2)(c)(i) of the Land Title Act 1994, subject to the terms of the mortgage, if the mortgagor defaults under a registered mortgage, the mortgagee may, by proceeding in a court of competent jurisdiction, obtain possession of the mortgaged lot.

Subsection 3 provides that the powers in this section are in addition to any other powers exercisable by the mortgagee. Those powers are also found in the mortgage; notices of default have been given.

I am satisfied, on the evidence before me, that the default has not been remedied and that API is entitled to the relief that it seeks in the amended originating application.

...

The order will be as per the draft which I have initialled and placed with the file.
