

SUPREME COURT OF QUEENSLAND

CITATION: *Law Partners Mortgages Pty Ltd (In Liquidation) v Jeremy and Anor* [2007] QSC 371

PARTIES: **LAW PARTNERS MORTGAGES PTY LTD (ACN 068 522 261) (IN LIQUIDATION)**
(plaintiff)
v
MICHAEL ALLAN JEREMY AS TRUSTEE FOR THE TURNER PARK SHOPPING VILLAGE PROPERTY TRUST
(first defendant)
and
SHANE ARTHUR MORGAN AS TRUSTEE FOR THE TURNER PARK SHOPPING VILLAGE PROPERTY TRUST
(second defendant)

FILE NO/S: BS 1070/03

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 December 2007

DELIVERED AT: Brisbane

HEARING DATE: 6, 7, 8 November 2007

JUDGE: Mackenzie J

ORDER:

1. **It is declared that the plaintiff is entitled to an equitable mortgage over Lots 5, 8, 11 and 13 in BUP 104666 County of Canning, Parish of Bribie, Title References 50137040, 50137043, 50137046 and 50137048 (“the mortgaged properties”);**
2. **It is ordered that the plaintiff be entitled to recover from the defendants in their capacity as Trustees of the Turner Park Shopping Village Property Unit Trust, the sum of \$218,000 together with contractual interest at the rate of 16 per cent per annum;**
3. **That, pursuant to s 99 of the *Property Law Act 1974*, it is ordered that:**
 - a. **a legal estate be created in the mortgagee in respect of the mortgaged properties to enable the mortgagee to carry out the sale of the**

mortgaged properties;

b. that the mortgaged properties be sold by the plaintiff as mortgagee in possession;

- 4. It is ordered that the caveats lodged by the first defendant on 13 March 2006 over each of the mortgaged properties be removed;**
- 5. It is ordered that the plaintiff deliver to each of the defendants and to my Associate, before 4pm on Monday 17 December 2007, a draft of a formal order consistent with orders 1 to 4 and any ancillary orders necessary to implement them, and as to costs.**
- 6. It is ordered that, in the event that the terms of the final orders need to be further considered, the matter be listed for further consideration on a date to be fixed.**

CATCHWORDS: MORTGAGES – MORTGAGES AND CHARGES GENERALLY – PARTICULAR MORTGAGES AND ENCUMBRANCES – EQUITABLE MORTGAGE – OTHER INCIDENTS – where the first defendant as trustee procured the advancement of money on security of property held in a personal capacity and on security of trust property – where first defendant honestly held out that he was the sole trustee – where the retirement of the second defendant as trustee was ineffectual – where mortgages were never registered – where plaintiff seeks repayment of the monies advanced or an order vesting the legal estate of the properties to enable them to be sold – whether the mortgages were executed by the Trust – whether the mortgage documents and other documents constituted a memorandum in writing resulting in money being advanced in reliance on them – whether the plaintiff is an equitable mortgagee

Property Law Act 1974 (Qld) s 99, s 100

Trusts Act 1973 (Qld) s 46

Uniform Civil Procedure Rules 1999 (Qld) r 189(2)

Maddison v Alderson (1883) 8 App Cas 467, cited

Riches v Hogben [1986] 1 Qd R 315, cited

COUNSEL: K E Downes for the plaintiff
The first respondent appeared on his own behalf
The second respondent appeared on his own behalf

SOLICITORS: McCullough Robertson for the plaintiff
The first respondent appeared on his own behalf
The second respondent appeared on his own behalf

[1] **MACKENZIE J:** This is an application arising from a transaction in which the plaintiff advanced moneys to Mr Jeremy and his wife to refinance loans then held with the Bank of Queensland. The moneys were to be secured by mortgages over a

townhouse owned by them in their personal capacity and shops owned by Turner Park Shopping Village Property Trust (“the Trust”) of which Mr Jeremy was indisputably a trustee at all material times. The complication in what would otherwise have been straightforward is that Mr Morgan had also been a trustee of the Trust but had executed an ineffective Deed of Resignation prior to the relevant transaction.

- [2] The action is for repayment of the balance of the advances of \$218,000 plus interest, declaratory relief recognising the plaintiff’s status as an equitable mortgagee of the Trust properties and orders pursuant to the *Property Law Act 1974* (Qld) vesting the legal estate in the Trust properties in the plaintiff so that it may effect the sale of those properties. The matter has proceeded on the basis that Mr Morgan’s resignation was ineffectual because the process for retirement of trustees provided for in cl 56(c) of the Trust Deed had not been complied with. Mr Morgan’s name has remained on the Land Title Register as a trustee at all times, despite unsuccessful efforts to have it removed. It seems not to be disputed that Mr Morgan played no part in the affairs of the Trust from 1997 onwards.

Dealings Between the Parties

- [3] The plaintiff’s funding to enable it to enter into the transaction came from individual investors who provided funds to it for on-lending to borrowers. In late 1988 or early 1989 Mr Jeremy and his wife approached the plaintiff to refinance debts to the Bank of Queensland. At the time, there were three Bank of Queensland accounts, two of which were secured over the townhouse, owned by Mr and Mrs Jeremy, and the third secured over the four commercial properties owned by the Trust. The advances made by the plaintiff were to be secured against the townhouse owned by them personally and against the Trust properties. The advances to be made for the plaintiff were split into two amounts of \$55,000 and \$228,000, each to be secured by all of the properties. Accordingly, four mortgages were prepared, two to be executed by Mr and Mrs Jeremy in relation to the townhouse and two to be executed by the trustees in respect of the Trust’s properties. The reference in the panel naming the mortgagor to Mr Jeremy, and to Mr Morgan, whose name was struck through “under instrument 701117244”, which is the Turner Park Shopping Village Property Investment Unit Trust Deed, makes this clear.
- [4] Mr Neilson-Brown (Mr Brown) was the principal solicitor of Law Partners with which the plaintiff was associated, and was the plaintiff’s sole director. He said that Mr Jeremy had told him that he was the trustee of the Trust and that Mr Morgan had been trustee but had resigned. Mr Brown required a Deed of Retirement and an executed deed dated 16 February 1999 was forwarded to him by Mr Milne, who was acting for Mr and Mrs Jeremy, under cover of a letter dated 11 March 1999. It was apparently received by Law Partners, along with other documents relevant to the transaction, on the same day. On that day, Mr Milne also sent the Deed of Retirement and a statutory declaration by Mr Morgan to the Registrar of Titles for the purpose of having him removed from the register as a trustee. However, that was never done for reasons connected with requisitions from the Land Title Office.
- [5] On 7 April 1999 the advances were made. Mr Jeremy and his wife defaulted under the terms of the arrangement by failing to provide evidence that the townhouse and the properties owned by the Trust were insured. On 22 June 1999 the plaintiff served a Notice of Exercise of Power of Sale purporting to be under the mortgages that had been executed in relation to the townhouse and the other properties. On a

date not precisely known, but shortly after the service of the notices, the plaintiff took possession of the townhouse and the other properties.

- [6] The mortgage in relation to the townhouse was registered and the property was sold by the plaintiff as mortgagee exercising power of sale. That sale settled on 15 December 1999. Of that amount, \$60,000 was applied to repayment of the capital owing under the loans, leaving a balance outstanding of \$218,000 from the original amounts advanced.

Subsequent Difficulties

- [7] Attempts were made to register the mortgages in relation to the properties owned by the Trust but these ran into difficulties with the Department of Natural Resources, for a variety of reasons, including a requisition as to how the mortgages could be entered into by only one of the trustees on the record, and issues concerning compliance with the *Trusts Act 1973* (Qld) and the Trust Deed with regard to retirement of Mr Morgan as trustee.
- [8] On 30 June 1999, while these difficulties were ongoing, Mr Jeremy and his wife became bankrupt. Clout and Associates (later Korda Mentha) were appointed trustees in bankruptcy. That bankruptcy ceased in March 2004.
- [9] On 30 October 2001, Mr Gerry Collins was appointed liquidator of the plaintiff. At the time of his appointment, the plaintiff was still in possession of the properties owned by the Trust and Mr Collins continued in that possession until 2004. He received rent and paid costs associated with them. The costs actually exceeded the rent received and investors provided further funds to the plaintiff to pay them. Attempts by the then solicitors for the plaintiff, through the trustee in bankruptcy of Mr Jeremy, to have the name of Mr Morgan removed from the titles as a trustee of the Trust were also unsuccessful.
- [10] On 8 September 2003, Mr Morgan wrote to those solicitors acknowledging the loan but asserting that the mortgage on the properties owned by the Trust was never signed by the registered trustees. Therefore, it was asserted, the plaintiff did not have a valid mortgage that could be registered. It was therefore an unsecured creditor. It was asserted that the beneficiaries of the Turner Park Shopping Village Unit Trust had a stronger claim to any proceeds than the plaintiff. On 5 November 2004, the plaintiff lodged a caveat claiming an interest in the properties as equitable mortgagee.
- [11] A meeting was held in June 2005 at which Mr Morgan refused to sign the mortgages. He did so on the basis that he had not been a party to refinancing the properties. In addition to the transactions previously mentioned, on 13 March 2006 Mr Jeremy lodged a caveat over each of the properties. If the plaintiff is successful in these proceedings, it seeks to have those caveats removed.
- [12] Unless Mr Morgan either retires in accordance with cl 56(c) of the Trust Deed or executes the mortgages over the properties as the second trustee of the Trust, the plaintiff will be unable to register the mortgages entered into for the purpose of providing security over the properties. The Department of Natural Resources will not register them in the absence of resolution of Mr Morgan's status and Mr Morgan has refused to assist in that regard. In his oral submissions he explained it, unsurprisingly, in terms of an unwillingness to possibly subject himself to a liability of the extent claimed.

Issues at Trial

- [13] According to the submissions of the plaintiff, the issues arising for decision were the following:
- (a) are the defendants, as trustees of the Trust, liable to repay the advances plus contractual interest to the plaintiff?;
 - (b) if so, is the plaintiff entitled to an order that the defendant repay the balance of the advance in the sum of \$218,000 plus contractual interest?
 - (c) is the plaintiff an equitable mortgagee?
 - (d) if so, is the plaintiff entitled to a declaration to that effect?
 - (e) if so, is the plaintiff entitled to the remedies available under sections 99 and 100 of the *Property Law Act 1974* to have the legal estate vest in the plaintiff to enable it to sell the properties owned by the Trust and be paid the advances and contractual interest from the proceeds, along with its costs?
- [14] It was not in dispute that the attempts to retire by the second defendant as trustee of the Trust in 1997 and in 1999 were ineffectual. At the trial, there was no documentary evidence of Mr Morgan's attempted retirement in 1997. It appears, however, to be common ground that he did execute a document at that time. The solicitor who may have drafted the document is no longer in practice and could not be found despite inquiries. Notices to admit with regard to execution of the first deed of retirement and the defendants' belief that the second defendant was no longer a trustee were not responded to. In consequence of that, there is a deemed admission of those facts (*Uniform Civil Procedure Rules 1999* (Qld) r 189(2)).
- [15] The state of the evidence may be summarised shortly in this way. Mr Jeremy had a subjective belief that Mr Morgan had retired as trustee prior to the occurrence of the relevant transaction in respect of which recovery is sought. Because he had that subjective belief, he represented that he was sole trustee in his dealings with the plaintiff, Mr Brown on its behalf and Mr Milne. No one suggests that he had any ulterior motive in representing himself as the sole trustee. In the course of the transaction with respect to advancing moneys by the plaintiff, Mr Jeremy warranted that he had "full complete valid and unfettered authority and power to enter into" the documents pursuant to the trust and that the powers included the power to mortgage the mortgaged premises to secure money.
- [16] The first defendant executed the mortgages in both of them. Subject to an argument about the capacity in which he did so, he signed on the basis that he was the mortgagor as defined by cl 3. The first defendant also executed a variety of other documents which were used to advance the transaction.
- [17] So far as Mr Morgan was concerned, it was not in dispute that he believed that he had resigned as trustee before the relevant transaction was completed. Before the money was advanced by the plaintiff, Mr Morgan executed a deed of retirement on 16 February 1999 and other documents necessary for his removal from the Land Titles Office Register as trustee of the trust. In doing so, he was trying to facilitate dealings with the Trust properties by Mr Jeremy as he believed, as sole trustee.
- [18] It was submitted by Ms Downes that, by the conduct just referred to, Mr Morgan had held out the first defendant as being the sole trustee of the Trust and having authority to bind the Trust on his own. In particular, he had authority to deal with

the properties of the Trust. It was submitted that Mr Morgan could not now resile from that position, having conferred on Mr Jeremy that ostensible authority. It was submitted, in the alternative, that Mr Morgan had engaged in conduct that was unequivocally and in its own nature referable to some such agreement as that alleged. The agreement was to grant registrable legal mortgages to the plaintiff.

- [19] Mr Morgan elected not to give evidence, but insofar as it is suggested by the content of a question he asked of Mr Brown in cross-examination, he thought that his position might be improved by the assertion that he would have executed whatever further documents needed to be executed for the purposes of registering the mortgages had he been asked at the time of the transaction. Subsequent events show that he was unwilling to sign the documents at particular times. For example there is the letter dated 8 September 2003 to the plaintiff's then solicitors explaining why he would not execute the mortgages for the purpose of enabling them to be registered. His justification for declining to do so and defending the action, suggested during the course of the hearing, has previously been referred to.
- [20] There is no compelling explanation of why the process in cl 56 of the Trust Deed for effectuating a retirement of a trustee was not identified by the trustees or the solicitors involved in the matter. There is nothing to suggest that it occurred to either Mr Jeremy or Mr Morgan that there was a problem either. But the reality is that even though the attempts to resign were legally ineffectual, Mr Morgan's conduct evinced an intention on his part not to play any part in the affairs of the trust generally or in relation to the particular transaction being negotiated by Mr Jeremy for the benefit of Mr Jeremy and his wife. There is nothing to suggest that, at the time the transaction was undertaken and completed, the plaintiff knew of the defect in Mr Morgan's retirement.
- [21] In the circumstances, the only reasonable conclusion is that the documents in the form of mortgages were executed by Mr Jeremy with the consent of Mr Morgan, albeit driven by a wrong belief on both their parts that Mr Morgan was no longer a trustee. In that respect, Mr Morgan cannot avoid the consequences of failing to ensure that his retirement was effectual. The fact that he may not have been agreeable to the transaction proceeding had he known the true situation is of no consequence for present purposes. The consequence is that execution of the documents created an equitable mortgage in favour of the plaintiff. The foundation is the agreement between the trustees of the trust, represented by the first respondent, and the plaintiff that mortgages be granted to secure the advances of money by the plaintiff to the Jeremys.
- [22] The mortgage documents and other documents were necessary to facilitate the advance of the moneys. When executed in the way that they were, they constituted a memorandum in writing evidencing the agreement, in compliance with ss 11 and 59 of the *Property Law Act 1974*. The money was advanced in reliance on them. The acts are, in the words of Lord Selborne in *Maddison v Alderson* (1883) 8 App Cas 467 at 469, "unequivocal and in their own nature, referable to some such agreement as that alleged".
- [23] The defendants raised a number of issues that need to be addressed. One concerned the signatures on the mortgages. For reasons that are not explained, the mortgage to be executed on behalf of the Trust for \$228,000 was executed by Mr Jeremy without stating the capacity in which he was signing it. The schedule to it is signed by both him (without any indication of the capacity in which he signed) and his

wife. The \$50,000 mortgage, to be executed on behalf of the Trust, was signed by Mr Jeremy without stating the capacity in which he signed, and the schedule by Mr Jeremy, his wife and Mr Jeremy as trustee for the Trust. For completeness sake, the mortgage relating to the Jeremys in their personal capacity for \$228,000 was signed by the Jeremys and the schedule by them and by Mr Jeremy as trustee for the Trust. The mortgage for \$50,000 relating to the Jeremys in their personal capacities was signed by them, and the schedule by them and Mr Jeremy as trustee for the Trust.

- [24] At the most basic level, Mr Jeremy and Mr Morgan both contended that neither of the mortgages intended to be executed by the Trust was a validly executed document because it had not been executed by both trustees. So far as the proposition goes, it may be so, but it does not resolve the wider issue of what rights in equity or otherwise were created by the transaction in which the clear intention of the parties was to execute mortgages on behalf of the Trust in return for advances that were admittedly made.
- [25] Reliance was also placed on clause 46 of the Trust Deed which, subject to the power to delegate, required the trustees, if more than one, to act jointly. Mr Jeremy also referred to the *Trusts Act 1973*, without citing any particular section, and ss 14(4) and 14(4A) of the *Property Law Act 1974* as requiring two trustees “to sign all documents in order to make them legal and binding”. The last mentioned provisions may provide an example of a particular instance but do not lay down any general proposition. Mr Jeremy also submitted that not all pages of the documents had been signed. That is not a fatal defect. In any event, no positive case was made out that pages had been substituted or that, in any other way, the documents were not those presented for signature, albeit defective in their execution.
- [26] The other complaints made in Mr Jeremy’s written submissions and to an extent throughout the case as a whole are concerned with the liquidator and the trustee and bankruptcy who are not parties to the proceedings and, to an extent, in relation to the solicitors, particularly Mr Brown, involved in the transaction. They are not parties either. All of those issues, which appear to have been comprised in the counter-claim, the filing of which was refused at the commencement of the trial, could only be explored in other competent proceedings.
- [27] The only other issue that requires comment has its basis in an alleged lack of proof that moneys had been advanced with the authority of investors by the plaintiff. There were complaints that the identities of the persons whose moneys were invested with the plaintiff had not been revealed. With respect to the latter point, there appears to have been a notion harboured by Mr Jeremy that he could pay back, directly to the investors with the plaintiff, the amount of their investment and extinguish his obligation to pay back the plaintiff. That is untenable.
- [28] With respect to the former, the argument seemed to be based on the absence of proof that each investor had given authority to the solicitor to advance money through the plaintiff. The factual basis of this submission is erroneous. The solicitor gave evidence that he had obtained authorities before making the advances. There are ledger entries showing receipt of moneys by the plaintiff from certain investors. If the moneys were ultimately paid by the plaintiff to the solicitor’s trust account and paid from there to bring about the relevant transaction, that does not in any relevant way mean that the plaintiff’s action is defective because it did not advance the money.

- [29] Since there is no substance in any of the arguments raised by the defendants the plaintiff is therefore entitled to relief on the basis of the findings made in the preceding paragraphs.
- [30] If relief had not been granted on that basis, the plaintiff relied on equitable estoppel in reliance on passages in *Riches v Hogben* [1986] 1 Qd R 315 at 339-340 and 340-341 and the context of the conduct of each of the defendants. The proposition was that the combined conduct of the defendants created the expectation in the plaintiff that, in exchange for the advances it was asked to make, it would receive in return two legal and registrable mortgages over the Trust's properties. The plaintiff made those advances and acted to its detriment, in reliance upon that expectation which it held by reason of the conduct of the defendants. It was submitted that therefore the plaintiff had obtained an equitable interest. In view of the finding made as to the existence of an equitable mortgage, it is not necessary to further discuss this additional basis of liability.
- [31] It is also desirable to record two other submissions by the plaintiff. The first was that the plaintiff was entitled to rely on s 46 of the *Trusts Act 1973* which relevantly says the following:
- “A ... mortgagee .. advancing money to the trustee on a .. mortgage of trust property shall not be concerned to see that such money is wanted, or that no more than is wanted is raised or otherwise as to the application thereof, or that the trustee has power to effect such ... mortgage”.
- [32] It was submitted that by reason of that section, the plaintiff was not concerned to see that Mr Jeremy had the power to borrow money in the name of the Trust and to secure those borrowings by granting a mortgage over the properties of the trust. Accordingly the plaintiff was entitled to rely upon s 46 against any assertion raised by either defendant that it ought not receive the benefit of the entitlements conferred on it by the mortgages executed by the first defendant, on the ground that he lacked authority to grant the mortgage or secure the advances. When the matter was raised by the court during final submissions, Ms Downes was unable to refer me to any authority comparable to this case, where it was known to the mortgagee that Mr Morgan had been a trustee and had procured a further deed of retirement from him to facilitate the removal of his name from the Land Title Register but had not satisfied itself that the mode of retirement complied with the trust deed. As it is unnecessary to decide that issue to resolve the action, I would prefer to leave that question for determination if a like case arises where the issue is a critical one.
- [33] The second argument to be recorded is that based on an analogy with *Brocklesby v Temperance Permanent Building Society* [1895] AC 173. That was a case where a principal had engaged an agent and given him title deeds to borrow money on security, with an express direction not to borrow more than a certain sum. The agent borrowed more than that sum, applied the excess to his own purposes and absconded. The issue was whether the loss lay with the principal of the fraudulent agent or the lender. It was decided by the House of Lords that the relevant principle was that a principal who gave an agent the means of committing fraud must bear the consequence. As Lord Watson said in his speech, the principal who gave the fraudulent agent the means of committing it must bear the consequences of his agent's fraud. He said it appeared to be just and reasonable that the agent having control of the securities, for the purpose of borrowing, with the consent of the

principal, a lender who had no notice to the contrary should be entitled to deal with him on the footing that he had authority to pledge the securities in a full value. Lord Macnaghten at 184 expressed the principle similarly.

- [34] The proposition relied on was that by executing the statutory declarations and the deed of retirement, Mr Morgan armed Mr Jeremy with the facility to borrow money from a lender which required security in the form of a mortgage over the property of the trust. It was submitted that Mr Morgan could not now assert that Mr Jeremy did not have authority to borrow money or to execute the mortgages on his own or that the loans and mortgages were not binding on the trust. The argument was not developed except by analogy with the House of Lords decision which was concerned with fraud. As it is unnecessary to resolve the issue to grant relief it is not proposed to examine the validity of the analogy further.

Conclusions:

- [35] I am satisfied that the plaintiff is entitled to the status of equitable mortgagee over the Trust's properties, and to a declaration in that regard. The plaintiff is entitled to an order that the defendants, in their capacity as trustees of the Trust, repay the balance of the advance in the sum of \$218,000 plus contractual interest. In principle, the plaintiff is entitled to orders under s 99 of the *Property Law Act 1974* for sale of the properties and vesting a legal estate in the plaintiff as mortgagee to enable it to carry out the sale, and to any ancillary orders in that regard. As there is no basis for maintaining the caveats lodged by the first defendant, the plaintiff is entitled to have them removed from the Register.

Order

1. It is declared that the plaintiff is entitled to an equitable mortgage over Lots 5, 8, 11 and 13 in BUP 104666 County of Canning, Parish of Bribie, Title References 50137040, 50137043, 50137046 and 50137048 ("the mortgaged properties");
2. It is ordered that the plaintiff be entitled to recover from the defendants in their capacity as Trustees of the Turner Park Shopping Village Property Unit Trust, the sum of \$218,000 together with contractual interest at the rate of 16 per cent per annum;
3. That, pursuant to s 99 of the *Property Law Act 1974*, it is ordered that:
 - a. A legal estate be created in the mortgagee in respect of the mortgaged properties to enable the mortgagee to carry out the sale of the mortgaged properties;
 - b. That the mortgaged properties be sold by the plaintiff as mortgagee in possession;
4. It is ordered that the caveats lodged by the first defendant on 13 March 2006 over each of the mortgaged properties be removed;
5. It is ordered that the plaintiff deliver to each of the defendants and to my Associate, before 4pm on Monday 17 December 2007, a draft of a formal order consistent with orders 1 to 4 and any ancillary orders necessary to implement them, and as to costs.

6. It is ordered that, in the event that the terms of the final orders need to be further considered, the matter be listed for further consideration on a date to be fixed.