

SUPREME COURT OF QUEENSLAND

CITATION: *The Trustee of the Property of Paul Jason Uhrhane, a Bankrupt & Anor v Gunn & Anor* [2012] QSC 391

PARTIES: **THE TRUSTEE OF THE PROPERTY OF PAUL JASON UHRHANE, A BANKRUPT**
(first applicant)
and
BEVIN ROBERT SCHAFFERIUS AS TRUSTEE OF THE PERSONAL INSOLVENCY AGREEMENT OF DANIELLE SUZANNE UHRHANE
(second applicant)

v

KERRY FRANCES GUNN
(first respondent)
and
EDWARD STEPHEN GUNN
(second respondent)

FILE NO/S: BS10348 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 10 December 2012

DELIVERED AT: Brisbane

HEARING DATE: 16 November 2012

JUDGE: Douglas J

ORDER: **Give leave to the applicants to:**

- 1. withdraw the admission that the mortgage was valid;**
- 2. make the amendments sought; and**
- 3. make an order substituting Mr LeRoy as trustee of Mr Uhrhane's bankrupt estate and as trustee of the personal insolvency agreement of Mrs Uhrhane in place of Mr Schafferius.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS –

PLEADING – DEFENCE AND COUNTERCLAIM – where application for leave to withdraw admissions and to plead an amended defence alleging that a mortgage was in effect forged – where genuine dispute about the validity of the mortgage – whether leave ought be granted

Hanson Construction Materials Pty Ltd v Davey (2010) 79 ACSR 668, cited

The Trustee of the Property of Paul Jason Uhrhane, a Bankrupt & Anor v Gunn & Anor [2012] QCA 75, cited

COUNSEL: MJ Luchich for the applicant
JB Sweeney for the respondent

SOLICITORS: Patane Lawyers for the applicant
Carswell & Co for the respondent

- [1] This is an application for leave to withdraw admissions and to plead an amended defence alleging that a mortgage was, in effect, forged.

Background

- [2] Mr and Mrs Gunn are the respondents to the proceeding, but, in effect, the plaintiffs for the purposes of the pleadings. When pleadings were directed to be delivered they were required to deliver the statement of claim. Mr Uhrhane is their nephew and he is bankrupt. Mrs Uhrhane's affairs are subject to a personal insolvency agreement. Their defence to the proceedings was undertaken by their trustees. There is now one trustee for both Mr and Mrs Uhrhane, Mr Paul LeRoy. Previously, Mr Schafferius was Mr Uhrhane's bankruptcy trustee.
- [3] The Gunns' claim is for payment of \$176,154.98 said to be owed to them as secured creditors pursuant to a registered mortgage. The proceedings arose because the Uhrhanes' trustees sought orders compelling the release of the mortgage on settlement of a sale of the Uhrhanes' property. That occurred and the money in dispute, then approximately \$189,000, was paid into court.
- [4] The defence pleads that any agreement for the Gunns to advance money was not made with the Uhrhanes' but with a company called Chiefdan Pools Pty Ltd. As originally drafted, it went on to admit in paragraph 12 that a mortgage dated 18 September 2008 was lodged over the Uhrhanes' property in favour of the Gunns but denied as untrue an allegation that the mortgage was provided by the Uhrhanes in consideration of the Gunns' continuing to provide financial accommodation to the Uhrhanes.¹ Subsequently, in an amended defence filed 11 July 2012 the Uhrhanes' trustees added the following allegations about the mortgage:

“(c) further say that the mortgage:

¹ See paragraphs 12(a) and 12(b) of the defence filed 12 February 2010.

- (i) does not meet the requirements of an instrument of mortgage, because it was not validly executed;
- (ii) is not a mortgage;
- (iii) is not an equitable mortgage.

Particulars

- (A) The mortgage was not signed by the Uhrhanes or the First Respondent:
 - (1) in the presence of anyone that was not party to the instrument; or
 - (2) in the presence of the Witnessing Officer;
- (B) The mortgage was not signed by the Second Respondent:
 - (1) On or about 18 September 2008, at a meeting between the Uhrhanes and the First Respondent at the Property, the First Respondent signed the Second Respondent's name on the mortgage.”

- [5] Applegarth J, on 14 September 2011, ordered that the amended defence be struck out unless, within 14 days, the trustees filed and served an application for leave to make the amendments. They did that but simultaneously pursued an appeal against his Honour's order. The appeal failed. The losing argument was that leave to amend the defence was unnecessary because the amendment was not inconsistent with the admission of the existence of the mortgage.² After the failure of the appeal this application proceeded.

Evidence as to the making of the admission

- [6] The principal evidence as to the making of the admission by the trustees comes from their solicitor, Mr Patane.³ When Mr Uhrhane's trustee was first appointed, he instructed his solicitors to lodge a request to record transmission by bankruptcy over the mortgaged property in respect of Mr Uhrhane's interest. This was done on 22 July 2009. The trustee then entered into several contracts to sell the property and, as part of that process, his solicitors corresponded with the Gunns' solicitors in relation to the mortgage that appeared on the title in their favour, seeking its release to enable settlement to occur. Mr Uhrhane's trustee raised the issue as to whether the debt allegedly secured by the mortgage was in fact a debt of the Uhrhanes or whether the Gunns had advanced funds to Chiefdan Pools.
- [7] In the course of that correspondence, the Gunns' solicitors first advised, amongst other things, that there was no loan agreement between the parties and then advised

² *The Trustee of the Property of Paul Jason Uhrhane, a Bankrupt & Anor v Gunn & Anor* [2012] QCA 75 at [15]-[19].

³ See the affidavit of BB Patane filed by leave 16 November 2012 (containing 84 paragraphs).

that the Uhrhanes verbally agreed to pay the money and finally produced a handwritten loan document that, on its face, appeared to be signed by the Uhrhanes. The Gunns refused to provide a release of mortgage and an application was brought urgently on behalf of the trustee on 22 September 2009 to compel them to produce a release and for the funds to be paid into court.

- [8] In the material filed in support of that application, the trustee exhibited an email from Mrs Uhrhane denying that she signed the loan agreement and stating that she had checked with her husband and that he had not signed it, and that their signatures on the loan agreement were forged. That evidence was relied upon to argue that there was no consideration for the mortgage because there was no valid loan agreement.
- [9] The court ordered the release of the mortgage and that the balance of the proceeds of sale be paid into court. The Gunns then wished to apply to have the money paid into court paid out to them and, in preparation for that application, the trustee's solicitors wrote on 17 December 2009 to the Gunns' solicitors advising that a trial was necessary to determine the legal and contractual issues because of the existence of conflicting statements from the Gunns about whether there was a loan agreement and whether the Uhrhanes' signatures on it were forged. The trustee's communications with Mrs Uhrhane at that stage were through her solicitors because she had brought proceedings against Mr Uhrhane's trustee in the Family Court in his role as trustee of her husband's bankrupt estate.
- [10] Ms Luchich for the trustee submitted that it could be seen from that evidence that, at the time the original defence was filed, the dispute between the parties was in relation to the existence of consideration for the debt alleged to be secured by the mortgage and, in particular, whether there was a loan agreement between the Gunns and the company, Chiefdan Pools, or whether there was a loan between the Gunns and the Uhrhanes, including a dispute about whether the document "belatedly produced" by the Gunns was in fact signed by the Uhrhanes.
- [11] Mr Patane, in his affidavit, swears that at the time of filing the original defence on 12 February 2010, the trustee was not in possession of sufficient facts to instruct him that the defence should allege illegality of the mortgage and did not have the evidence to plead that the mortgage in question was not validly registered. That was the explanation for the making of admissions about the existence of the mortgage on the basis of the prima facie facts demonstrated by the Land Titles records.⁴
- [12] After disclosure, Mr Patane said that comparisons between the documents, presumably produced on disclosure, showed that Mr Gunn's signature on those documents appeared to be different from the signature on the alleged mortgage. Also, on 17 May 2011, his firm received a letter from Mrs Uhrhane's solicitors outlining their client's instructions about the facts surrounding the filing of the mortgage in which they said that Mrs Gunn forged the signature of Mr Gunn in the

⁴ See paragraph 10 of the affidavit of BB Patane filed 14 June 2012.

presence of both Mr and Mrs Uhrhane and that the purported witness, a Commissioner for Declarations, was not present at the time of signing by any of the parties.

- [13] Mr Patane then assembled a number of documents containing signatures on his file and, from analysing them, drew the conclusion that the signature on the mortgage of Mr Gunn was a forgery. He also made inquiries of the witness shown on the face of the mortgage as a Commissioner for Declarations, a Ms Spiteri. An affidavit was obtained from her⁵ in which Ms Saward, formerly Ms Spiteri, swore that she did not write the words “Dianne Michelle Spiteri” where they appear on the document, did not sign the document where it purports to contain her signature, and was not present when any of the mortgagors’ or mortgagees’ signatures were applied to them. She did not witness any of those signatures being applied to the mortgage and had no knowledge of the circumstances surrounding execution or witnessing of the mortgage.
- [14] Prima facie, that is a very reasonable explanation for the making of the admission in the first place and for seeking to withdraw it now to replace it with the following proposed amendment to paragraph 12 of the Defence:

“(c) further say that the mortgage:

- (i) does not meet the requirements of an instrument of mortgage, because it was not validly executed, in that:
 - A. section 162(c) of the *Land Title Act 1994* has not been complied with as the Uhrhanes did not sign the document in the presence of a person that was not a party to the instrument;
 - B. section 162(b) has not been complied with in that the purported witness, Dianne Spiteri, did not witness the signature of the parties to the document in their presence or at all;
 - C. the signature purporting to be that of the second respondent was in fact made by the first respondent on or about 18 September 2008.
- (ii) is not a mortgage entitled to registration and the benefit of indefeasibility, in that:
 - A. section 162(c) of the *Land Title Act 1994* has not been complied with as the person who in fact signed as a witness to the

⁵ Affidavit of DM Saward filed 28 September 2011.

document, namely the first respondent, was a party to the document;

- B. section 162(b) has not been complied with as the purported witness, Dianne Spiteri, did not witness the signature of the parties to the document in their presence or at all;
- C. the signature purporting to be that of the second respondent was in fact made by the first respondent on or about 18 September 2008.

- (iii) is not an equitable mortgage in that the signature purporting to be that of the second respondent was in fact made by the first respondent on 18 September 2012.

Particulars

- (A) The mortgage was not signed by the Uhrhanes or the First Respondent:
 - (1) in the presence of anyone that was not party to the instrument; or
 - (2) in the presence of the Witnessing Officer;
- (B) The mortgage was not signed by the Second Respondent:
 - (1) On or about 18 September 2008, at a meeting between the Uhrhanes and the First Respondent at the Property, the First Respondent signed the Second Respondent's name on the mortgage."

Submissions

[15] The main argument by the Gunns for resisting leave being given to withdraw the admission and make the proposed amendment is that Mrs Uhrhane herself has not sworn to the assertions of fraud and that what is sworn to is hearsay on hearsay as a contention from Mrs Uhrhane's solicitors that Mrs Gunn forged Mr Gunn's signature in Mrs Uhrhane's presence. Mr Sweeney also seeks to argue that the evidence that none of the signatures was witnessed was hearsay but that is not the case because of the affidavit from Ms Saward denying that her signature was applied to the document.

[16] In particular, Mr Sweeney argued that the evidence did not justify the withdrawal of the admissions because of the failure of Mrs Uhrhane to swear an affidavit as to what instructions were provided by her to the trustee by February 2010 and the

absence of an affidavit of what Mr Schafferius, the then trustee for Mr Uhrhane, knew himself. He argued that if Mrs Uhrhane did not disclose what she knew to Mr Schafferius, given her other allegations of forgery in respect of the loan agreement, and if no inquiries were made of her about the mortgage before the defence was filed, the case was one of “contrived ignorance” for which the Gunns should not have to suffer the consequences of cost and delay.

- [17] He submitted that Mrs Uhrhane must have known about a forgery and the lodgement of a defective document from the outset and that the trustee should be visited, in effect, with her knowledge. He also argued that the trustee had grounds to question the validity of the mortgage at an earlier stage before the admission was made evidenced by his solicitor’s letter of 23 July 2009 not conceding the validity of the mortgage. That was at a stage when he had only recently been appointed and may well have been at the early stages of his investigation of the case as Ms Luchich pointed out.

Discussion

- [18] There was no cross-examination of Mr Patane to question the evidence he provided about the issues and there seems to me to be no reason why the trustees would not have raised an issue about the execution of the mortgage earlier if they had known earlier about these allegations and of the evidence from the witness, Ms Saward. The trustee is acting essentially in the interests of creditors of the Uhrhanes and it does not seem to me to be a valid response to an application of this nature that this application should be affected by the failure of Mrs Uhrhane to give the trustee evidence about this issue at an earlier stage. The fact that Mrs Uhrhane has not sworn an affidavit at this stage is no reason to prevent the trustee from raising the allegation on the information that is available to him. It is not always possible to obtain a sworn affidavit, but it is possible to subpoena witnesses and the nature of the evidence likely to be led from Mrs Uhrhane should be clear from the correspondence from her solicitors.
- [19] Accordingly, it is my view that the making of the admission has been sufficiently explained as have the circumstances giving rise to the need to withdraw it and to plead the allegations which the trustee wishes to rely upon to raise the issues contained in the proposed further amended defence.

Delay and prejudice

- [20] The application was also resisted on the ground of delay. This was partly on the basis that the initially proposed amended defence was said to be not in a form compliant with the rules. In my view, the proposed amendments now sought are consistent with the rules. The allegation that the signature purporting to be that of Mr Gunn was in fact made by Mrs Gunn seems to me to lay the factual basis for the allegation of forgery and the further allegation that the mortgage is not entitled to the benefit of indefeasibility for the reasons set out in paragraph 12(c)(ii) of the proposed amendment. The same considerations affect the allegation that the

instrument is not an equitable mortgage contained in paragraph 12(c)(iii) of the proposed amendment.

- [21] The application was postponed after it was initially filed because of the appeal to the Court of Appeal. Further explanations for the delay include the fact that there have been two changes in the identity of the trustee. The application was also initially listed for hearing on 25 August 2012 but counsel retained at that stage had an unexpected dental problem and was unable to speak properly so the matter was adjourned.
- [22] Mr Sweeney argued that the Gunns were ready to go to trial and that they would be unfairly prejudiced by the withdrawal of the admission that the mortgage was valid because they had relied upon the admission in preparing their case. In respect of the issue of prejudice, Ms Luchich submitted that the issue of the validity of the registered mortgage has been known to the Gunns arguably since the filing of the amended defence on 11 July 2011 but certainly since the application before Applegarth J was heard and determined on 14 September 2011. She also submitted correctly that there was no evidence that the Gunns did, or refrained from doing, anything in reliance on the existing state of the pleadings.

Conclusion and orders

- [23] It seems very clear to me that there is a genuine dispute about the validity of the mortgage and one where the admissions made should be permitted to be withdrawn.⁶ It would be unjust to permit the proceedings to be determined in the absence of this issue being litigated.
- [24] Accordingly, I propose to give leave to the applicants to withdraw the admission that the mortgage was valid, to make the amendments sought, and also to make an order substituting Mr LeRoy as trustee of Mr Uhrhane's bankrupt estate and as trustee of the personal insolvency agreement of Mrs Uhrhane in place of Mr Schafferius. I shall hear the parties as to costs.

⁶ See *Hanson Construction Materials Pty Ltd v Davey* (2010) 79 ACSR 668, 675 at [15]-[16] per Chesterman JA with whom Muir JA and Applegarth J agreed on this point.