

SUPREME COURT OF QUEENSLAND

CITATION: *Hoggett v Murdoch & Ors* [2014] QSC 245

PARTIES: **NANITTA THERESA HOGGETT**
(applicant)
v
PETER ANTHONY MURDOCH
(first respondent)
NOELA CECILY MURDOCH
(second respondent)
ABERCLARE TRUST
(third respondent)

FILE NO: BS No 9192 of 2014
BD No 3520 of 2014

DIVISION: Trial

PROCEEDING: Application

DELIVERED EX
TEMPORE ON: 25 September 2014

DELIVERED AT: Brisbane

HEARING DATE: 25 September 2014

JUDGE: Peter Lyons J

ORDER: **The application is dismissed.**

CATCHWORDS: EQUITY – EQUITBALE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – PROBABILITY OF SUCCESS – where the applicant had transferred her property at Abbey Street to the third respondent, at which time the first and second respondent paid out the mortgage on that property – where the third respondent purchased a property at White Street, at which time the applicant commenced living there with her family – where the respondents later sold Abbey Street – where the respondents are now attempting to sell the property at White Street – where the applicant claims she has a proprietary interest in that property based on the transfer of Abbey Street to the third respondent and because she had been told by the first and second respondents that the property at White Street was her home – where the applicant seeks an interlocutory injunction seeking to restrain the dispersal of the net proceeds of sale of the property at White Street – whether the applicant shows a case of sufficient strength to warrant the granting of an injunction

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE GENERALLY – where the applicant contends that the respondents have debts and there is a risk that the respondents would dissipate the proceeds of the sale of the property at White Street, rendering the applicant’s claim futile if no injunction is granted – where there is at present no contract of sale for the White Street property – whether there is an immediate risk the respondents will dissipate funds received from the sale of the White Street property – whether an injunction should be granted to restrain the dispersal of the proceeds of sale of the property at White Street

COUNSEL: The applicant appeared on her own behalf
 The first respondent appeared on his own behalf
 The second respondent appeared on her own behalf
 The first and second respondents appeared on behalf of the third respondent

SOLICITORS: The applicant acted on her own behalf
 The respondents acted on their own behalf

- [1] **PETER LYONS J:** This is an application for interlocutory injunctions, which was referred from the District Court to this Court, today. The substantive matters which were contested, were an application for an interlocutory injunction seeking to restrain the dispersal of the net proceeds of sale of a property at 88 White Street, Wavell Heights and an application for an order that the applicant be permitted to continue to occupy that property until the time for settlement of the sale of the property arrives.
- [2] The respondents to the application are the parents of the applicant and a company, Aberclare, said to be the trustee of a trust. It is necessary to say something of the history of the matter before determining the application.
- [3] In 1997, the applicant purchased a property at 29 Abbey Street. That was purchased for \$115,000. \$100,000 was borrowed for the purchase of that property from Aussie Home Loans. The applicant lived in that house with her family. An extension was carried out to 29 Abbey Street. To pay for that, a sum of \$45,000 was provided by the applicant’s parents. It is contentious whether that was a gift or a loan. In late 1999 or early 2000 arrangements were made for the transfer of 29 Abbey Street to Aberclare. Again, the circumstances in which the transfer occurred are contentious.
- [4] It seems, however, to be common ground that the debt then owing to Aussie Home Loans was of the order of \$95,000 or thereabouts and that it was paid out by the respondents at about the time of the transfer. Shortly before this time, the applicant or her partner had obtained a valuation of 29 Abbey Street, apparently for the

purposes of obtaining further finance. The value which appears in the valuation is \$135,000. After the property at 29 Abbey Street was transferred to Aberclare, the applicant and her family continued to reside in it. It seems that at that time rent was paid. According to the material relied upon for the respondents, rent ceased to be paid in about 2004.

- [5] In early 2006, Aberclare purchased another property, the property at 88 White Street mentioned earlier. At about this time the applicant and her family moved to 88 White Street. In August 2006, Aberclare sold 29 Abbey Street for an amount of about \$395,000.
- [6] The applicant claims that she has a proprietary interest in 88 White Street. She says that she has that interest because she was persuaded by her parents to transfer 29 Abbey Street to Aberclare and at that time she had an interest effectively represented by the difference between the value of the property and the amount owing to Aussie Home Loans. She also says that she was told on several occasions, presumably after the sale of Abbey Street, that the amount received exceeded the purchase price for 88 White Street by some \$70,000, which stood to her credit in the trust of which Aberclare was trustee, and that she should regard 88 White Street as her house.
- [7] The respondents are now attempting to sell 88 White Street. No contract has been entered into. There are some disputes about whether the applicant has created difficulties for those attempting to sell 88 White Street on behalf of the respondents. It seems that steps have been taken to have the applicant vacate 88 White Street in the relatively near future. In those circumstances it is necessary for me to decide whether any of the relief which is sought should be granted.
- [8] It is obvious from the position taken by the applicant that the sale of 88 White Street itself is not opposed. I am told on behalf of the respondents that, provided that the applicant permits access for the purposes of facilitating a sale, she may continue to reside at 88 White Street with her family until it is necessary to have vacant possession in order to complete the sale. Regardless of my views about the balance of the application, in those circumstances it seems to me undesirable to make any orders about the continued occupation of 88 White Street.
- [9] The more difficult question is whether any form of injunctive relief should be given in respect of the net proceeds of sale when a sale of 88 White Street occurs. To determine that question I have to be satisfied that the applicant shows a case of sufficient strength to warrant the granting of an injunction, bearing in mind the competing inconvenience, to adapt the usual test, which each party might suffer should I make or refuse to make such an order.
- [10] There are difficulties with the applicant's case that she has an interest in the proceeds of the sale of 88 White Street. It is contentious whether she simply sold 29 Abbey Street to Aberclare in about 1999. On any view, it seems to me that if she had an interest in the property which effectively should be considered as surviving after the transfer of the property to Aberclare, it would only be represented by the amount to which the value of the property exceeded the debts taken on by Aberclare or otherwise forgiven to the applicant. Accordingly, it would not be represented by more than the difference between the value and the amount paid out to Aussie Home Loans.

- [11] Even that, as I indicated, is in issue because of the debate about whether there was a further debt of \$45,000, which was forgiven or whether, in fact, it was a gift of that amount to the applicant. It is not a matter to be determined on an application of this nature. However, the respondents' position is supported by the fact that there are documents which demonstrate that shortly before this time, they had engaged solicitors to prepare a second mortgage in respect of that debt, and as I said, the decision was made not to proceed with the registration of the second mortgage, no doubt because of the transfer, on the respondents' case. Those documents obviously raise a significant hurdle for the applicant to overcome in seeking to prove that she retained some interest in 29 Abbey Street.
- [12] The evidence in support of her case in support of an interest in 88 White Street faces further difficulties. The property at 88 White Street was purchased while Aberclare continued to own 29 Abbey Street. There is no basis on the material for thinking that proceeds of the sale of 29 Abbey Street contributed to the purchase of 88 White Street.
- [13] The purchase of 88 White Street occurred some seven to eight months before the sale by Aberclare of 29 Abbey Street. There is no suggestion that Abbey Street was, for example, used to secure a loan for the purchase of White Street. Accordingly, it is very difficult to see how whatever interest the applicant might ultimately establish in 29 Abbey Street, became an interest in 88 White Street as a result of its purchase.
- [14] However, the applicant also says that she was orally told that she should regard 88 White Street as her house. Although not referred to, I suspect she might consider the fact that she has not paid rent there to provide some support for her position. That evidence however, is far from compelling at least insofar as it might be regarded as establishing that she has an interest in 88 White Street. Her evidence that she should regard 88 White Street as her house would suggest a greater interest than an interest based on her interest in 29 Abbey Street, as advanced in support of the application.
- [15] There is nothing in writing which would support her claim, even if she was at some stage told she might regard 88 White Street as her house. In the context of a statement by parents to a child, it is by no means inevitable that that was intended to convey outright ownership, rather than identifying a place where she might live as if the home were her own. It is, however, unnecessary to explore these questions further because of the nature of this application. Suffice it to say, that it seems to me on the present material, there is very little to establish a substantial case that the applicant has a proprietary interest in 88 White Street, which would entitle her to a share of the proceeds of its sale.
- [16] The balance of convenience is said to favour the grant of the injunction because the applicant contends that the respondents are dissipating assets. There is an allegation that the first respondent, in particular, has gambling and perhaps other debts, which put him or both the first and second respondents in the position of financial difficulty, and that accordingly if no order is made, there is a risk that the applicant's claim, if established, would prove futile.
- [17] The allegation about the financial position of the respondents is strongly contested. It is not possible for me to determine that question on the material before me. I

should add, there is a statement in the affidavit of the second respondent to the effect that the first and second respondents have substantial financial assets, but no details are provided. It is not necessary to determine whether there is such a risk of dissipation because there is at present no contract for sale and no immediate risk of a receipt of funds which might be dissipated.

- [18] If the applicant considers that she can present a stronger case, then she can of course make a further application for similar relief, and perhaps better material from both sides will be available to resolve both questions of her entitlement, and questions relating to the risk of dissipation and other matters going to the balance of convenience. Accordingly I intend to refuse the application.