

SUPREME COURT OF QUEENSLAND

CITATION: *AET SPV Management Pty Limited v Wildfire Amusements Pty Ltd* [2012] QSC 402

PARTIES: **AET SPV MANAGEMENT PTY LIMITED**
ACN 088 261 346 AS TRUSTEE UNDER INSTRUMENT
714611536
(applicant)
v
WILDFIRE AMUSEMENTS PTY LTD
ACN 093 527 925 AS TRUSTEE
(respondent)

FILE NO: 9282 of 2012

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 13 December 2012

DELIVERED AT: Brisbane

HEARING DATE: 11 December 2012
Supplementary written submissions 12 November 2012

JUDGE: Applegarth J

ORDERS: **1. Declare that the applicant:**

(a) as first registered mortgagee pursuant to mortgage number 711824884 over the land described as Lot 25 on Registered Plan 1337725, County of Stanley, Parish of North Brisbane, Title Reference 15158146 (the Land), is entitled to payment first out of the proceeds of sale of the Land in priority to the respondent's claim to an equitable charge or security interest in the Land;

(b) accordingly, is not obliged to pay the respondent the sum of \$3 million (or any sum) from the proceeds of sale of the Land.

2. The applicant is discharged from paragraphs 2 to 4 of the orders made by McMurdo J on 12 November 2012.

3. The respondent pay the applicant's costs of this application and the reserved costs of the application heard by McMurdo J on 9 and 12 November 2012.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the applicant seeks final determination of its entitlement to proceeds out of the sale of land – where the respondent contends that it has an entitlement to be paid proceeds from the sale of land in priority to the applicant – whether on the proper construction of a deed the applicant is entitled to payment in priority to the respondent

Property Law Act 1974 (Qld), s84

COUNSEL: S Doyle SC and S Webster for the applicant
J F Curran for the respondent

SOLICITORS: Herbert Smith Freehills for the applicant
Gregg Lawyers for the respondent

- [1] By an amended originating application, the applicant seeks the final determination of its claimed entitlement, as first registered mortgagee over certain land, “to payment first out of the proceeds of sale of the Land in priority to the Respondent’s claim to an equitable charge or security interest in the Land”. The respondent (“Wildfire”) contends that it has an entitlement to be paid \$3 million from the proceeds of sale of the land in priority to the applicant. The applicant seeks a declaration that it is not obliged to pay Wildfire the sum of \$3 million (or any sum) from the proceeds of sale of the land, whereas Wildfire seeks a declaration that the applicant is obliged to pay it the sum of \$3 million together with interest.
- [2] The issue for determination turns on the proper construction of a Tripartite Deed (“the Tripartite Deed”) entered into between Wildfire as vendor of the land, APH 480 Queen St Pty Ltd (“APH”) as purchaser, BOS International (Australia) Ltd (“BOSI”) as financier and other parties. BOSI assigned its rights under the Tripartite Deed to the applicant on or about 20 June 2012, when notice of the assignment was given to Wildfire and others. The applicant’s submissions assume for the purpose of argument that it is in no better position than BOSI as regards any obligations under the Tripartite Deed.

Background

- [3] On 31 March 2008 Wildfire contracted to sell land situated at 391 Adelaide Street, Brisbane (“the land”) to APH. The purchase price was \$10 million, of which \$7 million was paid on completion. The balance of \$3 million was the subject of special conditions which provided for payment by way of trade for residential apartments, hotel apartments, office lots or a mix of them. The contract gave Wildfire a right of first refusal to purchase such “Development Stock” in a proposed multi-level mixed use building to be developed on the land and on adjoining land in Adelaide Street and Queen Street. The purchase of such lots was to be for that part of the balance of the purchase price not paid by cash (the “Trade Balance”). To further secure to Wildfire as vendor the Trade Balance, APH promised to execute a consent caveat in favour of Wildfire on or before completion. The contract provided for the consent caveat to be withdrawn and replaced by a caveat for such of the residential apartments, hotel apartments and office lots contracted to be purchased by Wildfire.

- [4] By a Deed of Variation dated 30 June 2008 Wildfire and APH varied the special conditions in relation to Wildfire's right of first refusal and in relation to consent caveats. It annexed a Right of First Refusal Agreement which restricted the ability of APH to offer lots for sale to the public without first following a procedure to permit Wildfire to make an offer. It contained clauses that fixed the price of the residential apartments. The Deed of Variation also provided for successive caveats to be lodged by Wildfire. The first was a caveat over the land. The next was a caveat over the "Residential Precinct" being that part of the development in which residential apartments were proposed to be constructed, and then for caveats over the lots which Wildfire might contract to purchase.
- [5] Importantly, the Deed of Variation stated that Wildfire's rights were subordinate to the financier's rights. Clause 4.9 provided:
- "Notwithstanding:
- (a) anything contained in this Contract;
 - (b) any rule of law or equity to the contrary; or
 - (c) any priority of registration of the Consent Caveats,

the Consent Caveats and the Vendor's interest in the Land will be subordinated to the rights and interests of any party providing finance to the Purchaser in connection with the acquisition or development (or both) of the land the subject of the Development and which party requires to mortgage the Land to secure that finance ('Financier')."

Clause 4.10 provided that special condition 4.9 applied notwithstanding any subsequent payment, advance or provision of accommodation by, or an increase or decrease in the amount secured by, any financier and whether or not an advance by any financier was after the date for completion of the contract. By cl 4.13, Wildfire and APH agreed that the form of the caveat must be approved by the Financier.

- [6] The sale of the land from Wildfire to APH was completed on 29 July 2008. Upon completion a first mortgage was registered in favour of BOSI. The registered mortgage has since been transferred to the applicant.
- [7] A consent caveat was lodged, as contemplated by the Deed of Variation. The caveat was stated to not apply to various instruments including any mortgage of the land granted in favour of BOSI and any transfer or assignment of such a mortgage.

The Tripartite Deed

- [8] At about the same time as the sale was completed and BOSI became registered as first mortgagee over the land, the Tripartite Deed was entered into between Wildfire as vendor, APH as purchaser, BOSI as financier and other parties.
- [9] Clause 2 provided:
- "2 Consents and acknowledgments of Vendor**

The Vendor agrees (and each Beneficiary acknowledges) that upon execution of the Securities and the AMGFM Securities and transfer of the Vendor Land from the Vendor to the Purchaser:

- (a) the Securities and the AMGFM Securities constitute an Encumbrance on the Secured Property in priority to any interest which the Vendor may at any time have in any of the Secured Property;
- (b) the Vendor does not, and will not, have the benefit of any Encumbrance over any interest of the Purchaser in the Land or in connection with the Land except for the Consent Caveats; and
- (c) notwithstanding the execution of the Securities and the AMGFM Securities or this deed, neither the Financier nor AMGFM assumes any liability to the Vendor in connection with any Contract, the Land or otherwise.”

[10] Clause 3 provided:

“3 Removal of Consent Caveat

The Vendor agrees (and the Beneficiary acknowledges) that upon receipt of:

- (a) written notice from an Enforcing Party¹ that it is enforcing its rights pursuant to the Securities; and
- (b) payment by an Enforcing Party to the Vendor of an amount equal to the Vendor’s Debt,

the Vendor shall no longer have any Interest in respect of all or any part of the Land and the Vendor undertakes to the Financier:

- (i) to promptly remove all of its Registered Interests from the relevant register in respect of the Land; and
- (ii) to give written notice to the Financier and such other persons as the Financier may direct that the Vendor no longer has any Interest in all or any part of the Land.”

[11] Clause 5 provided:

“5 Indemnity and preservation of Financier’s rights

5.1 Purchaser’s Indemnity in Relation to Cure, Step-in and Novation

The Purchaser shall indemnify the Financier on first demand for all costs, damages, losses and/or expenses suffered or incurred by

¹ Defined to mean the Financier.

any Enforcing Party arising out of, or connected with this deed and/or the payment of the Vendor's Debt.

5.2 No derogation of Financier's Rights

Nothing in this deed in any way derogates from, limits or prejudices any rights the Financier may have against the Purchaser under the Securities, the Facility Agreement, any other contract or at law."

- [12] It is also necessary to refer to cl 7.1(a) by which Wildfire agreed that it will:
- “(a) not object to, refuse its consent (if consent is necessary) to, or otherwise hinder or prevent the exercise of any right, power or remedy of any Enforcing Party under the Securities, or under any statute, rule, at law, in equity or otherwise in respect of the Securities; ...”.

Recent events

- [13] The proposed development is not proceeding. APH entered into an agreement to sell the land. Wildfire says that APH is obliged pay it \$3 million pursuant to the sale contract, and has commenced proceedings against APH to recover that sum.
- [14] The applicant has appointed a receiver and manager over the land. It also served a notice dated 19 October 2012 that it may exercise its rights to sell the property the subject of its securities. However, it has not sold the land in exercise of its power of sale, and it has not given notice to Wildfire so as to exercise its rights pursuant to cl 3 of the Tripartite Deed or paid Wildfire \$3 million in order to require Wildfire to remove “all its Registered Interests”.²
- [15] The land having been sold by the mortgagor, APH, the applicant submits that it has priority, as first mortgagee, in respect of the proceeds over Wildfire's claim to an equitable charge.
- [16] The applicant sought an order for the removal of the caveat. After hearing submissions about the issue of construction that I am asked to finally determine, McMurdo J found on 9 November 2012 that, although Wildfire's argument raised a serious question to be tried, the applicant's argument was stronger, and that the balance of convenience favoured an order that the caveat be removed on terms. These included terms requiring the applicant to retain the sum of \$3 million in the trust account of its solicitors until determination by the Court of the issue of whether Wildfire has an entitlement to \$3 million (or any other sum) of the proceeds of sale of the land in priority to the applicant's claim as first registered mortgagee of the land.

The issue

- [17] Two related issues arise for determination. The first is whether the applicant, as first mortgagee, is entitled to payment first out of the proceeds of sale of the land in priority to Wildfire's claim to an equitable charge, which Wildfire contends was “reflected in and protected by the Caveat”. The second is whether the applicant is

² “Registered Interests” are defined in the Tripartite Deed to include any Consent Caveats.

obliged to pay Wildfire \$3 million from the proceeds of sale. These issues turn on the proper construction of the Tripartite Deed, and in particular, whether cl 3 qualifies what otherwise would be the applicant's entitlement to priority. This priority was specifically acknowledged by Wildfire in cl 2(a) of the Tripartite Deed when it agreed that the mortgage granted or to be granted in favour of BOSI (as the "Financier") had "priority to any interest which [Wildfire] may at any time have in any of the Secured Property".

- [18] The essential issue is whether cl 3 affects the financier's priority, and, whether it affects the financier's priority in the present circumstances in which the financier has not chosen to invoke cl 3 to require Wildfire to remove its caveat.

Submissions on the issue of construction

- [19] The applicant submits that cl 3 says nothing about priorities at all, and is expressed in permissive and facilitative terms. It submits that cl 3 is not solely concerned with enforcement by sale, and contemplates any situation in which the mortgagee wishes to extinguish any interest (including any caveat) that Wildfire had acquired. The rights which are protected by the caveats provided for in the agreements:

- (a) affect the land as a whole, and then successively the residential precinct of the development before finally being confined to the selected lots;
- (b) limit the marketing of the residential apartments to the public;
- (c) limit the price to be paid for any selected lots (to a per square metre rate).

- [20] In those circumstances, the applicant submits that it is not surprising that a mortgagee would wish to be able to get rid of Wildfire's claim to these rights. This may be:

- (a) to facilitate a refinancing (including by the financier itself);
- (b) perhaps to enable a different development altogether of the land or of the residential apartments in particular;
- (c) to be free to market to the public without limitation;
- (d) to be free to sell for a price higher than the agreed rate per square metre;
- (e) to sell the very lots which Wildfire (in exercise of the right of first refusal) may contract to buy either at a higher price or to enable reconfiguration of them with lots of interest to other buyers;
- (f) to grant a registered lease to tenants over lots which Wildfire had caveated or which it had contracted to buy.

- [21] The applicant submits that cl 3 confers an *additional* right upon the first mortgagee; it does not *remove* its right to priority.

- [22] Clause 3 is said not to be concerned with the position where, as here, the current owner has sold the land and the first mortgagee is merely claiming to be entitled to

have its mortgage paid out at settlement in exchange for a release. That it does not in terms apply in such a situation is said to provide a further powerful reason for construing cl 3 in the permissive way for which the applicant contends; otherwise it would create in favour of Wildfire a promise which did not affect the first mortgagee's priority when the mortgagor sold but did so when the mortgagee sold. This is said to be an unlikely construction.

[23] Rather, the scheme of the Tripartite Deed is contended to be that:

- (a) the first mortgagee always has priority over Wildfire;
- (b) however, if for any reason (and regardless of what other enforcement steps are taken) the first mortgagee wishes to extinguish Wildfire's interests in the land, and remove its caveat or any other registered interest over the land, it has the *option* of doing so by paying to Wildfire the sum of \$3 million.

[24] Wildfire submits that cl 3 addresses the subject of "Removal of Consent Caveat" and envisages a financier "enforcing its rights pursuant to the Securities". The enforcement process has started. Clause 3 is said to be, in effect, a code that governs the means by which a financier removes the caveat and expressly contemplates this as part of the enforcement process. The fact that the mortgagor, not the applicant as first mortgagee, has sold the land is said to not affect the position.

[25] According to Wildfire, if the applicant could remove the caveat in the current circumstances, then cl 3 has no, or no real, operation. Such a construction is contrary to well-established canons of construction.

Does cl 3 govern priorities in the current circumstances?

[26] The fact that cl 3 of the Tripartite Deed is headed "Removal of Consent Caveat" does not mean that it is the only means by which a caveat can be removed. The text, and not simply the heading of cl 3, govern its interpretation and operation. Clause 3 casts an obligation upon Wildfire to remove its consent caveats in certain circumstances. It confers corresponding rights upon the financier (in this case, the applicant as assignee from BOSI) to have the caveats removed. The circumstances are the giving of the required written notice pursuant to cl 3(a) and the payment of \$3 million pursuant to cl 3(b). The applicant may choose to exercise its rights pursuant to cl 3. It is not obliged to do so. I accept the applicant's submissions that cl 3 confers an additional right upon the first mortgagee.

[27] As a matter of construction, cl 3 is not engaged simply whenever a mortgagee enforces its rights pursuant to the mortgage. Its rights are many and will be exercised in a wide variety of circumstances. Clause 3 is engaged and the vendor's obligation to remove all its registered interests only arises if the written notice contemplated by cl 3(a) is given and the financier chooses to pay \$3 million to Wildfire.

[28] Clause 3 does not affect the financier's higher priority, save perhaps in circumstances in which the financier exercises its rights pursuant to cl 3 to have Wildfire's consent caveats removed from the relevant register in respect of the land. But the applicant has chosen not to exercise the additional rights which cl 3 provides to remove the consent caveats.

- [29] Clause 3 is not a code governing the removal of caveats. It contains, in effect, a promise by Wildfire that it will promptly remove its consent caveats and no longer have any interest in the land if it is paid \$3 million. It does not contain a promise by the financier that the only circumstances under which consent caveats will be removed is by the giving of a notice and the payment of \$3 million pursuant to that clause.
- [30] Clause 3 does not derogate from the priority recognised in cl 2(a) and does not derogate from the financier's rights to apply to remove a caveat. The fact that cl 3 does not derogate from its rights in this regard is stated in cl 5.2 of the Tripartite Deed.
- [31] Wildfire's contention that the applicant's construction gives cl 3 no, or no real operation, is answered by the applicant's submissions. There are many circumstances in which a mortgagee might wish to be able to have the consent caveats removed. The mortgagee might not wish to exercise its power of sale, but still wish to take steps to enforce its rights pursuant to the securities and make a commercial decision to pay \$3 million in order to free the title of the consent caveats and terminate any interest of Wildfire in the land or any part of it. The applicant has identified a variety of circumstances in which a mortgagee would wish to do so. Clause 3 has scope to operate in this fashion.

Conclusion – the issue of construction

- [32] Clause 3 confers an additional right upon the first mortgagee. In the present circumstances, cl 3 does not affect the applicant's entitlement as first mortgagee to priority over Wildfire in the payment out of the proceeds of sale of the land, being a sale effected by the mortgagor, APH, and not by the applicant in the exercise of a power of sale.

Other matters

- [33] On 19 November 2012 after McMurdo J had made orders on 12 November 2012 pending the determination of the issue which I have now determined, the applicant filed an application seeking a declaration in the terms which I propose to make, an order that it be discharged from the interlocutory orders made by McMurdo J on 12 November 2012, an order for costs, and an order that it be granted leave pursuant to r 377 to amend its originating application to include such relief. It served its application and its draft amended originating application on the solicitors for Wildfire under cover of a letter dated 20 November 2012. The application was listed for a long hearing in the Applications List on 11 December 2012. When the matter came on for hearing before me Wildfire did not oppose the grant of leave to amend the originating application, as sought. However, it submitted that the matter should not be determined at the hearing of the application and that, instead, the issue to be determined should come on for hearing after pleadings were delivered and disclosure was given. I declined Wildfire's request for the matter to proceed in that fashion. The issue for determination was one appropriately brought by way of originating application. Counsel for Wildfire did not identify any useful purpose that pleadings would serve in circumstances in which the issue of construction had been argued in written and oral submissions before McMurdo J. The facts and documents that enabled the issue of interpretation to be determined were before me, and were not in dispute. Although the issue of interpretation had been previously

argued before McMurdo J, and upon the hearing before me Wildfire relied again on its written submissions of 9 November 2012, I permitted counsel for the respondent additional time to file supplementary written submissions in response to the applicant's written submissions.

- [34] Counsel for Wildfire speculated that disclosure might reveal documents relating to the transfer from BOSI to the applicant, whereby the applicant might have agreed to give additional rights to Wildfire. If I had allowed pleadings Wildfire had no basis upon which to plead such an agreement, so as to make it relevant and entitle it to disclosure. In any event, counsel for the applicant acknowledged that the determination sought would not affect Wildfire's rights pursuant to such an agreement, if it existed. Wildfire provided no basis to suppose that any such agreement existed and did not seek to cross-examine any of the applicant's deponents in order to give some substance to its speculation.
- [35] In the circumstances, I was not persuaded that the issue for determination should await the delivery of pleadings and disclosure, and a hearing on an adjourned date. The matter was ready for determination of the issue of construction and making directions for the matter to proceed by way of pleadings would have been inconsistent with procedure under the rules for such an issue of construction, based on undisputed facts, to be the subject of an originating application. It also would have been inconsistent with the philosophy of civil procedure in this Court, namely facilitating the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

Orders

- [36] Wildfire did not contest the form of declarations sought. In its supplementary submissions it sought, by way of an alternative, declarations to the opposite effect. The orders which I propose to make are as follows:
1. Declare that the applicant:
 - (a) as first registered mortgagee pursuant to mortgage number 711824884 over the land described as Lot 25 on Registered Plan 1337725, County of Stanley, Parish of North Brisbane, Title Reference 15158146 (the Land), is entitled to payment first out of the proceeds of sale of the Land in priority to the respondent's claim to an equitable charge or security interest in the Land;
 - (b) accordingly, is not obliged to pay the respondent the sum of \$3 million (or any sum) from the proceeds of sale of the Land.
 2. The applicant is discharged from paragraphs 2 to 4 of the orders made by McMurdo J on 12 November 2012.
 3. The respondent pay the applicant's costs of this application and the reserved costs of the application heard by McMurdo J on 9 and 12 November 2012.
- [37] No reason is advanced as to why costs should not follow the event. The applicant has succeeded in obtaining a final determination in its favour. As to the costs reserved before McMurdo J, the applicant succeeded in obtaining an order for the

removal of the caveat over Wildfire's opposition. Its success on that application entitles it to an order in respect of the reserved costs, especially since the construction which McMurdo J favoured has been now finally determined to be the correct construction of the Tripartite Deed.