New South Wales Supreme Court

[Index] [Search] [Download] [Context] [Help]

70 Pitt Street Sydney v McGurk [2004] NSWSC 413 (10 May 2004)

Last Updated: 17 May 2004

NEW SOUTH WALES SUPREME COURT

CITATION: 70 Pitt Street Sydney v McGurk [2004] NSWSC 413

CURRENT JURISDICTION: Equity

FILE NUMBER(S): 2753/04

HEARING DATE{S): 10 May 2004

JUDGMENT DATE: 10/05/2004

PARTIES:
70 Pitt Street Sydney Pty Limited - Plaintiff
Michael Loch McGurk - Defendant

JUDGMENT OF: Campbell J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
M J Cohen - Plaintiff
C R C Newlinds SC - Defendant

SOLICITORS:
Michell Sillar - Plaintiff
Henry Davis York - Defendant

CATCHWORDS:
CONVEYANCING - LAND TITLES UNDER THE TORRENS SYSTEM - caveats against dealings - order for removal of caveat - principles for making such an order - EQUITY - injunctions - interlocutory injunction requiring continuance of personal relationship of trust and confidence - application to facts of this particular case

ACTS CITED:
Real Property Act 1900

DECISION:
Order for removal of caveat not made upon receipt of undertaking by caveator. Interlocutory injunction requiring manager of building development project to continue in that role not granted.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
DUTY JUDGE LIST

CAMPBELL J

MONDAY 10 MAY 2004

2753/04 70 PITT STREET SYDNEY PTY LIMITED v MICHAEL LOCH McGURK

JUDGMENT – Ex Tempore

1 **HIS HONOUR**: This case began on Friday 7 May 2004 when leave to serve short notice was granted by the duty judge. The summons in the case seeks an order pursuant to section 74MA **of the** *Real Property Act 1900* that caveat registered number AA58913Y, to the extent that it affects the land contained in six identified strata title lots, be removed.

2 The plaintiff is the registered proprietor of various lots in two strata plans. Strata plan 70713 originally related to 16 different lots in a multi-storey block located at 70 Pitt Street Sydney. Now one of its lots has become Lot 21 in Strata Plan 71579. The plaintiff and the defendant had agreed to be involved in a venture for the development of the land at 70 Pitt Street including its subdivision into various strata lots and the sale of those strata lots.

3 The role of the defendant in the development was defined by a Management Agreement entered into on 5 August 2003. Some of the provisions of that Agreement have been altered by subsequent agreements made on 3 September 2003 and 20 October 2003, but those amendments do not affect the substance of the matter now before me.

4 Under the Management Agreement, the defendant was appointed to manage the project, and given the title of Development Manager. There was provision in Clause 3 that the defendant would, either himself or through such subservants and agents as he might engage with the prior written consent of a company called Astoria (which is associated, in some way the evidence does not make particularly clear, with the plaintiff), acting reasonably, undertake various tasks connected with the project. One of those tasks was *"marketing and sale of the strata title offices"*. There was provision in Clause 4.1 that the defendant:

"would have responsibility for the conduct of the project to the extent specified in clause 3 [of the Management Agreement], subject always to the overriding control of Astoria".

5 There was an express conferring of powers to carry out certain kinds of activities in Clause 4.2, which included *"co-ordinate the marketing and sale of the project in accordance with prior authorisation from Astoria"*. There was provision in Clause 4.3, that:

"...the grant of powers, functions and authority pursuant to clause 4.2 may be revoked or varied by Astoria but not in such a manner as to amount to termination of the engagement of the Development Manager to manage the Project pursuant to the Deed unless the provisions of clause 13 are invoked by Astoria".

6 Clause 13 was a clause which, in broad terms, conferred a power on Astoria to terminate the engagement of the defendant in circumstances where there was default, and another provision enabling termination in circumstances where the default amounted to wilful misconduct, bad faith or negligence. Clause 13 sets out the consequences of each such type of termination.

7 There was provision in Clause 8 for the defendant to receive a fee for his activities, which was to be calculated and paid in a way set out in schedule 1 of the Deed. That schedule entitled the defendant to receive a management fee which was calculated by reference to a defined term of the *"Available Proceeds"*. The Management Agreement provided there would be finance from two different sources for the project. The first was from a loan on mortgage from the Commonwealth Bank of Australia, the second from a loan on mortgage from another company associated with the plaintiff, Pinmark Pty Limited. In broad terms the Available Proceeds were the amount left over after the mortgagees had been paid out and the project expenses had been paid.

8 The Management Agreement contained provision in Clause 10 whereby:

"10.1 The Trustee hereby charges its right title and interest in and to the Project and the Property with payment of the Management Fee and any amount payable to the Development Manager by the Trustee on any account whatsoever, and acknowledges that the Development Manager shall have the right to lodge a Caveat against the interest of the Trustee in the Property or any pat or parts of the Property to protect its interest as charge.

10.2 The charge hereby created shall rank behind the moneys secured by the Prior Mortgage and the principal moneys and interest secured by the charge given by the Trustee to the Lender."

9 Pursuant to that Clause, the defendant, in October 2003, lodged a caveat against the title to the land comprising the strata plan. That caveat claimed an interest in the land as equitable chargee by virtue of

the Management Agreement. No criticism has been made in the hearing before me of the form of the caveat.

10 Some of the lots in the building have already been transferred to purchasers. Concerning certain other lots, a contract has been entered for their sale, but that sale has not settled. There are two particular lots which are at the heart of the dispute before me, Lots 7 and 9. Those lots were sold to the one purchaser, Abadeen Group Pty Limited. The urgency in the present case arises from the fact that the plaintiff has served on the purchaser a notice to complete those contracts, which fixes 3 o'clock this coming Wednesday, 12 May 2004, for completion of the contracts.

11 In relation to contracts which have previously settled, the defendant has provided a withdrawal of caveat at the settlement. Concerning the settlement of Lots 7 and 9, the defendant has not given an unequivocal assurance that he will provide such a withdrawal of caveat at settlement.

12 There are six lots in the strata plan the sales of which have not yet settled, and which are the subject of a claim in the summons that the caveat be removed. Concerning four of them, namely Lots 11, 12, 16 and 21, the defendant does not oppose an order that the caveat be removed.

13 The situation concerning Lots 7 and 9 is that if the settlement goes ahead, all the proceeds of sale will be required by the Commonwealth Bank to reduce the indebtedness to it. The plaintiff says that in those circumstances the discretion conferred by section 74MA should be exercised.

14 Section 74MA says:

"(1) Any person who is or claims to be entitled to an estate or interest in the land described in a caveat lodged under section 74B **or** 74F may apply to the Supreme Court for an order that the caveat be withdrawn by the caveator or another person who by virtue of section 74M is authorised to withdraw the caveat.

(2) After being satisfied that a copy of the application has been served on the person who would be required to withdraw the caveat if the order sought were made or after having made an order dispensing with service, the Supreme Court may:

(a) order the caveator or another person, who by virtue of section 74M is authorised to withdraw the caveat to which the proceedings relate, to withdraw the caveat within a specified time, and

(b) make such other or further orders as it thinks fit.

(3) If an order for the withdrawal of a caveat is made under subsection (2) and a withdrawal of the caveat is not, within the time limited by the order, lodged with the Registrar-General, the caveat lapses when an office copy of the order is lodged with the Registrar-General after that time expires."

15 Where land which is subject to a mortgage has been sold for a price which will be completely payable to a first mortgagee a subsequent mortgagee is not entitled to maintain a caveat which will prevent completion of that sale. ***Wildschut v Borg Warner Acceptance Corporation (Aust) Limited*** (1984) 4 BPR 9453; ***Dunecar Pty Ltd (In Liq) v Colbron*** [2001] NSWSC 1181 at [18]-[19]. A caveat can be removed in that situation under section 74MA even if (as in the present case) the caveat is a

valid one and the initial lodgement of the caveat was something the caveator was entitled to do: ***Kerrabee Park Pty Ltd v Daley*** [1978] 2 NSWLR 222. This is because the test for whether a caveat should be ordered to be removed is whether, at the time the court comes to consider whether the caveat should be removed, an interlocutory injunction would be granted to protect the interest claimed in the caveat: ***Kerrabee Park Pty Ltd v Daley*** [1978] 2 NSWLR 222; ***Martyn v Glennan*** [1979] 2 NSWLR 234; ***Gay v Gooden*** (1989) NSW ConvR ¶55-445.

16 That situation is one which is recognised and accepted by the defendant. The defendant says that he has no desire whatever to stop completion of the sale of Lots 7 and 9 occurring on Wednesday. What he is concerned about, however, is that if the settlement does not occur, then the fact that he has provided a withdrawal of his caveat concerning those lots will have demonstrated that the plaintiff was ready willing and able to complete, and may then entitle the plaintiff to terminate the contract for sale, forfeit the deposit, and re-sell the property. If that were to happen, the defendant would want his caveat to still attach to Lots 7 and 9.

17 There is some evidence before me which suggests that the purchaser of Lots 7 and 9 may not have its finance in order for the settlement. There is some evidence also, however, that the purchaser may have available some finance at rates which it would rather not use, but might use if it was absolutely compelled to do so. The situation about what the purchaser will actually do on Wednesday is simply not clear on the evidence before me.

18 Mr Shanahan, who is a director of the plaintiff, has given evidence before me, which comes down to saying that he has not made a definite decision about whether, if the settlement were not to go ahead on Wednesday, the plaintiff would terminate the contract, but neither has he ruled out that possibility. There is evidence that the plaintiff has offered a commercial resolution to the purchaser, whereby an extension of time may be granted if the purchaser can come up with some more deposit money. It is not known whether that commercial resolution is one which will come to fruition or not. Thus, on the evidence before me, there is a realistic possibility that if the settlement does not go through on Wednesday, the plaintiff might be in a position to terminate the contract, and might decide that it will do so.

19 The defendant takes the view that it will be commercially most undesirable for the plaintiff to terminate the contract, rather than give the purchaser more time, if the purchaser is not able to complete on Wednesday. The defendant, consistent with his stated attitude that he does not want to stand in the way of a settlement going ahead, proffers an undertaking that he will attend the settlement on Wednesday and will hand over a withdrawal of caveat concerning Lots 7 and 9 if at that time the purchaser is then willing to complete. What the defendant is concerned about is what will happen if the purchaser is not then willing to complete.

20 Today, I granted leave to the defendant to file in Court a cross-claim, under which the defendant claims a declaration that the Management Agreement is valid and subsisting, a declaration that the plaintiff has evinced an intention no longer to be bound by the present agreement and has thereby repudiated the Management Agreement. The cross-claim also sought an order that the Management Agreement be specifically performed by order the plaintiff to take all steps reasonable to allow the defendant to manage the development of the Project or, alternatively, damages for breach of contract. The terms of the cross-claim keeps open those two alternatives, as one concerning which the defendant will make an election at some stage in the future. There are also some other orders sought.

21 The defendant moved orally for an interlocutory injunction to protect the subject matter of the suit of that cross-claim. He sought an order that if settlement of the contract for the sale of Lots 7 and 9 did not occur on Wednesday, that the plaintiff not terminate those contracts until 24 June 2004. That date is a date which is arrived at by taking 10 June 2004 (a date as at which the purchaser has been saying for some weeks at least it will be ready to complete) and adding on a fourteen-day period for a notice to complete. The defendant says that to preserve the full scope of the remedies which he seeks under the cross-claim, he needs to have such an injunction. He submits that the power he has been given by the Management Agreement to market and sell the offices in the strata plan is one which does not come to an end at the moment a contract for sale is entered, but that it also extends to making decisions about whether a contract for sale ought be terminated. The defendant proffers an undertaking as to damages in support of that proposed interlocutory injunction.

22 The issues concerning whether the caveat relating to Lots 7 and 9 should be ordered to be withdrawn, and whether the interlocutory injunction sought by the defendant should be granted are conceptually separate. I deal with the order for removal of the caveat first.

23 On the legal principles which I have earlier outlined, there is no dispute that the caveat could prevent a settlement from going ahead. In circumstances where the defendant proffers the undertaking to attend and hand over withdrawal of caveat on Wednesday if the purchaser is then willing to complete there is, it seems to me, no present case for the Court to make an order that those caveats be withdrawn. I proceed on the basis that the defendant has been advised, and if he has not already been advised he will be advised, of the serious nature of the undertaking he proffers and of the consequences which would follow from failing to adhere to it.

24 If the defendant attends the settlement and proffers the withdrawal of caveat, then even if the purchaser is not in a position where it can complete, that action, assuming that everything else concerning the settlement is in order, will have demonstrated that the plaintiff was then ready willing and able to complete. It will provide the plaintiff with a trigger for rescission. The question which arises concerning the grant of the interlocutory injunction is whether the plaintiff should be disabled from exercising that trigger for rescission.

25 There is a letter written on 28 April 2004 on behalf of the plaintiff to the defendant which sets out the situation concerning five specific purchasers of lots who had exchanged contracts. That letter, after advising the situation concerning those purchasers, said:

"You are specifically directed not to engage in any discussions whatsoever with the purchasers or associates of the purchasers for the matters noted (1) – (5) above. If the purchasers raise any matters directly with you, you are instructed to advise them to contact their legal representatives."

26 The defendant says that while he has acted in accordance with that instruction that instruction is denying to him one of the powers he was entitled to perform under the Management Agreement. The plaintiff, for its part, says that, first, the power to deal with marketing and sale of the strata title offices has come to an end when contracts are exchanged, and, even if that is not right, Astoria has exercised the power under the agreement to exercise an overriding control over the activities of the defendant.

27 It seems to me that there is a serious question to be tried about which of those two sets of contentions is right.

28 I turn, therefore, to the balance of convenience.

29 The Management Agreement is one which involves a close personal relationship between two people. It is also one which involves one person, managing the affairs of another, and thereby having a significant power to affect the interests of that person. The Courts have traditionally been reluctant to enforce specific performance of such agreement, and, though there has been some erosion of that principle of recent years, I have not been pointed to any case which has shown that the erosion has extended so far as to reach a situation where one person is the agent of another concerning matters involving significant commercial decision making.

30 Therefore, for that reason, it seems to me that there is significant doubt about whether an order for specific performance would actually be granted, even though the position is not so clear that I would say there was no serious question at all to be tried. Further, the effect of not granting an interlocutory injunction will be to produce a converse situation. The fee arrangements under the Management Agreement are in essence a profit-sharing arrangement, and if the injunction were not to be granted, the effect would be that the plaintiff would have a significant power to affect the commercial interests of the defendant concerning the amount which he receives, ultimately, as his fee. The defendant's real concern is to protect his fee, and maximise the size of it. If the plaintiff is in breach of contract in not letting the defendant decide whether to terminate the contracts concerning Lots 7 and 9, and the defendant suffers loss, the defendant will have a remedy in damages. I am not persuaded that that remedy would be an inadequate one.

31 If the settlement does not go through on Wednesday, the defendant will still have a caveat over Lots 7 and 9, to assist in securing whatever ultimately might be payable to him. It is not possible, on the limited evidence which has been presented to me so far, to form a view one way or the other about in whose hands this project would be better left for its future administration.

32 In all these circumstances, I have come to the view that the balance of convenience does not favour the granting of the injunction which has been sought.

33 I should also say, however, that the decision which I have made is one which has been very much influenced by the fact that there is extreme pressure of time, because a decision needs to be made before Wednesday. The matter has come on with extreme urgency, and with much less opportunity than would ordinarily be the case for the preparation of an interlocutory hearing. Without wishing to bind any other judge whom the matter might come before, this might possibly be a case where, if there were significant evidence of a kind which has not been presented before me today, it might be appropriate to reconsider the question of whether an interlocutory injunction, of the type which I have just decided not to grant today, should be granted.

34 For those reasons, I order that caveat AA58913Y, to the extent it affects the land contained in folio identifier 11/SP70713, 12/SP70713, 16/SP70713, and 21/SP71579, be removed. Upon the defendant by its counsel undertaking to the Court to attend the settlement of the sale of Lots 7 and 9 in strata plan 70713, set for Wednesday 12 May 2004, and to hand over a withdrawal of caveat concerning the said Lots 7 and 9 if the purchaser is then willing to complete, I decline to make any order pursuant to section 74MA relating to Lots 7 and 9. The defendant's application for an interlocutory injunction is dismissed.

35 The plaintiff seeks the costs of today's application. The defendant points out that the present

dispute arose only on 5 May, which was the time when it became apparent that the defendant might not unconditionally hand over a withdrawal of his caveat concerning Lots 7 and 9. The defendant promptly instructed solicitors, who said that they needed to consider the matter, and would give advice by today. The result of that advice has been that the caveat has not been persisted in as far as four of the strata lots are concerned, and an undertaking, of the kind which I have accepted, has been proffered concerning the other two.

36 Because of the attitude taken concerning the four lots where the caveat will be removed, no time was spent on that part of the case today. The undertaking which was proffered concerning Lots 7 and 9 was proffered only today. The application for an interlocutory injunction is one which the defendant has lost. In all those circumstances the appropriate order is that the defendant pay the costs of the plaintiff of the summons, and of the interlocutory injunction concerning the cross-claim.

37 I order that the costs of the summons be payable forthwith. I will grant each party liberty to apply on two hours notice to and including 5pm Wednesday, 12 May, and on two days notice thereafter. That liberty can be exercised by application to the Duty Judge for the time being, or, if I have ceased to be Duty Judge, to me. I stand the matter over to the Registrar's list on Monday, 17 May 2004, for further directions.

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LAST UPDATED: 14/05/2004