

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP148/2018

CATCHWORDS

LANDLORD AND TENANT – Injunction to restrain settlement of a contract of sale where a party asserts that it has a leasehold interest in the property sold; injunction seeking an order to stay the auction of plant and equipment, to be sold pursuant to a debenture charge.

APPLICANT	GDM Technologies Pty Ltd (ACN 005 991 499)
RESPONDENT	Questco Pty Ltd (ACN 120 783 726)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	6 April 2018
DATE OF ORDER	10 April 2018
CITATION	GDM Technologies Pty Ltd v Questco Pty Ltd [2018] VCAT 544

ORDERS

1. The Applicant’s application for an order restraining the Respondent from completing the contract of sale for the property located at 4-6 Rodney Road, North Geelong is dismissed.
2. Upon the Applicant’s director, Amrit Narain, undertaking to:
 - (a) pay the reasonable costs of removing and storing the plant, equipment, stock and other goods belonging to the Applicant, and the 2008 Holden Commodore Lumina sedan (**‘the Goods’**), and
 - (b) undertaking to abide by any order which the Tribunal may make as to damages in case the Tribunal shall be of the opinion that the Respondent has sustained any by reason of this order for which the Applicant ought to pay;

the Respondent is restrained until further order, whether by itself, its agents or otherwise howsoever, from selling or offering to sell by public auction or otherwise the Goods, unless otherwise by agreement between the parties.

3. **This proceeding is listed for a compulsory conference to be conducted on 25 June 2018 commencing at 10.00 am at 55 King Street, Melbourne. Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions, including those relating to the compulsory conference.**
4. The parties may each be represented by professional advocates at the conference.
5. All parties must attend a compulsory conference personally or be represented by a duly authorised person with personal knowledge of the issues in dispute, and who has, for all practical purposes, unlimited authority to settle. Costs may be ordered if a party's representative does not have unlimited authority to settle, or where a party refuses to negotiate in good faith at the compulsory conference.
6. The parties must each prepare a document not exceeding 4 A4 pages setting out a summary of their positions and must exchange copies by 4.00 p.m. on the business day prior to the compulsory conference, and provide the Tribunal with a copy at the commencement of the conference.
7. Liberty to apply, including liberty to make further application for an order that the stock in trade and 2008 Holden Commodore Lumina sedan be released to the Applicant.
8. **The directions hearing listed for 25 May 2018 is confirmed, unless the parties advise the Tribunal that the directions hearing can be vacated, having regard to these orders.**
9. Costs reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr C Magowan of counsel
For the Respondent	Ms C Gobbo of counsel

REASONS

Introduction

1. The Applicant is the manufacturer of certified organic and natural products used for cleaning and sanitising. It has occupied premises located in Rodney Road, North Geelong (**‘the Property’**) for many years, having fitted out the Property to accommodate its manufacturing business.
2. The registered proprietor of the Property is Narain Holdings Pty Ltd (**‘Narain Holdings’**), a company with common or associated shareholders to the Applicant. Although Narain Holdings is still identified as a registered proprietor on title, the Respondent is now in possession of the Property as mortgagee in possession, pursuant to a warrant of possession issued by the Supreme Court of Victoria on 14 August 2017.
3. The Applicant no longer occupies the Property. However, its plant and equipment, stock in trade and other personal belongings (**‘the Fixtures and Chattels’**) still remain in the Property. The Respondent contends that it has a right to sell the Fixtures and Chattels, pursuant to a debenture charge given by the Applicant to the Respondent dated 6 November 2007.
4. The Property has now been sold, with settlement due to occur at some date prior to the end of April 2018. Prior to that occurring, the Respondent seeks to sell the Fixtures and Chattels by public auction, to take place on 16 April 2018.
5. By this application, the Applicant seeks an interlocutory injunction to restrain the Respondent from settling on the sale of the Property. It also seeks further interlocutory relief to stay the auction of the Fixtures and Chattels and for the stock in trade to be returned to it. The Respondent opposes the orders sought.
6. For the reasons which follow, I find that notwithstanding there being a serious issue to be tried concerning any leasehold interest that the Applicant has or may have had, the balance of convenience does not favour injunctive orders restraining the settlement of the sale of the Property.
7. In relation to the Fixtures and Chattels, I find there is a serious issue to be tried concerning the ambit or scope of the debenture charge and that the balance of convenience favours staying the auction of the Fixtures and Chattels. However, given that the Property is to be sold with vacant possession, I find that any order staying the auction of the Fixtures and Chattels, is to be subject to the Applicant undertaking to pay for the reasonable costs of removing and storing the Fixtures and Chattels, pending determination of the substantive issues in dispute or

until the parties otherwise agree as to what is to happen to the Fixtures and Chattels.

Background

8. As indicated above, the Applicant has occupied and operated its business from the Property for a significant period of time. Over that period, Narain Holdings was and remains the registered proprietor as recorded on the relevant Certificate of Title.
9. During 2005 to 2007, a number of loans were made to either Ravi Narain or to Narain Holdings. Security, in the form of several mortgages was given by Narain Holdings over the Property. In addition, further security was provided by the Applicant, in the form of a debenture dated 17 April 2007, giving the Respondent a charge over all or some of the Fixtures and Chattels in the Property.
10. According to the Respondent, Narain Holdings was chronically in arrears in making payments to the Respondent pursuant to the mortgage loans executed by it. It contends that more than \$6M remains outstanding in relation to those loans. The Respondent further contends that in order to assist Narain Holdings, it agreed that it would not press for mortgage payments but would enter into a lease with the Applicant, provided it paid a commercial amount of rent. Consequently, the Respondent and the Applicant entered into a lease dated 15 June 2010 (**'the First Lease'**) for a period of three years (with an over-holding clause). The Respondent contends that under the terms of the mortgages, the Respondent was empowered to lease the Property in its own name.
11. It appears, from documents tendered in evidence, payments were made to the Respondent pursuant to the First Lease. According to the Respondent, those payments were made from June 2010 until March 2017, after which time no further payments were made.
12. The Applicant contends that the First Lease was superseded by a second lease entered into between Narain Holdings and the Applicant dated 29 September 2015 (**'the Second Lease'**). Consequently, it submits that any rights under the First Lease, if they existed, are now subsumed in the Second Lease.
13. According to the Respondent, the Second Lease only came into existence as a result of discussions between Mr Ravi Narain and the Respondent, to the effect that the Property would be sold in order to discharge loans secured by mortgages over the Property, while at the same time allowing the Applicant to continue to occupy the Property. In that sense, it was envisaged that the proposed sale would be subject to the Second Lease. Consequently, the Respondent contends that the Second Lease was subject to Narain Holdings selling the Property and

discharging the mortgages over the Property. It says that it would not have otherwise consented to the Second Lease.

14. Although the Applicant concedes that the ultimate purpose of the Second Lease was to secure its tenure following the sale of the Property by Narain Holdings, it disputes that the validity of the Second Lease was in any way subject to Narain Holdings selling the Property and discharging the mortgage over that Property.
15. The sale of the property by Narain Holdings did not take place. Consequently, the Respondent moved to execute its powers under the mortgages and orders were ultimately made by the Supreme Court of Victoria on 14 August 2017 granting a warrant of possession in its favour.
16. The Property has now been sold to an unrelated third-party purchaser (**'the Purchaser'**). Settlement of that sale is due to occur at some time prior to the end of April 2018. Prior to that occurring, the Respondent intends to auction the Fixtures and Chattels on 16 April 2018, so as to empty the Property and discharge the debt secured by the debenture charge.

Should the Respondent be restrained from settling the sale of the Property?

17. On 26 February 2018, an application was heard by this Tribunal, where the Applicant sought interlocutory injunctive relief in the form of an order restraining the Respondent from denying the Applicant access to the Property. In other words, the effect of that order, if granted, would have been to restore the Applicant's occupation of the Property. Notwithstanding that the Tribunal found that there was a serious issue to be tried, that application was dismissed.
18. Ms Gobbo, counsel for the Respondent, submitted that the present application, whereby the Applicant seeks an order to prevent settlement of the sale, is another way of attempting to obtain the same order that was previously sought at the hearing on 26 February 2018.
19. Mr Magowan, counsel for the Applicant, submitted that the nature of the application is different, in that the Applicant is not seeking to restore its occupation but rather, maintain the status quo pending final determination by the Tribunal. In particular, Mr Magowan argued that if the settlement of the Property took place, then any leasehold interest which the Applicant may have held would be lost.
20. Numerous affidavits have been filed by both parties, both in relation to the application that was before the Tribunal on 26 February 2018 and in the current application.
21. Without going into the particulars of what is deposed to in those affidavits, I accept that there is a serious issue to be tried concerning

the validity of any leasehold interest that may have been held by the Applicant. I further accept that the peculiar nature of the Applicant's tenure casts some doubt as to whether damages would adequately compensate the Applicant, if the injunction is not granted and its position is ultimately accepted by the Tribunal.

22. Turning then to the question of where the balance of convenience lies. On one hand, the Applicant contends that its business will be completely destroyed if the relief sought is not granted. The affidavit of Ravi Narain, sworn on 14 February 2018, deposes to the difficulty in re-establishing the business elsewhere.

23. On the other hand, it is reasonable to assume there may be serious consequences if the Respondent is unable to complete the contract of sale. In particular, it may lose that sale and be subject to a claim for damages. Although an undertaking has been given by Ravi Narain in the application that was before the Tribunal on 26 February 2018, and by Amrit Narain in this application, it is unclear whether those undertakings would also cover any damages occasioned by the Respondent if it ultimately becomes embroiled in litigation with a third party.

24. Further, the interests of the third-party Purchaser is of serious concern. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)*,¹ Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ commented in reference to the rights of third parties:

In applications to grant interlocutory injunctions, the court is concerned to examine and in appropriate cases to protect, pending the trial, the moving party's right to relief against that party's opponent. But the rights of the plaintiff and defendant are not the only rights considered in determining where the balance of convenience lies.²

25. The following statement by Cumming-Bruce LJ in *Miller v Jackson*³ was approved:

Courts of Equity will not ordinarily and without special necessity interfere by injunction where the injunction will have the effect of very materially injuring the rights of a third persons not before the court.⁴

26. In *Bridge Property Investments Pty Ltd v Garland Lot 3 Pty Ltd*,⁵ Barrett JA, stated further:

¹ (1998) 195 CLR 1.

² Cited in *Bridge Property Investments Pty Ltd v Garland Lot 3 Pty Ltd* [2014] NSWCA 82, [51], per Barrett JA.

³ [1977] QB 966 at 988.

⁴ Cited in *Bridge Property Investments Pty Ltd v Garland Lot 3 Pty Ltd* [2014] NSWCA 82, [52] per Barrett JA.

⁵ [2014] NSWCA 82.

[54] When the matter was before the primary judge, Ruby Street [the innocent purchaser] was a stranger to the suit. In deciding whether to grant an injunction, his Honour was bound to consider the injury that the injunction might inflict on such strangers and third parties generally: *Maythorn v Palmer* (1864) 11 LT 261. His Honour did not do so, as regards Ruby Street. Had he considered the matter, he would have found that Ruby Street, as purchaser under the extant but uncompleted contract of sale, had an equitable interest in the land and that any restraint at all upon the Garland companies in relation to their performance of the contract was, of its very nature, a matter in which Ruby Street had a clear and distinct expectation of being heard. On that basis alone, his Honour should have regarded the balance of convenience as favouring refusal of the interlocutory order.

[55] Ruby Street became a party to the proceedings at the start of the hearing in this court. While its non-party status was thereby resolved, it remained a third party as regards Bridge, the Garland companies and their contract; and the competition, if one may call it that, was between Bridge's contractual right against the Garland companies, whatever its precise content may be, and Ruby Street's proprietary right as purchaser under the uncompleted contract with the Garland Companies. Ruby Street's right is "superior" to that of Bridge, in the sense discussed in *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530.

27. In my view, a similar situation arises in the present case. Here, an unknown third-party Purchaser has an equitable right. As highlighted in *Bridge Property Investments*, its equitable right is superior to the mere equity held by the Applicant.
28. Further, there is some question as to the promptness in seeking equitable relief. It remains unexplained why the application to restrain the settlement of the sale was brought now, virtually on the eve of settlement of that contract of sale. As I understand from submissions made by counsel during the course of the hearing, it was no secret that the Property had been offered for sale. Indeed, counsel indicated that a selling board had been erected at the Property, which now displays a prominent "sold" sign across its face.
29. Had the Applicant acted sooner, it may have avoided a situation where a third party's equitable interest has crystallised. In my opinion, that is a further factor to take into consideration in assessing the balance of convenience.
30. Consequently, I find that the balance of convenience does not favour the granting of an injunction to restrain the Respondent from settling on the contract of sale with the third-party Purchaser. Accordingly, that aspect of the injunctive relief sought is dismissed.

Should the auction of the Fixtures and Chattels be stayed?

31. There is some question as to the validity of the debenture charge and in particular, whether the scope of the charge is limited to the specific items of plant listed under Item 9 of Schedule 1 in the *Deed of Charge* or extends more generally to all plant and equipment (and stock). I am satisfied that there exists a serious question to be tried going to the scope of the *Deed of Charge*.
32. I am also satisfied that damages would not be an adequate remedy. In that regard, I accept submissions made by Mr Magowan, supported by the affidavit of Amrit Narain sworn 3 April 2018, that the plant and equipment is unique to the business operations of the Applicant and its value to the Applicant may not equate to market value.
33. It is therefore necessary to proceed to the balance of convenience and to determine whether the Respondent will suffer greater hardship if the auction is delayed than the Applicant will suffer if the auction proceeds.
34. In my view, the balance of convenience favours the granting of an injunction to stay the operation of the auction. The affidavit of Amrit Narain deposes to a number of factors which ultimately adversely affect the business operations of the Applicant, if it were not permitted to obtain its stock. Further, the affidavit material indicates that the plant and equipment is unique to the operations of the Applicant, which I understand to mean that the plant and equipment would not be readily available on the open market, if it had to be replaced.
35. On the other hand, a delay in auctioning the Fixtures and Chattels would result in a delay in discharging the debenture charge. It would not mean, however, that the Respondent loses its security holding.
36. Accordingly, when weighing up each of these factors, I am of the opinion that the balance of convenience favours the granting of the injunction subject to the following. Given that the Property is to be sold with vacant possession, the Fixtures and Chattels must be removed prior to settlement. Therefore, on condition that the Applicant pays, in the first instance, the reasonable costs of the Respondent to remove and store the Fixtures and Chattels prior to settlement, I am prepared to grant this aspect of the injunctive relief sought. That said, the ultimate payer of those costs would be a matter to be determined at the final hearing of this proceeding.

Stock in trade

37. In the application filed by the Respondent, the orders sought included an order restraining the Respondent from selling the Property and the Fixtures and Chattels, and an order allowing the Respondent to remove all stock currently stored in the Property. The orders sought were slightly modified by Mr Magowan, given that the Property has already been sold.

38. Although not specifically pressed during the course of the hearing on 6 April 2018, I understand that the Applicant still seeks an order giving it access to the Property to remove and retain the stock, as opposed to the plant and equipment and other goods held in the Property.
39. It is unclear to me how much stock, as opposed to plant and equipment or other goods, is currently held in the Property and what its value is. Without knowing that information, I am reluctant to order that the stock be released to the Applicant. This is particularly so given that the stock constitutes consumables and is likely to be dissipated through the ordinary course of the Respondent running its business. Unlike plant and equipment, it cannot be returned to the Respondent if the Respondent ultimately succeeds with the substantive issues in dispute.
40. Therefore, I will order that the Applicant has liberty to reapply for an order that the stock, alone, be released to it, in the event that the parties are unable to reach some compromise as to what is to happen to the stock. To that end, I will order that the parties attend mediation or a compulsory conference, with a view of not only reaching some agreement in relation to the stock but also giving the parties an opportunity to reach a settlement in relation to all of the Fixtures and Chattels.

SENIOR MEMBER E. RIEGLER