Part Performance and the Putative Secured Creditor

In *Dinh v Dang* [2007] QSC 3, Chesterman J was faced with an unusual situation arising from lending transactions that were entirely oral.

Facts

The parties to the litigation were related by marriage (the respondent and the applicant's wife being sisters) and were Vietnamese. It was noted by Chesterman J that there was distrust by the parties and their families of the banking institutions in this country and a dislike for the ordinary processes of recording business transactions.

The respondent's case was that she lent her sister, the applicant's wife, two significant sums of money. The respondent alleged that these sums were secured by a charge, or mortgage, over the applicant's land which was the matrimonial home of Mr and Mrs Dinh. As mentioned, there was no writing which evidenced the charge or mortgage. On 18 November 2004 the respondent lodged a caveat over the land claiming 'an equitable interest as mortgagee of an estate in fee simple.' Some two (2) years after the caveat was lodged, the applicant sought an order pursuant to s 127 of the *Land Title Act 1994* (Qld) that the caveat be removed.

The applicant accepted that some monies were lent but asserted that there had been repayment in full. The applicant denied that the matrimonial home was charged with the obligation to repay the loans and, on those grounds sought an order that the caveat be removed. For the respondent, it was claimed that there were acts of part performance taking the case beyond the operation of s 59 of the *Property Law Act 1974* (Qld) such that the equitable mortgage could be enforced notwithstanding a lack of writing.

Decision

In the result, Chesterman J found the alleged caveatable interest to be without substance. There was nothing in the way of part performance of the claimed equitable mortgage sufficient to overcome the operation of s 59 of the *Property Law Act 1974* (Qld). The following extract from the decision is reproduced at length as it provides useful guidance concerning those acts that may be required to successfully invoke the equitable doctrine of part performance in the context of an equitable mortgage:

> It must be understood that the respondent's case is that she is a secured lender to the applicant. The interest which she asserts gives her an interest over the applicant's land is that of equitable mortgagee. It is not enough that she alleges, and perhaps proves, that she lent money to the applicant. She must prove that the applicant contracted to mortgage his land to secure the repayment of the loan and that the respondent partly performed that contract.

Whether conduct by a plaintiff seeking to enforce an oral contract for an interest in land can amount to part performance depends upon whether the acts are 'unequivocally and in their own nature, referable to some such agreement as that alleged': per Lord Selborne in *Maddison v Alderson* (1888) 8 App Cas 467 at 469. This test 'has been consistently accepted as a correct statement to the law': Per Gibbs J (with whom the other members of the court agreed) in *Regent v Millett* (1976) 133 CLR 679 at 683. The acts relied upon must be unequivocally and in their own nature referable to some contract of the general nature of that alleged: see *McBride v Sandland* (1918) 25 CLR 69 at 78.

By 'some such agreement as that alleged' is meant some contract of the general nature of that alleged, some agreement for the disposition of some interest in the land in question: see *Cooney v Burns* (1922) 30 CLR 216 at 222.

These statements of principle form an insuperable barrier to the respondent. The acts of part performance relied upon do not point, even equivocally, to the disposition of an interest in land. Debts are commonplace things, as are secured debts. The advance of money and demand for its repayment do not point in any degree to a promise to encumber land with the obligation to repay the debt. An indication by a debtor that he will sell property to raise the money to repay the loan is no indication that his property was charged with the repayment. It would be different if the creditor went into possession of the land to secure his repayment but nothing of that sort is alleged here. There is no more than a demand for repayment and a promise to make it.

It was pointed out in Maddison (at 480) that acts recognised as part performance 'have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land'. The payment of money by itself is insufficient to amount to an act of part performance though it may take on that complexion if accompanied by other conduct, but here there is no more than a demand for repayment and a promise to make it.

In *Francis v Francis* [1952] VLR 321 there was an agreement for a loan, an advance of money, documents of title delivered to the lender and an oral agreement made to give a legal mortgage as security. This was sufficient to amount to acts of part performance but the critical feature was the delivery of documents of title. Without some act of that character there is nothing to give the transaction a semblance of a secured loan as opposed to an unsecured one. ([16] –[21])

Comment

This decision highlights the difficulties inherent where loan arrangements are not reduced into writing and the limitations of the equitable doctrine of part performance where a putative secured lender fails to take any steps that can be seen to be unequivocally referable to a secured lending transaction. In this instance, the parties dislike for the ordinary processes of recording transactions became the catalyst for litigation which may otherwise have been avoided.

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