

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

Not Restricted

S ECI 2020 03709

FINCORE PTY LTD (ACN 634 098 418)

Plaintiff

v

DONALD CHARLES WEBB

First Defendant

REGISTRAR OF TITLES

Second Defendant

JUDGE: Derham AsJ
WHERE HELD: Melbourne
DATE OF HEARING: 29 October 2020
DATE OF JUDGMENT: 11 December 2020
CASE MAY BE CITED AS: Fincore v Webb
MEDIUM NEUTRAL CITATION: [2020] VSC 831

PROPERTY LAW – Application under s 116A(1A) of the *Transfer of Land Act 1958* (Vic) for the production to the plaintiff of a certificate of title to land – First defendant granted an equitable mortgage to the plaintiff – Plaintiff is, by virtue of its equitable mortgage and under contract, a ‘person interested’ for the purposes of s 116A(1A) of the *Transfer of Land Act 1958* – *Mitrovic v Koren* [1971] VR 479; *Kousal v Suncorp-Metway Ltd* [2011] VSC 312, considered.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms RT Zambelli	Logie-Smith Lanyon
For the Defendant	Mr A Stewart	Stewart Law, Sydney

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HIS HONOUR:

Introduction

- 1 The plaintiff, Fincore Pty Ltd (**'Fincore'**), applies by Originating Motion and Summons filed on 23 September 2020 for orders, apart from formal matters, for the production to the plaintiff of the certificate of title of the property owned by the first defendant, Donald Charles Webb (**'Webb'**) at 40 Drysdale Crescent, Point Cook, Victoria (**'Land'**), being the land more particularly described in Certificate of Title Volume 10770 Folio 256 (**Certificate of Title**).¹ The application for production of the Certificate of Title is made under s 116A of the *Transfer of Land Act 1958* (Vic) (**'TLA'**).

- 2 Alternative directions were also sought in the event Webb failed to produce the Certificate of Title. These orders are not presently pressed, but may be if there is no compliance with the primary order sought. Those alternate orders are that the second defendant, the Registrar of Titles (**Registrar**):
 - (a) convert the Certificate of Title to an electronic certificate of title with control given to Fincore pursuant to s 116A(3)(c) of the *Transfer of Land Act 1958* (Vic) (**TLA**); or
 - (b) cancel the Certificate of Title and create a new certificate of title for the Land pursuant to s 103(1) of the TLA and provide it to Fincore.

- 3 The Registrar has been served with the Originating Motion and Summons, and has written to the Court and Fincore's solicitors, in the usual way, that on the basis of present information, he does not intend to appear in this proceeding, and that he has written to Fincore with his comments on the form of orders proposed . These reasons do not deal with the orders affecting the Registrar because, as I have said, they will only be sought if and when Webb fails to produce the Certificate of Title to Fincore in accordance with the primary order sought.

¹ On 13 October 2020, Kennedy J ordered pursuant to r 77.05 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**'Rules'**) that this proceeding is referred to an Associate Judge for hearing and determination.

4 In support of the Summons, the plaintiff relies upon the affidavits of:

- (a) Sonia Wilkin, Fincore's Chief Financial Officer, sworn 17 September 2020 (**Wilkin Affidavit**);
- (b) Junjian (Calvin) Mai, Partner of Bartier Perry, Fincore's solicitors in Sydney, sworn 17 September 2020 (**Mai Affidavit**);
- (c) Norman Donato, Partner of Bartier Perry, sworn 17 September 2020 (**Donato Affidavit**);
- (d) Simon Adrian Francis, Partner of Logie-Smith Lanyon, Fincore's Victorian solicitors, affirmed 16 September 2020 (**Francis Affidavit**);
- (e) Michael Harold Lanyon, Partner of Logie-Smith Lanyon, sworn 16 September 2020 (**Lanyon Affidavit**);
- (f) Simon Adrian Francis, Partner of Logie-Smith Lanyon, affirmed 30 September 2020 (**Further Francis Affidavit**); and
- (g) Stephanie Jayne Christiani affirmed 28 September 2020 and Chera Tottle sworn 25 September 2020 in relation to service of the Originating Motion and Summons on the defendants.

5 Webb resides and was served at the Land, but is represented by Sydney-based solicitors Stewart Law. A directions hearing was held on 29 September 2020 before Judicial Registrar Keith, at which Fincore's counsel and Webb's solicitor, Sam Saadat of Stewart Law appeared. A notice of appearance has not been filed. Orders were made for Webb to file and serve any affidavits opposing the relief sought by Fincore by 4.00pm on 12 October 2020. No such material has been filed or served on Fincore.

Background

6 Webb is the sole registered proprietor of the Land. The evidence adduced by the Fincore shows that, save for a caveat lodged by Fincore, the land is unencumbered.²

² Further Francis affidavit, [4] and exhibit SAF-2.

Production of the Certificate of Title is sought to enable registration of Fincore's equitable mortgage securing amounts owed by Webb pursuant to the terms of a Loan Agreement,³ General Security Deed⁴ and Deed of Guarantee and Indemnity⁵ all dated 11 October 2019 (together the '**Transaction Documents**'). The Transaction Documents are a package and are all interrelated and interdependent.

7 The parties to the Loan Agreement and General Security Deed are Fincore, as Lender, Renu Waste Pty Ltd (**Renu Waste**) as borrower, and Alistair Brodie ('**Brodie**') and Webb as Obligors (and as such the Obligors they were guarantors of Renu Waste's performance under the Deed of Guarantee and Indemnity). The parties to the General Security Deed are Fincore, as the secured party, and Renu Waste, Brodie and Webb as Grantors. The parties to the Deed of Guarantee and indemnity are Fincore, as lender, and Brodie and Webb, as Guarantors.

8 On 14 October 2019, Fincore advanced the sum of \$2,840,000 to Renu Waste under the Loan Agreement.⁶ The maturity date under the Loan Agreement was 12 calendar months from the date of the advance. On or about 14 January 2020, Renu Waste failed to pay interest due under the Loan Agreement. Pursuant to Clause 18.1(a) of the Loan Agreement, Renu Waste's failure to pay interest triggered an Event of Default:

- (a) entitling Fincore to declare the Secured Money (effectively, all the moneys due under the Loan Agreement) immediately due and payable; and
- (b) compelling Renu Waste to immediately repay the Secured Money to Fincore (Loan Agreement Clause 18.2(a)).

9 This Event of Default triggered the obligation of Brodie and Webb under the Deed of Guarantee and Indemnity, jointly and severally, to immediately repay the Secured Money to Fincore.

³ Exhibit SW-1 to the Wilkan Affidavit.

⁴ Exhibit SW-2 to the Wilkan Affidavit.

⁵ Exhibit SW-3 to the Wilkan Affidavit.

⁶ Paragraph 7 of the Wilkan Affidavit and exhibits SW-4 and SW-5.

- 10 On or about 31 January 2020, Fincore served on Renu Waste a Default Notice, requiring, inter alia, that the then amount outstanding be repaid immediately to Fincore. That sum has not been repaid, and the Event of Default is subsisting. On 6 May 2020, a receiver was appointed to Renu Waste's assets and undertakings, on 20 June 2020, a Voluntary Administrator was appointed to it, and on 14 July 2020 a Liquidator was appointed. These are all Events of Default under the Loan Agreement and the General Security Deed which continue to subsist.
- 11 Pursuant to General Security Deed, Webb granted Fincore a mortgage (a Security Interest) over any real property owned by him and Fincore is entitled to an equitable mortgage in the Land securing repayment of the Secured Money (Clauses 2.1 and the definitions of Security Interest and Collateral). Pursuant to Clause 2.4 of the General Security Deed, Fincore is entitled to register a first ranking mortgage over the Land **(Mortgage)**, to better secure its interest in the Land.
- 12 Under the terms of the Transaction Documents, Webb and Brodie were required, amongst other things:
- (a) to execute all documents and do all things reasonably required or requested at any time by Fincore to give effect to its rights under any Transaction Document (Loan Agreement Clause 16.1(k));
 - (b) to register any document required in connection with the Secured Money or Transaction Documents with any Governmental Agency if that registration is necessary to protect the rights and priority of Fincore (General Security Deed Clause 5.3(a)(ii));
 - (c) to provide Fincore with all title documents relating to their interest in property (General Security Deed Clause 5.4(g));
- 13 Webb and Brodie also irrevocably appointed Fincore and its authorised officers to do anything they were required to do under a Transaction Document or the law, including signing documents and anything else Fincore considers necessary to perfect

a Transaction Document or deal with Webb or Brodie's assets (Loan Agreement Clause 19.1(a), General Security Deed Clause 21.1(a) and (b)).

14 Notice of Default was given to Webb on 31 January 2020, including a demand for immediate payment of \$99,400 outstanding interest for the month of January 2020.⁷ No further repayments were made by Renu Waste, Webb or Brodie, and the total amount outstanding as at 25 August 2020 was \$3,529,380.54.⁸

15 On 26 May 2020, Fincore's Sydney-based solicitors, Bartier Perry, demanded Webb execute a mortgage instrument for registration on title.⁹ Webb contacted Calvin Mai of Bartier Perry that day enquiring as to what he need to do to comply with that request.¹⁰ However, he subsequently refused to do so.¹¹

16 On 25 August 2020, Fincore's Victorian solicitors, Logie-Smith Lanyon, wrote to Webb demanding that he:

- (a) execute a mortgage over the Land pursuant to clause 24.1 of the General Security Deed;
- (b) produce the executed mortgage and the original certificate of title to the Land to Fincore pursuant to clause 5.4(g) of the General Security Deed;
- (c) provide Fincore with full details of his financial position, any secured liabilities and any other information relating to his assets, liabilities or income, pursuant to clause 10.1 of the Guarantee and Indemnity; and
- (d) pay to Fincore all Secured Money that remains unpaid, in the amount of \$3,529,380.54 pursuant to clause 2.1(b) of the Guarantee and Indemnity.¹²

⁷ Paragraph 2 of the Donato Affidavit and exhibit ND-1.

⁸ Paragraph 12 of the Wilkan Affidavit.

⁹ Paragraph 2 of the Mai Affidavit and exhibit CM-1.

¹⁰ Paragraph 3 of the Mai Affidavit.

¹¹ Paragraph 4 of the Mai Affidavit.

¹² Paragraph 2 of the Francis Affidavit and exhibit SAF-1.

17 By that correspondence of 25 August 2020, Fincore also informed Webb that should he fail to comply with those demands by 31 August 2020, it would:

- (a) execute the mortgage in accordance with the power of attorney granted under Clause 19.1 of the Loan Agreement and Clause 21 of the General Security Deed; and
- (b) seek orders from the Court requiring him to produce the original Certificate of Title.¹³

18 Webb failed to comply with those demands¹⁴ and, despite the making of an open invitation to produce the Certificate of Title without the need for further hearing being extended to his solicitor at the directions hearing on 29 September 2020, he refused to do so.

19 Fincore considers that it is necessary to register the Mortgage on the title of the Land at the Land Titles Office of Victoria to, amongst other things, better secure its rights under the General Security Deed, perfect, maintain and preserve the priority of its Security Interest, better secure its position under the Transaction Documents and ensure that the Mortgage retains its priority as a first ranking mortgage on the Land.¹⁵

Applicable Law

20 The application is made under s 116A(1A) of the TLA. Section 116 authorises applications to a court of competent jurisdiction for order requiring production of documents. Sub-section 116A(1) applies to applications by the Registrar for the production of a certificate of title or document in certain circumstances. It was amended to arrive at its current form by the *Land Legislation Amendment Act 2009* (Vic) (**'2009 Amendment'**). The provision relevant to the current application is s 116A(1A), which was introduced by the 2009 Amendment, and provides:

An interested person may apply to the court by summons or, in the case of land or any instrument or dealing with respect to land which is the subject of an

¹³ Paragraph 3 of the Francis Affidavit and exhibit SAF-1.

¹⁴ Paragraphs 4-5 of the Francis Affidavit.

¹⁵ Paragraph 16 of the Wilkan Affidavit.

order by VCAT, to VCAT, for an order directing another person to produce a certificate of title or document for the reasons stated in the application.

21 Section 116A(3) of the TLA, provides:

The court or VCAT, as the case requires, may –

- (a) order the person to produce the document upon such terms or conditions as the court or VCAT, as the case requires, thinks fit;
- (b) direct the Registrar to proceed with any dealing or make any entry without requiring the production of the document; or
- (c) where the document is a certificate of title, direct the Registrar to take such action (whether by way of deleting the folio of the Register to which the certificate relates and creating a new folio of the Register in the name of such person as the court or VCAT, as the case requires, directs or otherwise) as the court or VCAT, as the case requires, directs –

and make such order as to the costs of the summons and the proceedings thereon as the court or VCAT, as the case requires, thinks fit.

22 The Explanatory Memorandum for the Bill that became the *2009 Amendment* stated that the amendments to s 116A were made-

...to compliment amendments to section 104 at clause 57. Section 116A(1) is amended to provide that the Registrar may apply to a court of competent jurisdiction or VCAT for an order directing a person to produce a certificate of title or other document if the Registrar has made a request under section 104(3) and that person has not complied. In accordance with amendments to section 104, that remove the mechanism for a person to apply to the Registrar to require production of a certificate of title or document, section 116A(1A) is inserted to provide that any person may apply to a court or VCAT for an order directing another person to produce a certificate of title or document. (Emphasis added)¹⁶

23 The cases that consider an application under s 116A(1A) and (3) are limited and largely turn on their own facts. The essential requirement for the making of an application is that the applicant is 'a person interested'.

24 *Kousal v Suncorp-Metway Ltd*¹⁷ concerned an application under section 116A(3)(a) of the TLA to compel the mortgagee defendant to produce the duplicate certificate of title to residential land the plaintiff had purchased from the Sheriff at auction.

¹⁶ Explanatory Memorandum, Cl 66.

¹⁷ *Kousal v Suncorp-Metway Ltd* [2011] VSC 312 (*Kousal*).

25 In that case, Mukhtar AsJ applied the reasoning of Gowans J in *Mitrovic v Koren*¹⁸ regarding the entitlement of a person having a proprietary interest or right in the certificate of title to its production. *Mitrovic v Koren* also concerned the purchase of unencumbered land from a Sheriff, and Gowans J ultimately granted orders for the production of the title,¹⁹ as did Mukhtar AsJ in *Kousal*.²⁰ In *Mitrovic v Koren*, Gowans J was dealing with an application for judgment in default of defence. He considered that the relief sought, the production of a duplicate certificate of title, was in effect an application for a mandatory injunction for the delivery up of the duplicate certificate. By parity of reasoning, in this case the order sought is analogous to an order in aid of specific performance of the obligations arising under the Transaction Documents.

26 In *Kousal*, Mukhtar proceeded on the basis that there was 'no doubt' the purchaser was an 'interested person' giving rise to the entitlement to apply to the Court under section 116A of the TLA.²¹ In this case, it was submitted the same reasoning establishes Fincore's standing as an interested person by virtue of its equitable mortgage over the Land arising from the Transaction Documents. I agree.

27 In *Lutar v Carley*,²² McMillan J considered an application for delivery up of a certificate of title in relation to property of a deceased estate. Possession of the certificate of title and its whereabouts were in dispute, and orders were made for the Registrar of Titles to cancel the folio of the register for the property, create a new folio of the register for the property, remove caveats and record a new registered proprietor of the property in the new folio and produce a certificate of title with the new folio and deliver it to the executor of the deceased estate.²³

28 It appeared that the certificate of title was lost. In this circumstance, the Registrar of Titles made an application seeking to vacate the order and for a formal declaration to be made by the Court that the certificate was lost. This was on the basis that the order

¹⁸ [1971] VR 479 at 481-2.

¹⁹ *Mitrovic v Koren* [1971] VR 479 at 483.

²⁰ *Kousal* at [1] and [41].

²¹ *Kousal* at [27].

²² [2017] VSC 366.

²³ *Lutar v Carley* [2017] VSC 366 at [13].

directed at the Registrar was not appropriate in circumstances where it is open to the plaintiff to make an application under s 31 of the TLA for cancellation of the folio and creation of a new folio of the Register. Orders as sought by the Registrar were ultimately made by the Court.²⁴

29 Fincore, in its written submissions, also referred to the decision in *Gorkowski v Turner*.²⁵ However, that decision concerns the jurisdiction of the Court in relation to land in respect of which an order had been made, in another proceeding, pursuant to s 116A(1A) of the TLA for the delivery up of the certificate of title to the Trustee in Bankruptcy of the registered proprietor. The decision concerned, in effect, a challenge to the underlying interest of that registered proprietor and the jurisdiction of the Court in that regard.²⁶

Consideration

30 Fincore is entitled to call for production of the Certificate of Title pursuant to clause 5.4(g) of the General Security Deed,²⁷ and is entitled to execute the mortgage instrument over the Land pursuant to clause 24.1 of the General Security Deed,²⁸ and the power of attorney at clause 21 of General Security Deed.²⁹

31 It is clear, in my view, that by virtue of Fincore's entitlement to an equitable mortgagee pursuant to its rights under the Transaction Documents, and by reason of the contractual rights it has under the Transaction Documents, it is an 'interested person' for the purpose of section 116A(1A) of the TLA, and is thereby entitled to apply for production of the Certificate of Title.

²⁴ *Lutar v Carley* [2017] VSC 366 at [14]-[15].

²⁵ (2014) 285 FLR 66.

²⁶ *Gorkowski v Turner* (2014) 285 FLR 66 at [4(m)].

²⁷ Exhibit SW-2 to the Wilkin Affidavit (at page 15 of the exhibit found at page 95 of the electronic bundle comprising the Wilkin Affidavit and exhibits).

²⁸ Exhibit SW-2 to the Wilkin Affidavit (at page 42 of the exhibit found at page 122 of the electronic bundle comprising the Wilkin Affidavit and exhibits).

²⁹ Exhibit SW-2 to the Wilkin Affidavit (at pages 40-41 of the exhibit found at pages 120-121 of the electronic bundle comprising the Wilkin Affidavit and exhibits).

32 Webb has made no submission that in any way undermines the entitlement of Fincore to the relief it seeks. There is no reason why Fincore should not be enabled to register its mortgage and for that purpose have the Certificate of Title produced to it.

33 In the letter sent to Fincore by the Registrar, and copied to the Court, it is noted that the Registrar is currently not issuing any paper certificates of title and that control of an electronic certificate of title may only be given to a 'Subscriber' within the meaning of the *Electronic Conveyancing National Law* (applicable by virtue of the *Electronic Conveyancing (Adoption of National Law) Act 2013 (Vic)*). Other relevant comments are made with respect to the alternate orders sought for the Registrar to convert the Certificate of Title to an electronic certificate of title with control being given to Fincore pursuant to s 116A(3)(c) of the *TLA* and to cancel the Certificate of Title and create a new certificate of title for the Land pursuant to s 103(1) of the *TLA* and provide it to Fincore.

Conclusion

34 For the reasons given above, orders and declarations will be made to the following effect:

- (a) Order that the plaintiff has leave under r 45.05 of the Rules to commence this proceeding by originating motion in Form 5C and the requirements of rr 5.03(1) and 8.02 of the Rules are dispensed with.
- (b) Declare that the plaintiff is entitled to the certificate of title for the land situated at 40 Drysdale Crescent, Point Cook, Victoria, 3030, being the land more particularly described in Certificate of Title Volume 10770 Folio 256 ('**Land**') for the purposes of the *Transfer of Land Act 1958* and the *Electronic Conveyancing National Law* (applicable by virtue of the *Electronic Conveyancing (Adoption of National Law) Act 2013 (Vic)*).
- (c) Order pursuant to section 116A(3)(a) of the *Transfer of Land Act 1958*, that the first defendant must produce and deliver Certificate of Title Volume 10770

Folio 256 to the plaintiff, or such other person as directed by the plaintiff, by 12 noon on 18 December 2020.

- (d) Order that the first defendant must pay the plaintiff's costs of and incidental to the summons filed 23 September 2020 on the standard basis, including the costs of and incidental to the hearings on 29 September 2020, 19 October 2020 and 29 October 2020.
- (e) Order that the further hearing of the plaintiff's originating motion filed 23 September 2020 is adjourned to a date to be fixed.
- (f) Reserve liberty to apply on not less than 7 days' notice.

CERTIFICATE

I certify that this and the 10 preceding pages are a true copy of the reasons for judgment of Derham AsJ of the Supreme Court of Victoria delivered on 11 December 2020.

DATED this eleventh day of December 2020.

