ADR Bulletin
ADR Bulletin

Volume 6 | Number 5 Article 5

9-1-2003

Case notes in ADR

Lisa Goldacre

ADR Bulletin

Case notes in ADR

Prepared by **Lisa Goldacre**

These case notes were prepared by Lisa Goldacre and first published in LEADR Dispute Resolution Update, June 2003. They are published here with the permission of the author and Michael Mills, National Chair, LEADR.

MYROSS (NSW) v KAHLEFELDT SECURITIES
[2003] NSWSC 138

Facts

The plaintiff farmer had agreed to mortgage his farm to the defendant in return for a fixed term loan of $650,000 together with interest. The loan was repayable by 12 July 2004. The plaintiff defaulted on the loan. The defendant gave the plaintiff notice pursuant to s 8 of the *Farm Debt Mediation Act 1994* (NSW) (the Act). A mediation occurred and on 8 November 2002 an agreement in writing was made as a result. Under the agreement three options were available to the plaintiff, the first being the sale of the property in question, which was completed on 28 February 2003. The defendant gave a discharge of the mortgage in return for payment of the principal sum of $650,000 with interest up to 28 February 2003 and certain fees and charges.

Matters in issue

The question to be decided by the Court was whether the amount of interest payable by the plaintiff was limited to interest to 28 February 2003, being the date of completion, or whether the defendant mortgagee was entitled to interest up to 14 July 2004. This involved a consideration of s 93 of the *Conveyancing Act 1919* (NSW), which provides that a mortgagor has a right to early redemption, but remains liable to pay interest for the unexpired portion of the term of the mortgage. This is so unless agreement provides otherwise. There was no express term in the agreement that allowed the plaintiff to pay interest only until 28 February 2003. The question was whether the defendant mortgagee had acted in a manner that bound the defendant to accept repayment of the principal before the stipulated payment date, with interest to the date of payment only. The effect of steps taken by the defendant under the Act were considered:

(1) section 8 notice
(2) agreement made 8 November 2002 as a result of the mediation.

Decision

(1) Section 8 notice. It was submitted that issuing such a notice was a step towards enforcement evidencing the imposition by the defendant of a requirement for an early payment of principal, and therefore payment of interest to the date of early repayment only. The Court held that the notice was no more than a statement that the mortgagee wishes to proceed to enforcement if any mediation under the Act does not produce some other solution or, in the absence of such a solution, the issue of a certificate under s 11 of the Act. The issuing of a notice under s 8 of the Act cannot be said to be an overt action by a mortgagee amounting to a requirement that the principal sum be repaid early.
(2) In the agreement before the Court, there was no express requirement that the principal sum be paid early. The agreement contained a number of ways forward for the parties, one option being for the plaintiff to enter into a contract for the sale of the property. The plaintiff chose to sell his farm. In exercising that option, the Court said, 'It was necessary in a business sense that the plaintiff should be able to convey an unencumbered estate upon completion of a sale in accordance with [the agreement].' On that basis, the Court implied into the contract a term that the mortgage should be discharged upon completion. Therefore, the

defendant was taken to have agreed to provide a discharge in return for payment of the mortgage monies in full on completion. This, therefore, was an overt act by the defendant mortgagee amounting to a requirement that the principal sum be repaid early.

Consequently, as a result of the term implied into the mediation agreement, interest was only payable up to and including 28 February 2003. ●

SPENCER v SPENCER *[2003] QBT 183*

Facts

This was a dispute in relation to the construction of a house between homeowners and a builder, who were all members of the same family. Application was made by the homeowners for relief from payment, an award of damages, rectification of defective and incomplete work and legal costs. On 26 October 2001 the parties executed a mediation agreement. The agreement was in full and final settlement of the contract by way of nil payment owing. The parties agreed to a determination of the defects by a Queensland Building Services Authority inspector (QBSA inspector) following an inspection of the premises by the same. The QBSA inspector's decision was to be final and the builder agreed to rectify the defects as required by the inspector within 90 days of a notice of rectification issued by the inspector. The parties consented to the terms of the mediation agreement being made by order of the Tribunal.

As the mediation agreement was in terms of full and final settlement of claims by nil payment, any outstanding contractual claims by the homeowners had been compromised.

Matters in issue

There were several questions of fact to be determined in relation to direction given by the QBSA inspector and the effect of a restraining order preventing the builder from carrying out any work. Two other questions before the Tribunal were:

(1) Was this a dispute solely about the enforcement of the mediation agreement, or was it a domestic building dispute within the jurisdiction of the Tribunal?

(2) Had the builder repudiated the mediation agreement?

Decision

(1) The Tribunal found that it did have jurisdiction to hear this matter, notwithstanding that the dispute related to the mediation agreement made on 26 October 2001, rather than the original application. The Tribunal relied on s 93 of the Act and the definition of 'domestic building dispute'. In resolving domestic building disputes, the Tribunal has the power to order rectification. The mediation agreement included an agreement to carry out rectification. The order made by consent of the parties was not in the same terms as the mediation agreement, nor had the parties applied for the variation of the order. The mediation agreement was not converted into a decision pursuant to s 125 of the Act. The resulting effect was that the Tribunal was unable to find that the inspector gave any direction.

(2) As the mediation agreement was in terms of full and final settlement of claims by nil payment, any outstanding contractual claims by the homeowners had been compromised. The parties were found to have agreed to be bound by the decision of the QBSA inspector in respect of items that were listed as (possibly) defective in the mediation agreement. The builder had compromised any right to challenge such a decision. As no notice of rectification had been issued by the QBSA inspector pursuant to the mediation agreement, time for carrying out rectification had not commenced to run against the builder, and consequently there had been no repudiation. The Tribunal noted that 'as the QBSA inspector was not a party to the agreement he cannot be criticised for his failure. *This situation demonstrates the lack of wisdom in imposing obligations on third parties when drafting mediation agreements*' [emphasis added].

The Tribunal noted this was particularly so 'in circumstances where neither party had any control over the outside parties'.

The builder was ordered to engage someone to carry out the rectification as listed in the QBSA inspector's report or, alternatively, pay damages as assessed by the Tribunal. ●

MILLER v OWNERS CORPORATION *[2003] NSWCTTT 27 (22 January 2003)*

Facts

The applicant was the owner of a townhouse who claimed that her roof leaked and had not been fixed by the respondent owners corporation as agreed. The applicant had first complained of the leak in her roof in November/December 2001. At that time, some repair work was carried out on the roof. The applicant claimed this work failed to fix the leak and attending damage.

The parties attended mediation on 23 September 2002. It was agreed that the respondent would engage a contractor to undertake a mutual inspection of roof problems with the applicant. The date for inspection was fixed and the contractor was required to fix the problems within a month. The contractor was also to inspect the stain on the garage floor and give advice on the rectification. Further, a suitable method of removal, satisfactory to all parties, would be undertaken. The applicant contended

that the repairs that were subsequently carried out failed to fix the problem. The respondent claimed that it had rectified the problem to the extent it could and did not believe further work was required.

Matters in issue

The applicant sought orders to give effect to the mediation agreement reached on 23 September 2002 pursuant to s 131 of the Act. The question before the adjudicator was whether the agreement was sufficiently certain.

Decision

The adjudicator found that it was not possible to make enforceable orders giving effect to the mediation agreement since *the terms of the agreement were too vague, as they did not outline with precision what was agreed to be done by the respondent*. The difficulty came from the fact the parties had agreed that a contractor would be engaged to:

> … inspect and fix the range of problems associated with the applicant's roof. The works to be carried out are not specified in the agreement …

The adjudicator was unable to determine the exact nature of the defect complained of or the appropriate remedial action required. The applicant also failed to discharge the onus of proof required. The applicant failed to prove her assertions on the balance of probabilities. ●

PUBLISHER: Oliver Freeman PUBLISHING EDITOR: Linda Barach PRODUCTION: Kylie Gillon SUBSCRIPTIONS: $495.00 per year including GST, handling and postage within Australia FREQUENCY: 10 issues per annum plus binder and index SYDNEY OFFICE: 8 Ridge Street North Sydney NSW 2060 Australia TELEPHONE: (02) 9929 2488 FACSIMILE: (02) 9929 2499 adr@richmondventures.com.au

ISSN 1440-4540 Print Cite as (2003) 6(5) ADR