HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND HEYDON JJ

PICO HOLDINGS, INC APPELLANT

AND

WAVE VISTAS PTY LTD (FORMERLY TURF CLUB AUSTRALIA PTY LTD) & ANOR RESPONDENTS

Pico Holdings, Inc v Wave Vistas Pty Ltd [2005] HCA 13
5 April 2005
B60/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of Queensland made on 23 May 2003 and in their place order:*

   (a) *the appeal to that Court is allowed;*

   (b) *set aside the orders of Helman J made on 26 March 2002 and in their place declare that the appellant has an interest in the fund comprising the proceeds of sale of Lot 2 in Registered Plan No 817782 in the County of Ward, Parish of Nerang being all the land contained in title reference 1866 0224 ("the Property") corresponding with the equitable mortgage in its favour created by the contract between the appellant, the first respondent and Dominion Capital Pty Ltd arising from the oral promises of 25 April 2001, the letter of 4 May 2001 and Addendum No 2 to the Promissory Note dated 22 December 2000.*

3. *Remit to the Court of Appeal of the Supreme Court of Queensland the question whether the appellant's equitable mortgage over the Property took priority over any interests in the Property held by the second respondent.*

4. *Reserve to the Supreme Court of Queensland the question of the costs of the trial.*

On appeal from the Supreme Court of Queensland

Representation:

B W Walker SC with M R Pearce for the appellant (instructed by Gilbert & Tobin)

G D Sheahan for the first respondent (instructed by Mallesons Stephen Jaques)

H B Fraser QC with B T Porter for the second respondent (instructed by Thynne & Macartney)

CATCHWORDS

Pico Holdings, Inc v Wave Vistas Pty Ltd

Contract – Parties to a contract – Sole director of first respondent company was principal actor on behalf of another company in securing a loan – Director, as borrower's actor, offered to use land owned by first respondent as further security to obtain a further extension of loan repayment – No reference was made to the first respondent, or to its ownership of the land, or to the fact that the borrower's actor was the first respondent's sole director – Lender agreed to extend the repayment date – Whether first respondent was a party to the agreement – Whether a reasonable person in position of lender could have understood that the first respondent was making an offer to provide security – Whether borrower's actor was in fact exercising his authority to offer the land as security – Whether the lender supplied consideration for the first respondent's promise.

Corporations Law, ss 128(1), 128(4), 129(4), 180 and 181.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND HEYDON JJ. This appeal from the Queensland Court of Appeal should be allowed. The principal relief to which the appellant, Pico Holdings, Inc ("the Lender") is entitled is a declaration that it has an interest in the fund comprising the proceeds of sale of what is identified in these reasons as the "Turf Club Land". This interest corresponds to an equitable mortgage of the Turf Club Land created in favour of the Lender in 2001.

2 The Lender's written submissions suggested that the outcome of the appeal would be determined by the correction of errors in legal principle. However, this appears not to be so. Rather, the differences between the parties turn on questions of inferences from, and characterisation of, the following uncontroversial circumstances.

The factual background

3 *The First Promissory Note of 8 September 2000.* The Lender was a Californian corporation. On 8 September 2000, in circumstances of great urgency, the Lender made a loan of $US1 million to Dominion Capital Pty Ltd ("the Borrower"), a company registered in Victoria. The loan was to bear interest at eight percent per annum. It was said to be repayable on 8 September 2001. The terms were recorded in a Non-Negotiable Secured Promissory Note ("the First Promissory Note"). On the face of this Note, the Lender was given security over 350,000 common shares in "Dominion Wineries"[1]: an original share certificate was to be delivered to the Lender. It was never delivered, and the loan was never repaid.

4 *The Second Promissory Note of 22 December 2000.* On 22 December 2000, the Lender made a loan ("the Loan") of $US1.2 million to the Borrower. Again the circumstances were very urgent. The Loan was to bear interest at 12 percent per annum. The terms of the Loan were recorded in a Non-Negotiable Secured Promissory Note ("the Second Promissory Note"). The Loan was to be secured by "Collateral" – share certificates of 400,000 unencumbered common shares in "Dominion Wineries Ltd" were to be delivered to the "Maker", ie to the Borrower[2]. On Default, the Lender was "entitled to exercise upon and to own the

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1 It is possible that this was a mistake for "Dominion Wines Ltd".

2 In proceedings in the Supreme Court of Victoria which were heard and decided after the decision of the Queensland Court of Appeal in the present proceedings, Mandie J found that the relevant language was mistaken, held that Dominion

(Footnote continues on next page)

[Lender's] interest in the equity of Dominion Wineries". If, as the Second Promissory Note suggested on its face, the Lender was not entitled to possession of the share certificates, the "Collateral" was a rather weak form of security, even though the Second Promissory Note contained a representation that the share certificates were not encumbered and that there were no obligations or commitments on them which were outstanding, and even though it was agreed that a "Default" would be deemed to have occurred if the Borrower assigned the Collateral for the benefit of creditors. The principal and interest were repayable about a fortnight later on 5 January 2001.

5 The principal actor on behalf of the Lender was Mr Hart, who was resident in California. The principal actor on behalf of the Borrower was Peter David Voss, who was resident in Australia. He signed the Second Promissory Note on behalf of the Borrower, giving as his title "Chairman and C.E.O.".

6 *The first extension of the repayment date.* "In or about early/mid-January 2001", according to Mr Hart's evidence, the Lender extended the repayment date from 5 January 2001 to 30 April 2001, although Mr Hart did not tell Mr Voss this. Pursuant to Mr Hart's instructions, an officer of the Lender, Mr Mosier, executed Addendum No 1 to the Second Promissory Note recording the extension of the repayment date and dated it 4 January 2001.

7 *The Borrower's unsatisfactory performance.* By the time of a crucial telephone conversation between Mr Hart and Mr Voss, which the former fixed as taking place "[i]n or about the end of April/early May 2001", and which the trial judge found to have taken place on 25 April 2001, there is no evidence that either the Borrower or the Lender had obtained delivery of the share certificates for 400,000 unencumbered shares in Dominion Wineries Ltd or Dominion Wines Ltd. Although the Second Promissory Note on its face did not give the Lender any right to possession of the share certificates, Mr Voss promised to send them in a conversation in early February 2001, and went so far as to say: "The certificates are in the mail". They did not arrive. However, Mr Voss told Mr Hart in March 2001 that a firm of Manly solicitors (Stewart Green Mijovich)

Wines Ltd share certificates (not "Dominion Wineries Ltd" as specified on the face of the Second Promissory Note) were to be delivered and assumed that they were to be delivered to the Lender: *Pico Holdings Inc v Voss* [2004] VSC 263 at [105]-[112]. He reached these conclusions on evidence which was apparently more extensive than that which is before this Court. For the purposes of this appeal it does not matter whether the language is mistaken.

evidently acting for the Borrower held a share certificate, issued by a company described as "Dominion Wines Ltd", as security. The Lender never received any share certificates, despite numerous requests. Nor did the Borrower repay the Loan. Mr Hart made many complaints about the failure to repay the Loan; in each case Mr Voss promised that the Loan would be repaid and claimed that the delay in repayment was caused by "administrative problems" which would be remedied shortly.

8 *The 25 April 2001 conversation.* Mr Hart described the crucial conversation of 25 April 2001 in two ways in his evidence. The first description was:

> "In or about the end of April/early May 2001, I had a telephone conversation with Mr Voss in which he requested a further extension for repayment of the Loan. I told Mr Voss that the applicant required further security if the Loan was to be extended. Mr Voss then offered to me what he described as the Turf Club property at the Gold Coast, Queensland, the property the subject of these proceedings (the Turf Club Property). In reliance on his representation to me that the Turf Club property was worth at least double the value of the US$1.2 million Loan, I agreed with Mr Voss, relevantly, that:
>
> (a) the Turf Club Property was acceptable further security for the Loan repayment and was to be provided to the applicant as further security for the Loan;
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> (b) that in due course the title deeds to the Turf Club Property and a recent valuation would be provided to the applicant; and
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> (c) the applicant would extend the Loan repayment date from 30 April 2001 to 31 May 2001."

9 The second description immediately succeeded the first:

> "During that telephone conversation words to the following effect were spoken:
>
> Hart: 'We have got a continuing problem with our auditors and the US$1.2 Million Loan and the collateral. We are going to have to write it off unless we can demonstrate the adequacy of the collateral to our auditors.'

> Voss: 'Why don't I give you my Turf Club[3] property at the Gold Coast. It's unencumbered. I will give you a recent valuation report. It's worth at least double the value of the Loan. It will be easier for the auditors to work out the value of the property than the winery. I will get the money to you shortly. There have been all sorts of administrative problems. Don't worry. I will definitely get the money to you. If you can wait a little longer until the admin issues are cleared up.'
>
> Hart: 'In addition to the property collateral Dominion Capital is going to have to give Pico additional compensation if it extends the due date for the US$1.2 Million Loan. We want the North American and Mexican BioModule waste water treatment technology marketing rights for our water company Vidler Water.'
>
> Voss: 'Okay.'
>
> Hart: 'I'll need the title deeds to the property and a recent valuation report on the property for our auditors.'
>
> Voss: 'Okay.'"

10 There was no objection to these descriptions of the conversation. Although plainly at least the last sentence, and perhaps more, of the first description would have been vulnerable to an objection, it was admitted into evidence and remains in evidence. It is convenient to call the first description the "objectionable material", and the second description the "unobjectionable material".

11 *The 4 May 2001 letter.* On or about 4 May 2001, Mr Hart received a letter on the letterhead of the Borrower from Mr Voss. It read:

> "This letter is to confirm that as consideration for PICO Holdings Inc agreeing to extend the maturity date for the US$1.2 Million loan to May 31st, 2001, I will provide additional substitute collateral. The collateral is

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3 The second respondent criticised the use of initial capitals on the ground that they cannot have corresponded with anything actually said. Mr Voss, who did not disagree with the terms of the conversations as recorded by Mr Hart and who gave no instructions to counsel for the first respondent to cross-examine Mr Hart to suggest error, recalled himself as having "suggested the Turf Club property" as security.

> the deed for property described as Lot 2, Registered Plan 817782, County of Ward – Parish of Nerang, Local Government – Gold Coast (as described in Certificate of Title attached) with a valuation of $3.8 to $4.1 Million. This collateral is in substitute of [sic] previous collateral provided which will increase your security to effectively provide you with a loan value ratio of approximately 50%.
>
> My solicitors [scil Stewart Green Mijovich of Manly] will immediately provide a letter confirming that the deed is held in trust for the benefit of PICO Holdings Inc as collateral. In addition, a copy of the most recent valuation report will be forwarded.
>
> Furthermore, the draft Agreement granting Vidler Water Company the exclusive marketing rights to the BioModule Waste Water Treatment Technology for the US and Mexico is complete and will be sent shortly for your review."

12 Below Mr Voss's signature and typed name appeared the words "CHAIRMAN & MANAGING DIRECTOR". The letter enclosed a photocopy of a certificate of title revealing that land with the title details set out in the letter was owned by a company called Turf Club Australia Pty Ltd. That company is the first respondent (its name has since been changed to Wave Vistas Pty Ltd). That land was the Turf Club Land.

13 On receipt of the 4 May 2001 letter, Mr Hart instructed Mr Mosier to execute Addendum No 2 to the Second Promissory Note. This he did. Addendum No 2 deleted 30 April 2001 as the repayment date and inserted 31 May 2001. Addendum No 2 was dated 25 April 2001.

14 It is convenient to note three aspects of the letter of 4 May 2001. First, it illustrates Mr Voss's Panglossian view of the world. He spoke of "additional substitute collateral" and "previous collateral provided"; it would have been more accurate to speak of collateral being provided, not in addition to, but in lieu of, collateral which had been promised on 22 December 2000, but had not yet been provided. Secondly, it may be doubted whether Mr Hart would have instructed Mr Mosier to execute Addendum No 2 had Mr Voss told him that although he had said on 25 April 2001 that the Turf Club Land was unencumbered and although the photocopy certificate of title sent on 4 May 2001 did not reveal it to be encumbered, he had offered a first registered mortgage over the Turf Club Land to the second respondent on 29 and 30 March 2001 as part of a solution to grave financial difficulties from which he was suffering, and the Borrower had written to the second respondent on 30 April 2001 alleging that an offer had been

made to buy the Turf Club Land for $3-3.1 million and that he was expecting contracts to be exchanged within two weeks. Thirdly, the representation of fact by Mr Voss that "the deed is held in trust for the benefit of [the Lender] as collateral" was not true. Mr Voss gave evidence that the certificate of title was in fact in the possession of a firm of solicitors named Wockner Partners of the Gold Coast (not Stewart Green Mijovich of Manly) until it came into the possession of the second respondent in July 2001. In truth, Wockner Partners had a possessory lien over the certificate of title for unpaid fees of $15,865.88. They did not release it until the second respondent paid that sum on 11 December 2001.

15 *From 4 May to 30 August 2001.* After 4 May 2001, on several occasions Mr Hart spoke to Mr Voss on the telephone and requested the certificate of title promised on 25 April 2001. On each occasion Mr Voss said it was on its way. The extended repayment date of 31 May 2001 came and went without repayment. Solicitors acting for the Lender requested confirmation that the Borrower's solicitors held the certificate of title in trust and requested advice as to the terms on which the certificate of title could be released by letter of 14 June 2001. Those solicitors followed that up by telephone messages. On 21 June 2001 they requested the certificate of title as a matter of urgency. On Friday 29 June 2001 they required from the Borrower's solicitors, by the close of business on the following Monday, 2 July 2001, confirmation that the Borrower's solicitors held the certificate of title in trust and an undertaking not to release it to anyone else. They also required, by the close of business on the following Tuesday, 3 July 2001, delivery of the certificate of title together with a recent valuation of the property. The letter concluded with a statement that a failure to satisfy the Lender's demands would result in a breach of the Borrower's obligations and cause the Lender to suffer significant damage. On 29 June 2001, the Lender's solicitors also sent a letter to the Borrower alleging that the failure to repay the Loan on 31 May 2001 was a breach of the Second Promissory Note, as amended by Addendum No 2, and that pursuant to cll 3(a) and 5 of the Second Promissory Note, the Borrower had two days to remedy the breach and repay the principal and interest. The letter demanded payment by 3 July 2001, and conveyed a threat by the Lender to exercise "its right of ownership" over the Turf Club Land and to apply to the court for relevant orders. The demands were not met. Not surprisingly, neither the confirmation nor the certificate of title were ever supplied.

16 On 9 July 2001, the Lender instituted proceedings in the Supreme Court of Victoria against the Borrower for recovery of the Loan. On 30 August 2001, it obtained judgment.

The present proceedings

17 The Lender then instituted the present proceedings in the Supreme Court of Queensland against the first respondent. Initially it sought orders for the sale of the Turf Club Land owned by the first respondent. In the course of the proceedings, during Mr Voss's cross-examination, it came to light that on 21 May 2001 the first respondent had granted a mortgage to National Australia Bank Ltd. Accordingly, it was joined as second respondent. The Lender sought declarations that it had an equitable charge over the Turf Club Land, and that that charge had priority over the second respondent's mortgage.

18 Helman J held that on 25 April 2001 the Lender and the Borrower made an oral agreement, the terms of which were recorded in the 4 May 2001 letter. However, he held that the first respondent was not a party to that agreement. He found that even if it had been, the agreement would not have been enforceable because of non-compliance with ss 11(1)(a)[4] and 59 of the *Property Law Act* 1974 (Q)[5]. Hence the Lender had no equitable charge over the Turf Club Land, and the priorities dispute between the Lender and the second respondent did not arise[6]. The Court of Appeal of Queensland (McMurdo P, Jerrard JA and Mullins J) dismissed an appeal[7].

The Lender's pleaded case

19 In the Amended Statement of Claim and at the trial the Lender put two cases in the alternative.

20 The first alleged a bipartite transaction between the Lender and the first respondent pursuant to which the first respondent granted an equitable mortgage or charge over the Turf Club Land. The grant was said to have taken place on or

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4 The respondents do not now press s 11(1)(a) as a bar to the Lender's success. This provides for the creation or disposition of an interest in land by writing signed by the person creating or conveying the same (or the agent of that person lawfully authorised in writing) or by a will or by the operation of law.

5 The text of s 59 is set out later in these reasons under the heading "Written memorandum or note".

6 *Pico Holdings Inc v Turf Club Australia Pty Ltd* [2002] QSC 86.

7 *Pico Holdings Inc v Wave Vistas Pty Ltd* [2003] QCA 204.

about 25 April 2001; so far as it was oral it was "constituted" by the 25 April 2001 telephone conversation, and so far as it was written it was "constituted" by Addendum No 2 dated 25 April 2001 and the 4 May 2001 letter. Mr Voss was alleged to have been acting, both in the conversation and in signing the letter, on behalf of the first respondent.

21 Alternatively, the Lender claimed that on or about 25 April 2001, the Lender, the first respondent and the Borrower agreed that the first respondent would cause the "title deeds" to the Turf Club Land to be delivered to the Lender. The agreement was said to have been "constituted" by the 25 April 2001 conversation, Addendum No 2 and the 4 May 2001 letter.

22 These two claims raise several preliminary issues.

Equitable mortgage or equitable charge?

23 The first preliminary issue is whether, if the Lender had made out its case in other respects, it would have been entitled to an equitable mortgage or an equitable charge. The Amended Originating Application sought a declaration of equitable charge; the Amended Statement of Claim spoke of the first respondent having "granted an equitable mortgage or charge". The parties did not engage in debate about this, perhaps because what the Lender wanted when it began the proceedings was an order permitting it to exercise a power of sale, and a power of sale would exist in either case. Before the trial concluded on 7 March 2002 and judgment was given on 26 March 2002, the parties agreed that a contract to sell the Turf Club Land which had been entered by the first respondent on 11 February 2002 could proceed, and on 21 February 2002 the first respondent undertook that the proceeds would be held in its solicitor's trust account. In the circumstances it is convenient hereafter to speak of the interest allegedly created as an "equitable mortgage".

What kind of equitable mortgage?

24 The next issue is what kind of equitable mortgage the Lender was claiming. An equitable mortgage of the first respondent's Turf Club Land, of which it appeared on 4 May 2001 to be absolute owner, in favour of the Lender could have been created by the first respondent entering a specifically enforceable agreement to grant a legal mortgage over it. That appears to correspond with the first way in which the Amended Statement of Claim put the Lender's claim. It must fail. Neither the facts pleaded nor those proved established that on or about 25 April 2001 an equitable mortgage in that sense had been created. The trial judge and the Court of Appeal said nothing

supporting the first way the claim was put, and the Lender did not attempt to revive it in this Court.

25 The second way in which the Amended Statement of Claim put the Lender's claim is plainly not an allegation of an equitable mortgage created by actual deposit of title deeds. Rather it alleges an equitable mortgage created by entry into a specifically enforceable contract to deposit the title deeds with the Lender. That allegation is consistent with the demands made by Mr Hart and his solicitors from 5 May 2001 until the Victorian proceedings were instituted for delivery of the certificate of title. Assuming that the relevant promisor was the first respondent and not the Borrower, the evidence supported that allegation in several ways. On 25 April 2001 Mr Voss told Mr Hart that the "title deeds" to the Turf Club Land would be provided. According to the 4 May 2001 letter, the Turf Club Land was to be provided "in substitute of previous collateral": that is, as replacement for the weak security over the Dominion Wineries Ltd share certificates which would have been created by the Second Promissory Note had those share certificates been delivered to the Borrower. The terms of Addendum No 2 spoke of the Borrower's obligations being "secured by a deed for real property", and of the Lender having "a first lien on the real property pledged as collateral for the Note".

Oral agreement, or partly oral and partly written?

26 A third issue arises from the way in which the second claim is pleaded in the Amended Statement of Claim.

27 It is not entirely clear whether it is alleged that the 4 May 2001 letter is an element of a partly oral and partly written contract, or whether it is alleged that it is evidence of an entirely oral contract made on 25 April 2001.

28 The respondents and the trial judge treated the pleaded case as involving an allegation of the former kind. The trial judge found proved an allegation of the latter kind, but with the wrong parties from the Lender's point of view:

> "There was … an agreement reached in late April 2001 between Mr Hart acting on behalf of the [Lender] and Mr Voss acting on behalf of [the Borrower] as recorded in the facsimile transmission of 4 May 2001 and the second addendum to the promissory note. The first respondent was, however, not a party to the agreement."

29 In this Court counsel for the Lender's primary position was to support the trial judge's conclusion of an oral agreement, but with the first respondent as a

party. In the alternative he adopted a secondary position of contending for the pleaded agreement – one partly oral and partly in writing. Nothing prevents the Lender from reverting to its stance in the Amended Statement of Claim. In general, where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards. But here the point was taken below, and in any event the respondents did not attempt to identify any evidence capable of being given there which by any possibility could have prevented the point from succeeding.

Tripartite or bipartite?

30 The events of late April to early May 2001 could have supported a conclusion of an oral bipartite agreement on 25 April 2001, an oral tripartite agreement on 25 April 2001, a partly oral and partly written bipartite agreement made between 25 April 2001 and 4 May 2001, or a partly oral and partly written tripartite agreement made between 25 April 2001 and 4 May 2001. It is not necessary to consider all the details of these and other permutations, because below it will be concluded that the case which the trial judge understood the Lender to be advancing is made out – a tripartite agreement to which the Lender, the Borrower and the first respondent were parties and by which Mr Voss, on behalf of the first respondent, contracted with the Lender to hand over the first respondent's certificate of title in consideration of the Lender giving forbearance to the Borrower.

The respondents' conduct of the trial

31 *The defences relied on.* The second respondent was joined in the proceedings after the oral evidence of Mr Hart and Mr Voss was completed. It did not file any defence. It did not seek the recall of Mr Hart or Mr Voss. Thus the conduct of the trial so far as it was concerned with the dealings between Mr Hart and Mr Voss was entirely in the hands of the first respondent.

32 The first respondent's defence advances numerous answers to the Lender's contention that the first respondent had promised security over the Turf Club Land.

33 Putting on one side the answers which have been unquestionably abandoned, the defences pressed at trial and still distinctly pressed in this Court are that no reasonable person in Mr Hart's position could have thought that the first respondent was entering the agreement; that Mr Voss, although authorised to enter the agreement on behalf of the first respondent, was not in fact exercising

that authority at the material time; that there was no consideration for any promise by the first respondent to supply the certificate of title; that s 59 of the *Property Law Act* 1974 (Q) had not been complied with; and that the Lender could not take advantage of the doctrine of part performance.

34 *The respondents' acceptance of Mr Hart's evidence.* The first respondent did not object to or seek to contest Mr Hart's version of the 25 April 2001 conversation, whether through Mr Voss's evidence or otherwise. Indeed Mr Voss's evidence indicated agreement with some of the key points that Mr Hart made.

35 Mr Voss was in difficult financial and forensic circumstances. His testimony might be expected to contain, and to some extent did contain, surprises for all parties. The 4 May 2001 letter afforded some confirmation of Mr Hart's evidence about the 25 April 2001 conversation. Hence it is understandable that counsel for the first respondent did not choose to attack Mr Hart's account of the 25 April 2001 conversation, and counsel for the second respondent no doubt lacked instructions which would have permitted him to have Mr Hart recalled with a view to going beyond the cross-examination conducted by counsel for the first respondent. It is as if the parties chose to conduct the trial, at least in this respect, on agreed facts, the relevant facts being recorded in Mr Hart's affidavit material, both unobjectionable and objectionable. The respondents proceeded on the basis that those facts did not point to a contract. That strategy succeeded below. It is not now open to the respondents to take up a different strategy and concentrate only on the unobjectionable material and ignore the objectionable material. It is not the case that had objection been taken and upheld only the unobjectionable material would have remained: it would have been open to the Lender to seek leave to call further evidence of the conversation from Mr Hart orally in chief. To ignore the objectionable material now is to alter the blueprint of the case developed by the parties at the trial.

36 Hence the key finding of the trial judge – that the first respondent was not party to any agreement – is not credit-based, for there was no assault on Mr Hart's credit and no contrary version of Mr Voss to be preferred on demeanour-based grounds. Rather, as the trial judge said, the conclusion he reached was based primarily on the letterhead of the 4 May 2001 letter and the description in it of Mr Voss's capacity. For those reasons, had the trial judge, instead of concluding that the agreement was wholly oral, concluded that an agreement was reached in late April and early May 2001 which was partly oral and partly in writing, he would still have found that the first respondent was not a party. Since his reasoning was not credit-based, it is open to this Court to

consider for itself whether the Court of Appeal's refusal to depart from the trial judge's conclusion was sound.

37 *The "incomplete negotiations" case.* The cross-examination of Mr Hart was directed to an argument that the negotiations of Mr Voss and Mr Hart had not progressed sufficiently far to arrive at a binding contract, and that there were unfulfilled preconditions to the existence of contractual liability. The first respondent appeared to be urging that no contract could be made until provision of a valuation establishing that the Turf Club Land was worth at least $US2.4 million; that the transaction was not contractual in character, but was merely designed to generate documentation which would satisfy the Lender's auditors; and that well after 25 April 2001 and 4 May 2001, the Lender appreciated that no binding agreement could be made until the first respondent had provided its written consent and various draft documents were settled.

38 The trial judge impliedly rejected the first respondent's argument that the negotiations which might have led to a contract were incomplete. The argument was not repeated before the Court of Appeal. Neither respondent raised it in this Court by notice of contention or by written submissions provided in advance of the hearing.

The belated revival of the "incomplete negotiations" case

39 However, during the oral hearing of the appeal, each respondent did fleetingly return to the "incomplete negotiations" argument. So far as it was put, it was unconvincing.

40 *No agreement to extend time?* For example, the second respondent submitted that the unobjectionable material did not establish any agreement to extend time. That overlooks the references to waiting "a little longer" and it overlooks the agreement on the extension to 31 May 2001 recorded in the objectionable material.

41 *No agreement by Mr Hart on 25 April 2001 to anything?* Another example is the suggestion that the conversation of 25 April 2001 did not show Mr Hart to be agreeing to anything at all. The suggestion is unsound. First, the unobjectionable material can be read as setting out a conversation in which Mr Hart raised a problem, Mr Voss made an offer to solve it, and Mr Hart made two counter-offers, to each of which Mr Voss assented. Secondly, the objectionable material records an agreement by Mr Hart, and Mr Hart's affidavit did not state that the conversation recorded in the unobjectionable material exhausted the content of the agreement stated in the objectionable material.

42 *Waste water treatment technology marketing rights agreement condition precedent to contract?* Another example is the claim that no contract could arise until the terms of the draft waste water treatment technology marketing rights agreement, referred to at the end of the 4 May 2001 letter, were settled. This point cannot be relied on now, since it was not pleaded.

43 *Disconformity between conversation and letter?* Finally, the second respondent said that there was disconformity between the 25 April 2001 conversation and the 4 May 2001 letter. The letter said that Mr Voss's solicitors would "immediately provide a letter confirming that the deed is held in trust for the benefit of [the Lender] as collateral." It was submitted that the conversation did not refer to that. However, there is no inconsistency. In the 25 April 2001 conversation it was agreed that "in due course" the certificate of title would be provided. A promise to provide the letter confirming that the certificate of title was held in trust before the certificate of title was provided is not inconsistent with the promise to give delivery.

44 In general, the theory that no agreement had been reached by 4 May 2001 encounters a fundamental difficulty: the evidentiary material before this Court does not report any asseveration by Mr Voss of that theory either in that letter or in any later communication before the commencement of the present proceedings.

45 Further, the transaction is capable of analysis as one in which the Lender promised forbearance in return for two promises – a promise by the first respondent to provide a certificate of title to the Turf Club Land and a promise by the Borrower to supply the waste water treatment technology marketing rights. The second of those promises may well have been, not a condition precedent to the existence of a contract, but only at most a condition subsequent, which if breached was actionable in damages and would have entitled the Lender to terminate. The Lender performed its promise by granting forbearance until 31 May 2001, even though none of the promises made to the Lender were performed. A construction of the parties' dealings which entitled the Lender to waive whatever its rights were under the second promise, and to seek specific performance only of the first – to provide the certificate of title – is possible and plausible. But these questions need not be examined further. It might have been open to the respondents to re-agitate their arguments based on incompleteness and uncertainties in the negotiations, but the fact is that in substance they did not do so. The respondents touched on the arguments, but did not press them. This makes it unnecessary to deal with them.

Who was to provide the security?

46 *The key submission.* The key submission of the respondents – some refinements will be noted below – was that when on 25 April 2001 Mr Voss proposed the supply of security, no reasonable person in Mr Hart's position could have understood that an offer by the first respondent to provide security was being made. The Borrower wanted an extension of time to repay the Loan, and the Lender was prepared to give it. Mr Hart and Mr Voss made no reference to the first respondent, or to its ownership of the Turf Club Land, or to the fact that Mr Voss was its sole director. The position was not altered by Addendum No 2, which did not mention anyone except the Lender and the Borrower. Nor was the position altered by the 4 May 2001 letter: it was on the letterhead of the Borrower, and the reference to Mr Voss as Chairman and Managing Director was to be understood as a reference to that office in the Borrower.

47 In short, the respondents submitted that the only relevant promise was a promise by the Borrower to procure the grant of security over the Turf Club Land; there was no promise by the first respondent to grant it.

48 The respondents also advanced a related contention: that it has not been shown either that the first respondent intended to be bound, or that Mr Voss was exercising his authority to act on its behalf. In his evidence Mr Voss conceded very early in cross-examination that he was the sole director of the first respondent and had authority to offer the Turf Club Land as security. In this Court the respondents did not dispute that evidence and did not dispute that Mr Voss was the effective controller of the first respondent. Rather they submitted that, although Mr Voss had authority to offer the Turf Club Land as security, he was not in fact exercising that authority, and hence there was insufficient evidence of an intention on the part of the first respondent to be bound. A further submission was that even if Mr Voss had actual authority, there was no "outward manifestation" of an exercise of it.

49 *The pre 25 April 2001 background.* In evaluating these arguments the following background matters must be borne in mind. Mr Hart had known Mr Voss since June or July 1998. Mr Hart and the Lender had had many dealings with Mr Voss from then until 2001. Mr Hart knew before 25 April 2001 that in Mr Voss's commercial empire there were many entities for which he claimed to have power to act, as the second respondent conceded. Mr Hart gave evidence that "Mr Voss was in the habit of referring to the number of entities he was involved with as his companies." He knew of the Borrower (Dominion Capital Pty Ltd) and Dominion Wineries Ltd, both of whom were referred to in the Second Promissory Note. He knew of Dominion Wines Ltd, which

according to Mr Hart was referred to in the negotiations leading up to and following the making of the First Promissory Note, although the First Promissory Note refers to "Dominion Wineries". Mr Hart also knew of a company described in some parts of the Second Promissory Note as "Dominion [Winemakers]". Mr Hart knew of Dominion International Investments, Inc, a Canadian company. Mr Hart knew of a company Mr Voss called "Dominion Japan". According to Mr Hart, on 8 September 2000 the Lender sold some shares to Dominion Capital Japan, Inc, and Mr Hart described that company as "Mr Voss' nominated purchaser". At periods apparently before 25 April 2001, Mr Hart had observed on the Dominion International website references to "Dominion Wines" and "Dominion Estates". It may be that Mr Hart was confused about the company which he in his affidavits and his solicitors in their letters to Mr Voss persistently referred to as "Dominion Wines Ltd". It may be that it was actually called "Dominion Wineries Ltd". In oral evidence he referred to the company, the shares in which were to be the Collateral under the Second Promissory Note, as "Dominion Winery" and "winery". Another possibility is that the reference in the First and Second Promissory Notes to "Dominion Wineries Ltd" was a mistake for "Dominion Wines Ltd"[8]. The question of whether, and how far, Mr Hart was confused was not investigated in oral evidence. But, whether he was right or confused, his mental state was that of a man who perceived Mr Voss to act through numerous corporate vehicles.

50 There are instances of Mr Voss using the first person singular pronoun not only in relation to his proposals for the Borrower but also in relation to his proposals for companies other than the Borrower. When Mr Voss told Mr Hart that it would be easier for the auditors to work out the value of the "Turf Club property" than the "winery", he doubtless was referring by the last word to an asset of Dominion Wineries Ltd or Dominion Wines Ltd, and implying that the "Turf Club property" was owned by some other company. Hence when on 25 April 2001 Mr Voss used the first person singular pronoun in relation to the company providing the Turf Club Land, he was reasonably to be understood as speaking not of the Borrower but of another company.

51 *The effect of the 4 May 2001 letter.* But any doubts a reasonable person in Mr Hart's position might have had on 25 April 2001 about which company was the promisor would have been cleared up on receipt of the 4 May 2001 letter and its enclosure. When Mr Voss used the first person pronoun to promise substitute collateral on 25 April and 4 May 2001, he can only have been referring to

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8 See *Pico Holdings Inc v Voss* [2004] VSC 263, discussed in footnote 2.

himself, to the Borrower, or to the owner of the substitute collateral. No party contends that he was referring to himself. Was he referring to the Borrower? That was a corporation which seemed to be in an acute financial crisis, which had not been able to repay an urgently requested and very short-term loan advanced under the Second Promissory Note and which had not complied with its duties in relation to the Collateral created by both Promissory Notes. The known difficulties and non-performance of the Borrower would prevent any reasonable person from thinking that the Borrower owned unencumbered land worth twice as much as the $US1.2 million debt under the Second Promissory Note. That left as the promisor the owner of the Turf Club Land. Mr Voss's language suggested that he controlled the corporation which owned the land. A reasonable person in the position of Mr Hart would have appreciated on 4 May 2001 that the Borrower did not own the land and that the first respondent, whose name appeared on the copy of the certificate of title attached to the letter of 4 May, did.

52 It is contrary to reason to conclude that Mr Voss's promise to supply a certificate of title over the Turf Club Land was a promise by the Borrower, which did not own that land, rather than a promise by the first respondent, which did. Hence a reasonable person in Mr Hart's position would have inferred that Mr Voss was purporting to act on behalf of the first respondent. The contrary inference from the Borrower's letterhead on the 4 May 2001 letter relied on by the respondents is nullified by the disclosure of the true position in the copy of the certificate of title which the letter enclosed. It is common ground that Mr Voss in fact had the authority to commit the first respondent to that promise. There is nothing more that he could have done to suggest that he was acting on that authority. There was no reason for Mr Voss to take the unusual course of making any "outward manifestation" of the authority he possessed or of its exercise beyond his conduct in purportedly exercising it by speaking as he did on 25 April 2001, saying what he said in the 4 May 2001 letter, and enclosing a copy of the certificate of title to the first respondent's land. The 4 May 2001 letter would have indicated to a reasonable person in Mr Hart's position that Mr Voss was an officer of the first respondent. That would have entitled him to assume that Mr Voss was properly performing his duties to the first respondent, given that he did not know or suspect that that assumption was incorrect: see

s 128(1) and (4) and s 129(4) of the Corporations Law[9]. Hence a reasonable person in Mr Hart's position would have concluded not only that Mr Voss had actual authority from the first respondent, as he did, but that he was exercising it.

53 *Mr Hart's failure to seek proof of the first respondent's consent and authority.* The first respondent submitted that if a reasonable person in the position of Mr Hart had appreciated that the first respondent was involved in providing its security, he would have done three things. He would have asked for proof of its consent and proof of authority from the company. He would have done what he did after 4 May 2001 – that is, demand a letter saying that the certificate of title was held by the solicitor in trust, and demand delivery of the certificate of title. And he would have done what he did on 13 July 2001 – that is, demand execution of a mortgage over the Turf Club Land.

54 This submission is flawed. First, even if (which, in view of his past dealings with Mr Voss, may be doubted) Mr Hart's conduct differed from what a reasonable person in his position would have done, that cannot affect the question whether a contract was arrived at. Secondly, since Mr Voss had actual authority to bind the first respondent, Mr Hart's failure to inquire was without significance: a truthful response to his inquiry would not have altered the

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9 The Corporations Law provided:

"**128**

(1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.

…

(4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

129

…

(4) A person may assume that the officers and agents of the company properly perform their duties to the company."

conclusion at which a reasonable man in his position would have arrived without inquiry. Thirdly, since a reasonable person in Mr Hart's position would have thought that the first respondent had promised to supply the certificate of title, the Lender's demands for the certificate of title to be provided did not establish a recognition by the Lender of some deficiency in the formation of the contract; rather they pointed to a belief that the contract had been validly formed, that it had been fully performed by the Lender, and that all that remained was for the obligations owed to the Lender to be performed. Fourthly, the Lender's demands for an executed mortgage on 13 July 2001 were made only after it had become apparent that the April-May agreement was not being performed and a new agreement was allegedly struck between Mr Hart and Mr Voss: they cast no light on what a reasonable person in Mr Hart's position believed had been agreed by 4 May 2001 or would have done in that state of belief.

55 *Mr Hart's personal reaction to the copy certificate of title.* The respondents relied on Mr Hart's evidence of his mental state on receiving the copy of the certificate of title enclosed with the 4 May 2001 letter. The evidence does not make it clear whether Mr Hart did not notice the name of the owner, or whether he did not infer that the owner was not the Borrower. But Mr Hart's personal reaction is immaterial. What matters is the reaction of a reasonable person in his position, and that person would have appreciated that the owner was not the Borrower.

56 *Later "admissions" of Lender.* The first respondent relied on the fact that in the Victorian Supreme Court proceedings the Lender and Mr Hart appeared to proceed on the basis that it was the duty of the Borrower to deliver the certificate of title, the recent valuation and the so-called "Water Treatment Exclusive Marketing Agreement". But that conduct is not inconsistent with the stand the Lender now takes, and it is not an admission which can stand against the view that a reasonable person in Mr Hart's position would have formed of the events of 25 April and 4 May 2001.

57 *Lack of benefit for first respondent.* Finally, an argument advanced by the second respondent was that Mr Voss could not have been exercising his authority as a director of the first respondent, because to grant security to the Lender over the first respondent's Turf Club Land in order to assist the Borrower to obtain forbearance conferred no benefit on the first respondent. According to the second respondent, a likelier explanation for what happened was that Mr Voss promised on behalf of the Borrower that the Borrower would provide the certificate of title, intending to fulfil that promise by making arrangements with, and beneficial to, the first respondent to enable him to cause the Borrower to

fulfil the promise. Attention was directed to the following passage in an affidavit of Mr Voss's, particularly the last sentence:

> "In those circumstances there was never a concluded agreement between [the Lender] and [the Borrower] regarding the Turf Club property. Moreover, there was never any agreement between [the first respondent] and any other entity that it would grant security over its assets in support of any other entities' debts. It was never proposed that [the first respondent] would get any benefit from the granting of any such security."

That passage was, it seems, not objected to, and Mr Voss was not cross-examined on it. Its probative value is very low: it appears at the end of an affidavit as a brief summary of Mr Voss's case, apparently generated by a lawyer. And it does not actually say that the first respondent got no benefit, merely that it was never proposed that it would. There was no more evidence that the offer by Mr Voss of the first respondent's land as security to the Lender was without benefit to the first respondent than there was that his offer of the first respondent's land as security to the second respondent was without benefit to the first respondent.

58 This argument of the second respondent should be rejected. The lack of benefit issue was not pleaded. Even if it had been pleaded, by reason of s 128(1) and s 129(4) of the Corporations Law Mr Hart was entitled to assume that Mr Voss was properly performing his duties to the first respondent, and hence was acting with care and diligence, in good faith and in the best interests of the first respondent, and for a proper purpose: see ss 180 and 181 of the Corporations Law. In consequence, s 128(1) debarred the first respondent from asserting that that assumption was incorrect. Further, to seek to infer from the lack of benefit to a particular company that Mr Voss was not intending to act on its behalf is wholly unconvincing: a man whose problems were as pressing and whose actions were as shifty as Mr Voss's were in 2000-2001 is very unlikely to have been guided by scruples of that kind. Even if he was, a promise by the Borrower to procure the first respondent to put up the Turf Club Land as security would raise the issue of benefit to the first respondent at a later stage, and would require it to be resolved by a process of internal dialogue in Mr Voss's brain between two corporations which he controlled. The difficulty of establishing a benefit to the first respondent was never advanced by Mr Voss after 4 May 2001 as a reason for not supplying the certificate of title. The complicated, indirect and unrealistic transaction for which the second respondent argues is much less likely than the simple transaction for which the Lender argues.

Consideration

59 In the courts below only Jerrard JA dealt with this question. He said that there was a "lack of any obvious consideration"[10]. He continued[11]:

> "The [Lender] contended that consideration was provided by its forbearance to sue [the Borrower] for the money lent, and that a request for that forbearance by [the first respondent], to be implied from the circumstances, was sufficient to bind [the first respondent]. As the first respondent submits, the problem with that argument is that there was no 'forbearance' promised or granted in the unusual circumstances of this case. Instead, the [Lender] had 'threatened' to write off the debt, not to enforce it; and it was Mr Voss who responded on [the Borrower's] behalf to that 'threat' with a request for an extension. No one bargained to obtain forbearance."

60 The first respondent supported this conclusion by contending that the first respondent did not request any extension of time or indulgence in favour of the Borrower: the only relevant request came from the Borrower.

61 This reasoning depends on three propositions. The first is that the Lender had threatened to write off the Loan, not to enforce it. The second proposition is that the Borrower, not the first respondent, met that threat with a request for an extension. The third proposition is that it is not sufficient that there be forbearance in fact: no forbearance was bargained for, and hence none was promised.

62 The first proposition, that the Lender had threatened to write off the Loan, not to enforce it, is only defensible by concentrating on the second sentence of what Mr Hart said in the unobjectionable material describing the 25 April 2001 conversation, and by ignoring much else. It ignores the repeated communications which Mr Hart had with Mr Voss from 6 January 2001 about the Borrower's failure to repay the Loan. It ignores the first two sentences of the objectionable material, according to which Mr Voss requested a further extension, and Mr Hart said that the Lender required further security if there was to be a further extension. And it ignores the Lender's strenuous attempts after

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10 *Pico Holdings Inc v Wave Vistas Pty Ltd* [2003] QCA 204 at [18].

11 *Pico Holdings Inc v Wave Vistas Pty Ltd* [2003] QCA 204 at [19].

4 May 2001 to recover the Loan, including the commencement of both the Victorian and the Queensland litigation. It defies belief that if the negotiations of 25 April 2001 and 4 May 2001 had not taken place, Mr Hart would meekly have written off the Loan without any attempt to obtain repayment. Read as a whole, the relevant evidence indicates an implied threat by the Lender communicated by Mr Hart to enforce the Loan and refuse forbearance unless further security was provided. This first proposition was also rejected by the first respondent, which, in another part of its submissions, accepted that the "purpose of the communications [on 25 April 2001] was to seek an extension of time in which to repay a debt."

63 The second proposition, that the Borrower, not the first respondent, requested the extension, is immaterial. It does not matter who requested the extension. The only real question is that posed by the third proposition: whether forbearance was promised.

64 The third proposition, that forbearance was neither bargained for nor promised, both depends on a misreading of the unobjectionable material, and excludes from consideration the objectionable material. The unobjectionable material supports a conclusion that the Lender impliedly promised to forbear – to "wait a little longer" – if the title deeds, a valuation report and the waste water treatment technology marketing rights were supplied. The objectionable material proves a promise by the Lender to extend the repayment date to 31 May 2001.

65 The Lender's contention that it supplied consideration for the first respondent's promise is sound.

66 The first respondent advanced one other consideration argument – that the Lender conferred no benefit on the first respondent, and that the first respondent "was not a party to any consideration." This argument is fallacious. Consideration must move from the promisee (the Lender); it need not move to the promisor (the first respondent).

Written memorandum or note

67 Section 59 of the *Property Law Act* 1974 (Q) provided:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note of the contract, is in writing, and signed by the party to be charged, or by some person by the party lawfully authorised."

68 A binding promise for the delivery of a certificate of title by way of security is a contract to create an equitable mortgage and, if specifically enforceable, creates an interest in the relevant land. The respondents did not challenge these propositions. The promise to deliver the certificate of title in this case, being backed by consideration, which has been fully performed, and being clear, is specifically enforceable.

69 The letter of 4 May 2001 is a note of that contract. It identifies the relevant promise of the first respondent, namely to provide the certificate of title: "I will provide additional substitute collateral. The collateral is the deed for" the Turf Club Land. It identifies the other promises of the first respondent. It identifies the consideration moving from the promisee (the Lender) for the creation of the equitable mortgage (namely, the extension of the maturity date of the Loan to 31 May 2001). The only point relied upon by the respondents was that the letter was signed by Mr Voss in his capacity as an officer of the Borrower, not the first respondent. That point fails: the first respondent is the party which executed the letter for the reasons given above in concluding that the first respondent was party to the contract[12].

Part performance

70 Since s 59 is satisfied, it is unnecessary to consider whether there were sufficient acts of part performance.

Orders

71 The matter must be remitted to the Court of Appeal of Queensland for determination of the outstanding question of priorities, which did not arise on the reasoning of the courts below and was not dealt with by them. It will be for the Court of Appeal to determine whether the proceedings should continue there or be remitted to a single judge. The appellant should have an order for its costs to date in the Court of Appeal and in this Court. Since the appellant may yet fail in the proceedings as a whole, the costs of the trial should be reserved to the Supreme Court of Queensland.

72 The claims for relief in the appellant's Amended Originating Application (save for that relating to priorities) have been overtaken by the sale of the Turf

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12 At [44]-[58].

Club Land and the trust over the proceeds of sale, and more appropriate orders should be made as follows:

1. The appeal is allowed with costs.

2. The orders made by the Court of Appeal of Queensland on 23 May 2003 are set aside and in lieu thereof order:

   (a) appeal allowed with costs;

   (b) the order and judgment of Helman J given on 26 March 2002 are set aside and in lieu thereof declare that the appellant has an interest in the fund comprising the proceeds of sale of Lot 2 in Registered Plan No 817782 in the County of Ward, Parish of Nerang being all the land contained in title reference 1866 0224 ("the Property") corresponding with the equitable mortgage in its favour created by the contract between the appellant, the first respondent and Dominion Capital Pty Ltd arising from the oral promises of 25 April 2001, the letter of 4 May 2001 and Addendum No 2 to the Promissory Note dated 22 December 2000.

3. The Court remits to the Court of Appeal of Queensland the question whether the appellant's equitable mortgage over the Property took priority over any interests in the Property held by the second respondent.

4. The Court reserves to the Supreme Court of Queensland the costs of the trial.