



Supreme Court
New South Wales

Case Name: Hua Cheng International Holdings Group Pty Ltd
(Receivers & Managers Appointed) (In Liquidation) v
James Hui Xiao Xu

Medium Neutral Citation: [2020] NSWSC 922

Hearing Date(s): 20 July 2020

Date of Orders: 20 July 2020

Decision Date: 20 July 2020

Jurisdiction: Equity - Commercial List

Before: Henry J

Decision: Judgment for the first plaintiff. See paragraph [24].

Catchwords: LAND LAW – application for mesne profits – where
defendant failed to provide possession pursuant to a
notice of termination of a contract for sale – where
defendant remained in possession for over two years –
no issue of principle – mesne profits and interest
ordered

Legislation Cited: Civil Procedure Act 2005 (NSW), s 100
Uniform Civil Procedure Rules (NSW), r 42.1

Cases Cited: Lamru Pty Ltd v Kation Pty Ltd (1998) 44 NSWLR 432

Texts Cited: Nil

Category: Principal judgment

Parties: Hua Cheng International Holdings Group Pty Ltd
(Receivers & Managers Appointed) (in Liquidation)
(First Plaintiff)
Super Vision Resources Ltd (BVI Registered No
1810534) (Second Plaintiff)

James Hui Xiao Xu (First Defendant)
Thomas Xi Yao Xu (Second Defendant)
Caiwei Xu (Third Defendant)
Qiao Wang (Fourth Defendant)
Samuel Jiang (Fifth Defendant)

Representation: Counsel:
Mr J Knackstedt (First and Second Plaintiffs)
No appearance for the First, Second, Third, Fourth or
Fifth Defendants

Solicitors:
Ashurst Australia (First and Second Plaintiffs)

File Number(s): 2018/382299

Publication Restriction: Nil

JUDGMENT – EX TEMPORE (REVISED)

1 In this matter, the first plaintiff, Hua Cheng International Holdings Group Pty Ltd (Receivers & Managers Appointed) (in Liquidation), seeks judgment against the third defendant, Caiwei Xu, for damages by way of mesne profits in relation to the third defendant's possession of an apartment in Woodville St, Hurstville, being Lot 10 in Strata Plan 94237 (**Lot 10**).

Background

- 2 The first plaintiff is the developer of a mixed residential and commercial building in Hurstville, which includes Lot 10.
- 3 The second plaintiff in these proceedings, Super Vision Resources Ltd, loaned money to the first plaintiff to carry out the development and is the registered mortgagee of the resulting strata title units, including Lot 10.
- 4 Units in the development were sold by the first plaintiff off the plan. On or about 20 September 2013, the first plaintiff (as vendor) and the third defendant (as purchaser) entered into a contract for sale of Lot 10 for \$320,000.
- 5 The development was completed in 2016. A final occupation certificate issued on 20 October 2016.

- 6 In January 2017, the first plaintiff defaulted under the loan agreement with the second plaintiff. Since June 2017, the first plaintiff has been under the control of receivers and managers appointed by the second plaintiff, including Marcus Ayres (**Receiver**). A liquidator was appointed to the first plaintiff on 21 July 2017.
- 7 By notice dated 31 July 2017, the Receiver terminated the contract for sale between the first plaintiff and the third defendant for Lot 10 as a consequence of the third defendant's failure to pay the deposit and procure a guarantee and indemnity as required under the contract for sale. The notice of termination required the third defendant to vacate Lot 10 by 18 August 2017, which she failed to do.
- 8 On 12 December 2018, the plaintiffs commenced these proceedings against the third defendant and four other defendants seeking possession of certain lots in the development, including Lot 10, and damages by way of mesne profits as against the first, second and third defendants.
- 9 On 17 May 2019, the plaintiffs obtained default judgment against the fourth and fifth defendants.
- 10 On 19 July 2019, judgment for possession was granted to the first and second plaintiffs against the first, second and third defendants in relation to Lots 43, 53 and 10 respectively. Leave was also granted to the first and second plaintiffs to issue writs of possession.
- 11 On 11 October 2019, following execution of the writs, the first plaintiff obtained possession of Lot 10 from the third defendant. On the same day, the second plaintiff obtained possession of Lots 43 and 53.
- 12 The plaintiffs have recently reached a settlement with the first and second defendants and have filed a notice of discontinuance in respect of their remaining claims against them. Thus, the only remaining claim in the proceedings, and the issue for determination today, is the first plaintiff's claim against the third defendant for damages for mesne profits.
- 13 Other than filing a notice of appearance on 26 April 2019 and her solicitor filing a notice of ceasing to act on 7 July 2020, the third defendant has not taken any

steps in the proceedings. She has not filed a commercial list response and did not appear at today's hearing.

- 14 There is evidence before the Court that attempts were made to serve the third defendant with the proceedings on 22, 23 and 31 January 2019 and that she was subsequently served on 28 March and 9 April 2019 pursuant to substituted service orders.
- 15 The third defendant was notified of the making of the possession orders and has also been given notice of today's hearing. My chambers also sent an invitation to the third defendant (to the email address on file for the third defendant) to join today's hearing, which is being run by the Court's virtual courtroom. As noted earlier, she did not appear.
- 16 In the above circumstances, I am satisfied that the third defendant has had an opportunity to be heard and that it is appropriate to proceed today in her absence.

Claim for mesne profits

- 17 The first plaintiff seeks an order for mesne profits in respect of the third defendant's possession of Lot 10 for the period from 18 August 2017 to 11 October 2019 (**Relevant Period**).
- 18 Mesne profits are a form of damages which a person entitled to possession of property may claim against another who has been wrongly in possession or occupation of that property: *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 435 and 439. The usual measure of mesne profits is the market rent for the property which the "trespasser" should have paid for the period of their occupation: *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 439.
- 19 I am satisfied that mesne profits are payable by the third defendant as sought by the first plaintiff.
- 20 The uncontested evidence establishes that the third defendant had no contractual or other right to possession or occupation of Lot 10 during the Relevant Period. The third defendant failed to provide possession on 18 August 2017 as required by the notice of termination. There is no apparent basis for her to have continued in possession of Lot 10 from that date to 11

October 2019, when the first plaintiff obtained possession on execution of the writ.

- 21 As to the calculation of mesne profits, the first plaintiff relies on the expert evidence of Darren Keen, a qualified valuer and real estate agent in Sydney. Mr Keen assesses the market rent for Lot 10 to be \$450 per week for the period from 18 August 2017 to 30 September 2019. On the assumption that Lot 10 was habitable (which the photographs in evidence suggest it was at the time possession was obtained) and allowing for three weeks of vacancy over the Relevant Period, Mr Keen's evidence is that the total rental value of Lot 10 for the Relevant Period is \$48,214.00. I accept that amount to be an appropriate calculation for the first plaintiff's claim for mesne profits.

Interest, costs and orders

- 22 The first plaintiff also makes a claim for interest under s 100 of the *Civil Procedure Act 2005* (NSW) up to the date of judgment. Interest has been calculated up to today adopting the interest rates set by Practice Note SC Gen 16 in respect of the market rent of \$450 per week, excluding the three week vacancy period allowed for by Mr Keen. According to a schedule prepared by the first plaintiff, the total interest claimed is \$4,623.05.
- 23 The amended summons also seeks an order for costs. I see no reason not to order the third defendant to pay the first plaintiff's costs of the proceedings according to the general rule that costs follow the event: *Uniform Civil Procedure Rules* (NSW), r 42.1.
- 24 For these reasons, I make the following orders:
- (1) Grant leave to the First Plaintiff to file in Court the Amended Summons dated 20 July 2020 which is returnable instanter.
 - (2) Judgment for the First Plaintiff against the Third Defendant in the amount of \$48,214.00 plus interest under s 100 of the *Civil Procedure Act 2005* (NSW) of \$4,623.05 to the date of these orders.
 - (3) Subject to any costs orders already made in respect of the Third Defendant, the First Plaintiff's costs of the proceedings, insofar as they relate to the claims made against the Third Defendant, be paid by the Third Defendant on an ordinary basis as agreed or assessed.

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