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Larry Schlesinger | 12 April 2013

Developer Rory O'Brien wins right to battle Bankwest-Commonwealth Bank over Whisper Bay receivership

Sydney property developer Rory O'Brien has won the right to sue Bankwest over its 2009 decision not to refinance a loan for his \$282 million Whisper Bay luxury development at Airlie Beach.

The clawback of the loan forced the luxury Whisper Bay development (pictured below), which counted former prime minister Bob Hawke as a buyer and promoter, into receivership in May 2009, months before it was due for on-time completion.



The claim against Bankwest is also likely to shed light on the Commonwealth Bank's conduct following its acquisition of Bankwest in October 2008 and claims it unfairly foreclosed on hundreds of loan arrangements.

Yesterday, the NSW Court of Appeal overturned a decision made in May last year in favour of Bankwest's claim against O'Brien and other guarantors for payment of the balance of an outstanding loan (a sum of around \$158 million) following the sale of the Airlie Beach development to David Marriner for \$56 million in 2010.

The project had once been valued at more than \$250 million.

The Court of Appeal also struck out the May ruling preventing O'Brien from making a counter-claim against Bankwest for breach of contract.

The counter-claim by O'Brien struck at the heart of subsequent allegations made against the Commonwealth Bank, -that it was able to negotiate a cheaper purchase price of Bankwest if there were more bad loans on the Bankwest book.

The Court of Appeal judgement notes that O'Brien had claimed that Bankwest took the steps it did "at the direction of a third party (in order that there might be a reduction in the price to be paid for the acquisition of the Bank)".

Apartments in Whisper Bay carried price tags of between \$1.5m and \$6.75m.

It had achieved around \$106 million in pre-sales and was due for completion in December 2009 when Bankwest issued a notice of demand for the repayment of a \$180 million loan facility in May 2009.

The loan was due to mature in January.

The development was subsequently placed into receivership with around one-third of the 104 apartments in the project sold.

At the time he lost the development O'Brien said that all that still needed to be done was "put the front of the office in, the bar and the furniture".

The demand that O'Brien repay the loan came just eight months after the Commonwealth Bank acquired Bankwest for \$2.1 billion in October 2008.

This, and other demands of repayment by Bankwest, sparked a Senate inquiry led by Nationals Senator John Williams into changes in bank lending practices since the GFC.

The inquiry heard from 150 Bankwest customers, who claimed the bank unfairly and unconscionably foreclosed on their loans after the Commonwealth Bank takeover.

In August last year Property Observer reported around 120 businesses had signed up to law firm Slater & potential class action for aggrieved borrowers/mortgagors against BankWest and the Commonwealth Bank.

O'Brien's successful appeal against the May 2012 judgement, which included costs, is expected to throw further light on the conduct of Bankwest as well as details of the sale of the bank to the Commonwealth Bank.

Had the NSW Court of Appeal not ruled in his favour the earlier decision would have bankrupted O'Brien.

"We can now sue the bank for a breach of contract that their termination of our agreement was for an improper purpose and we can pursue whether or not the claw back arrangement was relevant to Rory's case," said his lawyer Andrew Sutherland of Russells.

The case dates back to 2006 when Bankwest entered into an agreement to provide a \$175 million loan to refinance the development.

On April 6 2009, O'Brien and his Middle East business partner, Essque Hotels and Resorts received a letter of demand from Bankwest for "moneys then outstanding under the facility agreement".

Bankwest then terminated its lending facility provided for the development and "subsequently appointed receivers and managers...and in due course the property the subject of the refinancing arrangements was sold."

On 28 January 2011, Bankwest demanded payment from the guarantors of the balance then outstanding (after the sale of the property to Marriner) under the previous lending agreement.

In the now overturned 2012 judgement, Justice Robert McDougall ruled that O'Brien was liable for the funds his company had borrowed.

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