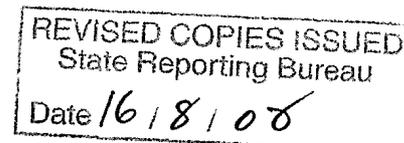




Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No S3637 of 2002

NORTHERN BUILDING SOCIETY LIMITED
now known as BENDIGO BANK
(ABN 11 068 049 178)

Respondent/Plaintiff

and

OMOHAE JACKWAY

Applicant/Defendant

BRISBANE

..DATE 29/07/02

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: Ms Jackway, I'm about to give judgment. I cannot allow your application in accordance with the law, so that I will be dismissing your application which will enable the bank to take possession of your property at 4 Stephanie Street, unless you can make arrangements with them for paying an amount of money that will satisfy them in holding off taking possession. So, I have got to apply the law and, after listening to you and Mr Looney and reading the documents, I have worked out that it is not possible to give you the orders that you sought in your application.

These are my reasons: Ms Jackway is one of the defendants named in this proceeding. The plaintiff, to whom I shall refer as "the bank", obtained judgment in default of Ms Jackway filing a notice of intention to defend on 30 May 2002. That judgment is for recovery of possession against Ms Jackway of the land described as lot 49 on RP 741379 in the County of Elphinstone, Parish of Ross, situated at 4 Stephanie Street, Rasmussen.

Ms Jackway and her then husband, who is now known as Robert Clive Jackway-Koomans, borrowed from Northern Building Society Limited pursuant to a mortgage dated 19 December 1989. The bank is the successor to Northern Building Society Limited.

Further advances were made to the borrowers and on 20 July 1992 Ms Jackway and her then husband signed a memorandum of variation of mortgage in the presence of the solicitor for the mortgagee, Mr Graeme Ivo Lawrence. That memorandum of variation of mortgage provided for the principal to be increased to \$37,485. That variation seems to have taken into account further advances that had been made by the mortgagee in respect of applications that were, on the face of the application, signed by both Ms Jackway and her husband for \$4,000 on 15 February 1990, \$7,000 on 11 March 1992, and \$10,000 on 10 July 1992.

The bank obtained an enforcement warrant for possession of the subject land on 26 June 2002. As a result, Ms Jackway filed her application on 10 July 2002 seeking a number of orders, including that the default judgment be set aside and the enforcement warrant be set aside.

That application came before his Honour Justice Fryberg on 15 July 2002 who adjourned the application for argument today and, in the meantime, until the determination of the application, stayed the enforcement warrant.

On this application I have read the affidavit that Ms Jackway filed on 10 July 2002, and her comments, which she has handwritten on copies of letters from Northern Building

Society - and I made those copies of the letters that she
tendered Exhibit 2 - and I have listened to her oral
submissions.

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For the purpose of the application today, the bank filed
further material, including the affidavit of Mr Lawrence,
the solicitor who witnessed the execution of the mortgage by
Ms Jackway and her then husband in 1989, and who also
witnessed their signatures on the memorandum of variation of
mortgage dated 20 July 1992, and was able to confirm, that at
the time of his witnessing those documents, both Ms Jackway
and her husband signed them in his presence.

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I have also looked at the affidavit of Mr Woodman, which was
filed by leave today, which sets out a chronology in
relation to the recent dealings of the bank with Ms Jackway
and exhibits considerable correspondence and other documents
that are relevant to the matters raised by Ms Jackway.

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In essence, Ms Jackway alleges that her signature on the
application for a further advance dated 11 March 1992 was
forged by her husband. This is an allegation that has been
raised by Ms Jackway previously and has not been pursued in
any meaningful way. Mr Jackway-Koomans, in his affidavit
that was filed on 26 July 2002, denies that he forged
Ms Jackway's signature.

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The documents which have been provided by way of exhibits in this matter, to the extent that photocopies allow an opinion to be formed on whether signatures are the same, do not indicate that the signature of Ms Jackway on the application on 11 March 1992 is significantly different to the signature which appears to be hers on the other documents.

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It is not necessary, however, that I form any view about the allegation, other than whether or not it justifies setting aside the default judgment. Because the judgment was for recovery of possession, what is critical is whether the amount that is claimed to be owed by the bank exceeds the sum of \$7,000 which is disputed by Ms Jackway. It appears on the material that the current debt owed to the bank is \$46,686.59. When the notice of exercise of power of sale was issued on 13 February 2002, the amount owed under the mortgage was \$29,585.59. On either amount, the allegation of fraud in respect of the sum of \$7,000 cannot affect whether the bank recovers possession, because there appears to be a significant amount owing to the bank under the mortgage.

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What is of concern to Ms Jackway is that the title was held to the property by them jointly and Mr Jackway-Koomans became bankrupt in March 1996 on a debtor's petition, and he has been discharged from bankruptcy in March 1999 and is not personally liable to the plaintiff for the debt. Ms Jackway

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submits that it would be moral for her to be released from
what would have been Mr Jackway's share of the debt if he
had not become bankrupt. The problem is that under the
mortgage, Ms Jackway has a joint and several liability to
the bank for the total amount of debt. Even though her
husband may not be liable to her for contribution of one
half of anything she pays to the bank, the fact remains that
because Ms Jackway agreed with the bank to be jointly and
severally liable for the whole amount of the debt, she is
liable to the bank for the amount that the bank claims is
due under the mortgage, unless she can show that there is
some substance in her allegations.

This will obviously become relevant when the bank has to
account to Ms Jackway for the selling of the property. In
the meantime, however, I'm satisfied on the material before
me that Ms Jackway cannot show good grounds for setting
aside the default judgment, because she cannot show that she
has a case which would enable her to preclude recovery of
possession by the bank.

I therefore order that the application filed on 10 July 2002
be dismissed.

HER HONOUR: I order that the applicant pay the respondent's
costs of the application to be assessed.

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