

SUPREME COURT OF QUEENSLAND

CITATION: *Westpac Banking Corporation v Klaric* [2018] QSC 38

PARTIES: **WESTPAC BANKING CORPORATION ABN 33 007 457 141**
(applicant)
v
NEVILLE MLADEN KLARIC (ALSO KNOWN AS NEVILLE MLADEN AND NEVILLE MLADEN MIKULANDRA)
(respondent)

FILE NO/S: No 829 of 2018

DIVISION: Trial

PROCEEDING: Originating Application

DELIVERED ON: 6 March 2018

DELIVERED AT: Brisbane

HEARING DATE: 20 February 2018

JUDGE: Atkinson J

ORDERS:

- 1. Recovery of possession of land by Westpac Banking Corporation as mortgagee pursuant to s 78(2)(c) of the *Land Title Act* 1994 (Qld) and pursuant to the terms and conditions of Registered Bill of Mortgage No. 711040809 given by Neville Mladen Klaric (also known as Neville Mladen and Neville Mladen Mikulandra) in respect of the property described as Lot 303 on Registered Plan No. 80308 in the Local Government of Gold Coast, being all of the land in title reference 13176150 situated at 13 Crescent Avenue (also known as 13 Nelson Avenue), Hope Island in the State of Queensland (“the property”).**
- 2. The respondent by himself, his servants and agents, be restrained from:**
 - (a) entering onto the property;**
 - (b) interfering with, obstructing or disturbing the applicant or its agents and employees from:**
 - (i) taking and maintaining possession of the property; and**
 - (ii) effecting a sale of the property.**
- 3. That the respondent pay the applicant’s costs of and incidental to this application on the indemnity basis.**

CATCHWORDS: MORTGAGES – MORTGAGEE’S REMEDIES – POSSESSION – PROCEEDINGS TO OBTAIN – where the applicant mortgagee sought to recover from the respondent possession of a property pursuant to s 78(2)(c) of the *Land Title Act* 1994 (Qld) – where the respondent had been in default for over five years – where notice had been given and the respondent had not remedied the default – whether the applicant mortgagee is entitled to possession

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – where the applicant mortgagee sought to restrain the respondent from entering onto the property or interfering with, obstructing or disturbing the applicant mortgagee in taking and maintaining possession and effecting a sale of the property – whether the applicant mortgagee is entitled to an injunction

COUNSEL: D M Turner for the applicant
The respondent appeared on his own behalf

SOLICITORS: MinterEllison for the applicant
The respondent appeared on his own behalf

[1] By an originating application filed on 23 January 2018, the applicant, Westpac Banking Corporation (“Westpac”) sought the following orders:

- “1. Recovery of possession of land as mortgagee pursuant to s 78(1)(c)¹ of the *Land Title Act* 1994 (Qld) and pursuant to the terms and conditions of Registered Bill of Mortgage No. 711040809 (Mortgage) given by the respondent in respect of the property described as Lot 303 on Registered Plan No. 80308 in the Local Government of Gold Coast, being all the land in title reference 13176150 situated at 13 Crescent Avenue (also known as 13 Nelson Avenue), Hope Island, in the State of Queensland (Property).
2. The respondent by himself, his servants and agents, restrained from:
 - (a) entering on to the Property;
 - (b) interfering with, obstructing or disturbing the applicant or its agents or employees from:
 - (i) taking and maintaining possession of the Property;
 and
 - (ii) effecting a sale of the Property.”

[2] The applicant also sought its costs on an indemnity basis from the respondent.

¹ As can be seen from these reasons, the relevant section in the *Land Title Act* 1994 (Qld) is s 78(2)(c). There is no s 78(1)(c) in the *Land Title Act* so I have worked on the assumption that this was a typographical error.

- [3] The applicant filed a number of affidavits in support of the application: an affidavit of Ian Cuffe Quin filed on 23 January 2018; an affidavit of Sabrina Anita Steer filed on 23 January 2018; an affidavit of Giuseppe Antonio Russo filed on 23 January 2018; an affidavit of Samantha Lang filed on 23 January 2018; a further affidavit of Ian Cuffe Quin filed on 16 February 2018; an affidavit of Claire Davies filed on 19 February 2018 and a further affidavit of Samantha Lang affirmed on 19 February 2018 and filed by leave of the court. The submissions on behalf of the applicant were made in written submissions.
- [4] The respondent did not rely upon any written material. A person purporting to be a trustee of the unincorporated entity which is or represents the respondent appeared on the hearing of the application. Oral submissions were made by that person who refused to identify himself by name but purported to make those submissions on behalf of the respondent.
- [5] The respondent was called and it appeared to me on the balance of probabilities that the man who appeared on behalf of the respondent was, despite his refusal to state his name, in fact the respondent himself. His oral submissions were to the following effect:
- that Neville Mladen Klaric is an unincorporated entity of which he is the trustee;
 - that he was appearing under duress;
 - that the designation of names in capital letters in court documents meant that the court documents were naming entities and that all these entities belonged to the trust of which he was the trustee. He therefore stated that he wanted to find out whether it was the intention of the applicant to either administer the estate of Mr Klaric or create a contract with Mr Klaric; and
 - that he did not submit nor surrender to the jurisdiction of the Court or anyone else.
- [6] These submissions did not address the merits of the application and can be readily disposed of. Mr Klaric appears to be a natural person and so has legal personality. The contractual documents between the applicant and the respondent were made with the respondent personally. As to his second point, he appeared in court, as he was entitled to, to make submissions and, if he wished to, present evidence as a respondent to an application made against him. The third dot point is nonsensical. The applicant complied with normal setting out in court documents and the use of capital letters had no significance. If, contrary to my conclusion, the gentleman who appeared before me was not Mr Klaric then I would not have been obliged to hear from him or consider any of his submissions.
- [7] The jurisdiction of this court was properly invoked by the applicant under s 78(2)(c) of the *Land Title Act* which provides:
- “78 Powers of mortgagee**
- (2) Without limiting subsection (1), but subject to the terms of the mortgage, if the mortgagor defaults under a registered mortgage, the mortgagee may—
- ...
- (c) by a proceeding in a court of competent jurisdiction—
- (i) obtain possession of the mortgaged lot; or

(ii) foreclose the right of the mortgagor to redeem the mortgaged lot;
or

(iii) obtain an order of the court for the sale of the mortgaged lot.”

- [8] The Supreme Court is a court of competent jurisdiction in which a registered mortgagee may commence proceedings to obtain possession of the mortgaged lot. The District Court also has jurisdiction to hear such matters if the amount owing under the mortgage does not exceed the monetary limit of the District Court (\$750,000) pursuant to ss 68(1)(b)(i) and (2) of the *District Court Act 1967* (Qld). This jurisdiction does not oust the Supreme Court’s jurisdiction: *Constitution of Queensland 2001* (Qld) s 58.
- [9] The respondent is the registered proprietor of the property as appears from the historical title search to the property which shows that he became the registered owner on 28 September 2007. Westpac has a registered mortgage over the property and sought by this application to recover possession of the property following the default of the respondent under that mortgage. The applicant is entitled to recover possession of the property following that default for the reasons that follow.
- [10] On or about 29 August 2007 Westpac entered into a home loan contract by which it provided a loan to the respondent in the sum of \$418,200. A variation was made to the loan on or about 9 June 2009 to fix the rate of interest payable on the loan from a five year period from 30 June 2009 to 29 June 2014. The repayment by the respondent of sums owing under the home loan contract was secured by the registered mortgage. Pursuant to the home loan as varied by the variation made on 9 June 2009, the respondent was obliged to make monthly repayments throughout the period from 30 June 2009 to 29 June 2014. Those monthly payments were fixed in the sum of \$2,612. The records of the applicant show that no repayment has been made since 7 December 2012. The records of the bank exhibited to the affidavit of Ms Lang filed by leave show that as at 19 February 2018 the date of hearing of the originating application an amount owing by the respondent to the applicant of \$636,765.34.
- [11] Under the standard terms applicable to the mortgage, clause C2 provides that if the borrower fails to pay the amounts owing under the mortgage and the failure continues for at least seven days, the lender, Westpac, could notify the borrower of the failure and serve a notice on him. If the failure continues for at least 31 days after service of the notice then the lender Westpac was permitted to require the borrower to pay to the lender all money secured by the mortgage and take possession of the property.
- [12] In addition to the contractual provisions the mortgagee, Westpac, is bound by the provisions of the *Property Law Act 1974* (Qld) and s 88 of the *National Credit Code 2010* (Cth).
- [13] Section 84 of the *Property Law Act* provides that a mortgagee shall not exercise the power of sale where the default has been in payment of the principal money or interest secured by the instrument of mortgage, unless and until notice requiring payment of the amount, the failure to pay which constituted the default under the instrument of mortgage, has been served on the mortgagor and such default has continued for a period of 30 days from service of the notice.
- [14] The *National Credit Code* is Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth). Section 88 deals with the requirements to be met before a credit

provider can enforce a credit contract or mortgage against a defaulting mortgagor. Subsection 88(2) provides that a credit provider must not begin enforcement proceedings against a mortgagor to recover payment of money due or take possession of, sell, appoint a receiver or foreclose in relation to property subject to a mortgage unless the mortgagor is in default under the mortgage and the credit provider has given the mortgagor a default notice allowing the mortgagor a period of at least 30 days from the date of the notice to remedy the default and the default has not been remedied within that period. The default notice is required to comply with s 88(3).

- [15] A complying default notice was served on 1 September 2016. The default has not been remedied. It follows that given the respondent is in default of his obligations to make repayments under the home loan and the mortgage and a complying default notice having been served and the default not being remedied within the relevant statutory period of at least 30 days, Westpac is entitled to recover possession of the property. It is apparent from the evidence that the respondent has failed to deliver up vacant possession of the property to Westpac. The applicant is therefore entitled to the relief sought in paragraph 1 of its originating application.
- [16] In addition, in paragraph 2 of the originating application, the applicant sought a prohibitory injunction restraining the applicant from:
- “(a) entering onto the Property;
 - (b) interfering with, obstructing or disturbing the applicant or its agents or employees from:
 - (i) taking and maintaining possession of the Property; and
 - (ii) effecting a sale of the Property.”
- [17] The applicant argued that such an order ought to be made because Mr Klaric has engaged in a protracted and vexatious course of conduct which is apparently designed to frustrate or delay the enforcement of the mortgage in accordance with its terms. Westpac submitted, and I accept, that the course of conduct is ongoing and gives rise to a reasonable apprehension that without the injunction issuing, the respondent will take further steps to interfere with or obstruct Westpac from taking possession of the property and selling it.
- [18] The course of conduct alleged can be divided into four areas. The first is that the respondent has brought three proceedings in this court which were dismissed as entirely without merit in an apparent attempt to frustrate or delay the enforcement of the mortgage. The first proceeding was an originating application No. 4201 of 2017 filed on 28 July 2017. The respondent commenced proceedings against the Chief Executive Officer of Westpac and a partner at MinterEllison, the solicitors for Westpac, seeking an injunction restraining the enforcement of the mortgage. The originating application was heard and dismissed by Justice Douglas of this court on 15 June 2017. In the application made to dismiss the originating application the respondents argued that the proceeding was brought without discernible merit and was brought for an ulterior purpose. Mr Klaric was ordered to pay the first and second respondents’ costs of and incidental to the proceeding to be assessed on an indemnity basis.

- [19] On 28 June 2017, the respondent then commenced proceeding No. 6468 of 2017 seeking a statutory order of review against the decision of Justice Douglas where the respondent was said to be “Justice Douglas for (Supreme Court of Queensland)”. The application was heard and dismissed by Justice Martin on 11 July 2017.
- [20] Following that Mr Klaric commenced proceedings against Justice Martin or at least the respondent was named as “Justice Martin in his private capacity, trading as Justice for [Supreme Court of Queensland; Department of Justice and Attorney-General, ABN: 13 846 673 994].” The application for a statutory order of review was:
- “to review the decision and conduct of the respondent under which (1) The decision made by Respondent in [Mladen v Justice Douglas] case number 6468/17 on the 28/06/2017 to summarily Dismiss the Applicant’s application for Judicial Review by proceeding ultra vires has failed to observe natural justice, due process in law and regular procedural fairness in the administration of justice, relying on substituted service. Authority: Due Process of Law Act 1368, 42, Edw 3 c 3, pursuant to section 117 of the Constitution of the Commonwealth of Australia Constitution Act, 1900 (UK); Age of Majority Act 1974, [Qld] No. 57; Supreme Court Procedure Act 1900, No. 49, section 3. “(1) In any action by ‘consent of both parties’ the whole or any one or more of the issues of fact in question may be tried or the amount of any damages or compensation may be assessed by a judge.” Only parties may consent to dispense with the jury.”
- [21] Mr Klaric also caused a subpoena to be issued to Melinda Smith, a partner at MinterEllison, but failed to serve her with the subpoena. Mr Klaric (then referring to himself as Mr Mladen) argued that matter before me on 7 August 2017. On that date I ordered that the subpoena for production and give evidence issued by the court on 4 August 2017 against Melinda Smith be set aside pursuant to r 416 of the *Uniform Civil Procedure Rules* 1999 (Qld) and the application before judicial review against Justice Martin be dismissed.
- [22] It appears correct to say, as the applicant Westpac submitted, that each of the three proceedings referred to above was entirely lacking in merit.
- [23] In addition, the affidavit of Giuseppe Russo, a solicitor employed by MinterEllison, sets out a large number of items of correspondence and purported instruments which have been sent by Mr Klaric to the solicitors for Westpac. They are voluminous, often unintelligible, aggressive in their tone and completely lacking in merit. They include an Australian Taxation Office form in which the respondent purported to nominate MinterEllison as his legal representative. Exhibited to Ms Davies’ affidavit filed on 19 February 2018 are further voluminous pages which include unintelligible and apparently aggressive correspondence sent by or on behalf of Mr Klaric to MinterEllison in the period 27 January 2018 to 12 February 2018 showing that the behaviour is continuing unabated.
- [24] Further on or around 25 June 2014 a release of mortgage was lodged purportedly executed on behalf of the mortgagee Westpac. Ms Lang on behalf of Westpac affirms and I accept that the signature purportedly by the mortgagee appears to be the same signature by which Mr Klaric as mortgagor signed the mortgage and the home loan as borrower. It would appear that it was Mr Klaric who purported to sign the release of

mortgage on behalf of Westpac. Both Westpac and the Registrar of Titles have separately placed caveats over the property to prevent the registration of further details.

- [25] In addition to those matters it appears that Mr Klaric has permitted other persons to reside in the property as set out in the affidavit material and the submissions. Such tenancies have not been agreed to by Westpac and may cause Westpac to have to give notice to any such tenant prior to obtaining possession of the property under s 317 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld). Notice has been given and as Westpac has submitted, if it is evident at the time of enforcement of any order for recovery of possession that the property remains occupied by a party other than the respondent pursuant to a lease or tenancy agreement, Westpac will require (and will seek) the leave of the court to obtain an enforcement warrant pursuant to r 913(2) of the UCPR.
- [26] I am satisfied that in the circumstances that the orders sought in paragraph 2 are justified and should be imposed upon the respondent to aid Westpac's recovery of possession of the property and the subsequent exercise of its power of sale.

Orders

[27] Accordingly I order:

1. Recovery of possession of land by Westpac Banking Corporation as mortgagee pursuant to s 78(2)(c) of the *Land Title Act 1994* (Qld) and pursuant to the terms and conditions of Registered Bill of Mortgage No. 711040809 given by Neville Mladen Klaric (also known as Neville Mladen and Neville Mladen Mikulandra) in respect of the property described as Lot 303 on Registered Plan No. 80308 in the Local Government of Gold Coast, being all of the land in title reference 13176150 situated at 13 Crescent Avenue (also known as 13 Nelson Avenue), Hope Island in the State of Queensland ("the property").
2. The respondent by himself, his servants and agents, be restrained from:
 - (a) entering onto the property;
 - (b) interfering with, obstructing or disturbing the applicant or its agents and employees from:
 - (i) taking and maintaining possession of the property; and
 - (ii) effecting a sale of the property.

In accordance with both the lack of merit exhibited by the respondent to this application and his contractual duties under the mortgage I further order:

3. That the respondent pay the applicant's costs of and incidental to this application on the indemnity basis.