

# SUPREME COURT OF QUEENSLAND

CITATION: *Kenny v ASK Funding Limited* [2019] QCA 13

PARTIES: **LEONE JOAN KENNY**  
(appellant)  
v  
**ASK FUNDING LIMITED**  
**ACN 094 503 385**  
(respondent)

FILE NO/S: Appeal No 5731 of 2018  
DC No 1570 of 2017

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane – [2018] QDC 78 (Porter QC DCJ)

DELIVERED ON: 6 February 2019

DELIVERED AT: Brisbane

HEARING DATE: 10 October 2018

JUDGES: Gotterson and McMurdo JJA and Bowskill J

ORDERS: **1. The appeal is dismissed.**  
**2. The appellant pay the respondent’s costs of the appeal.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SETTING ASIDE – appeal against order granting summary judgment on a claim by the respondent/mortgagee for recovery of possession of land secured by registered mortgage – where it was not controversial that the mortgagee had made out its claim for recovery of possession under s 78(2) of the *Land Title Act* 1994 – whether the primary judge erred in finding that the appellant/mortgagor had no real prospect of successfully defending the mortgagee’s claim, on the basis of contentions about the conduct of the mortgagee, including that the mortgagee had unlawfully frustrated the sale of the mortgaged land, by refusing to extend the date for payment under a deed of compromise – whether, even if those contentions could be established by evidence, they would provide a basis to restrain or prevent the mortgagee from exercising its power of sale under the mortgage – whether the primary judge erred in not further adjourning the hearing of the summary judgment application

*Land Title Act 1994* (Qld), s 78  
*Uniform Civil Procedure Rules 1999* (Qld), r 5, r 292  
*AON Risk Services Australia Ltd v Australian National University*  
 (2009) 239 CLR 175; [2009] HCA 27, cited  
*Clairview Developments Pty Ltd v Law Mortgages Gold  
 Coast Pty Ltd* [2007] 2 Qd R 501; [2007] QCA 141, cited  
*Clarke v Japan Machines (Australia) Pty Ltd (No 2)* [1984]  
 1 Qd R 421, cited  
*Harvey v McWatters* (1948) 49 SR (NSW) 173; [1948]  
 NSWStRp 58, cited  
*Inglis v Commonwealth Trading Bank of Australia* (1972)  
 126 CLR 161; [1972] HCA 74, cited  
*LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011]  
[QCA 105](#), cited  
*Morel v Bank of Queensland Limited* [2015] QCA 58, cited  
*National Australia Bank Limited v McCall* [2011] QSC 25,  
 cited  
*National Australia Bank Ltd v Troiani* [2002] QCA 196, cited  
*Queensland Pork Pty Ltd v Lott* [2003] QCA 271, cited  
*Sali v SPC Ltd* (1993) 67 ALJR 841; (1993) 116 ALR 625;  
 [1993] HCA 47, cited  
*Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1971]  
 1 WLR 43, cited

COUNSEL: The appellant appeared on her own behalf  
 C Templeton for the respondent

SOLICITORS: The appellant appeared on her own behalf  
 Boyd Legal for the respondent

- [1] **GOTTERSON JA:** I agree with the orders proposed by Bowskill J and with the reasons given by her Honour.
- [2] **McMURDO JA:** I agree with Bowskill J.
- [3] **BOWSKILL J:** This is an appeal from a decision made on 4 May 2018 by the District Court granting the respondent's summary judgment application to recover possession of two blocks of land, lot 58 on CP AG901 and lot 211 on CP A342593, under registered mortgages of the land, given by the appellant to the respondent as security for loans.<sup>1</sup>

#### **Factual circumstances**

- [4] The appellant, Ms Kenny, borrowed money from the respondent, Ask Funding Ltd (previously called Impact Capital) under a series of loan agreements entered into in June 2008, December 2008, September 2009 and January 2010. Each loan agreement effectively replaced the earlier one. The loans were secured by mortgages over property owned, or partly owned, by Ms Kenny.<sup>2</sup> Ask Funding

<sup>1</sup> *Ask Funding Limited v Kenny* [2018] QDC 78 (Porter QC DCJ) (**Reasons**).

<sup>2</sup> AR 153 (mortgage over lot 2 on plan 173401, securing the funds advanced under the December 2008 agreement); AR 186 (mortgage over **lot 2** on plan 173401 and over Ms Kenny's one-third interest in each of **lot 20** on Crown Plan A342701, **lot 110** on Crown Plan AG3 and **lot 211** on Crown Plan A342593, securing the funds advanced under the September 2009 agreement). Whilst the January 2010 agreement was also secured by a mortgage over lot 2, lot 20, lot 110 and lot 211 (AR 200), there was no evidence before the court below that it was registered (Reasons at [19]).

carried on business as a lender of funds, amongst other things, to meet living and legal expenses of beneficiaries awaiting the distribution of proceeds from deceased estates and of parties to estate litigation. Ms Kenny borrowed money for both legal expenses of litigation associated with the administration of her deceased mother's estate, and for her own personal living expenses, whilst she awaited the finalisation of that litigation.

- [5] By late 2012, according to Ask Funding, Ms Kenny owed just over \$560,000 in principal and interest (accruing at between 18.5 and 19.5 per cent) under these various loan agreements. A demand for payment was made.<sup>3</sup> Ms Kenny requested that Ask Funding give her time to try to repay the loan, by selling her property of 300 acres, which comprised three lots: lot 20, lot 110 and lot 211.<sup>4</sup> Ms Kenny acquired ownership of these lots from the estate of her late mother, as a beneficiary under her late mother's will.<sup>5</sup>
- [6] After some negotiations, on 10 December 2012 Ms Kenny and Ask Funding entered into a Deed of Acknowledgment.<sup>6</sup> The 2012 Deed of Acknowledgment:
- (a) contained an acknowledgment that the debt under the January 2010 loan agreement was \$585,462.45 as at 21 November 2012;
  - (b) provided for time to sell the 300 acre block until 28 February 2013;
  - (c) provided for a fixed repayment obligation of \$600,000 if payment was made by that date;
  - (d) required additional security, by way of mortgages over the lots comprising the 300 acre block (lots 20, 110 and 211) and over "any interest which [Ms Kenny] acquires after the date of this Deed" in lot 58 on CP AG901; and
  - (e) required repayment of the debt by 28 February 2013 in any event.<sup>7</sup>
- [7] In December 2012 Ms Kenny executed another mortgage over lots 20, 110 and 211, securing the "Secured Moneys", defined as all money payable under, among other things, the loan agreement entered into in January 2010, as varied by the 2012 Deed of Acknowledgment.<sup>8</sup> That mortgage was registered in December 2012. She also executed a mortgage over lot 58 at the same time; but that was not registered until May 2013, which the primary judge inferred was because the interest in that lot was transferred to her at a later time.<sup>9</sup>
- [8] The date for repayment under the 2012 Deed of Acknowledgment was extended to 29 March 2013,<sup>10</sup> and then to 30 June 2013.<sup>11</sup> The 300 acre property was not sold, and the loan was not repaid.

---

<sup>3</sup> Letter dated 31 August 2012 from Ask Funding to Ms Kenny at AR 382.

<sup>4</sup> Reasons at [23]-[26].

<sup>5</sup> Reasons at [31].

<sup>6</sup> AR 223.

<sup>7</sup> Reasons at [30].

<sup>8</sup> AR 229, 259 and 261.

<sup>9</sup> AR 263; Reasons at [32].

<sup>10</sup> As appears from handwritten amendments to relevant provisions of the 2012 Deed, at AR 224.

<sup>11</sup> See letter requesting this extension from Ms Kenny (AR 415) and the letter from Ask Funding, confirming its agreement (AR 420).

- [9] In September 2013 Ask Funding made a demand for full repayment of the amount then due, being some \$718,681.30.<sup>12</sup>
- [10] Further correspondence and negotiations ensued,<sup>13</sup> culminating in a second Deed of Acknowledgment entered into between Ms Kenny and Ask Funding on 15 July 2014.<sup>14</sup>
- [11] The 2014 Deed of Acknowledgment:
- (a) contained an acknowledgment that Ms Kenny's liability to Ask Funding under the January 2010 loan agreement, as at 11 June 2014, was \$861,474.99;<sup>15</sup>
  - (b) provided that Ask Funding would cap Ms Kenny's liability at \$600,000 (the same figure as in the 2012 Deed) if Ms Kenny:
    - (i) entered into unconditional contract(s) to sell any one or more of lots 58, lot 2, or lots 20, 110 and 211, by 8 October 2014, for an aggregate price of not less than \$600,000, for completion not later than 8 December 2014; and
    - (ii) paid Ask Funding \$600,000 by 8 December 2014; and
  - (c) provided that if that did not occur, the full amount of the debt would be immediately payable, and Ask Funding would be at liberty to act on its notice of default and notices of exercise of power of sale previously served;<sup>16</sup>
  - (d) contained an acknowledgment by Ms Kenny that entry into the Deed resolved the dispute about which she had lodged a complaint with the Financial Ombudsman Service in May 2014 and an acknowledgment that "she has no other complaints about, or issues with, Ask in relation to the Credit Contract, the Securities or any decision or conduct by Ask in its dealings with her";<sup>17</sup> and
  - (e) was accompanied by an independent solicitor's certificate, signed by Mr Anthony Bigby of Aden Lawyers, confirming the explanation given to Ms Kenny before she signed the Deed.<sup>18</sup>
- [12] The 2014 Deed was later varied, in October 2014, to extend the date for the contract(s) to 15 November 2014 and the date for payment to 15 December 2014.<sup>19</sup>
- [13] The conditions of the 2014 Deed were not met.
- [14] At some stage Ms Kenny was able to sell lot 2 and lots 20 and 110, and paid Ask Funding just over \$353,330. From late 2014 to January 2016 there was further correspondence, and further negotiations between Ms Kenny and representatives of Ask Funding, about the remaining amount owing.<sup>20</sup> This included, on 2 and 3 March 2015, an agreement, recorded in correspondence, that Ask Funding would

---

<sup>12</sup> AR 433.

<sup>13</sup> Reasons at [36]-[41].

<sup>14</sup> AR 297.

<sup>15</sup> See also the "client account statement" at AR 336-337.

<sup>16</sup> See AR 452, 468-471, 550-557.

<sup>17</sup> AR 300.

<sup>18</sup> AR 304-306.

<sup>19</sup> AR 308; 485.

<sup>20</sup> Reasons at [48]-[55].

accept \$200,000 in full and final satisfaction of Ms Kenny's remaining debt, if that amount was paid by 22 April 2015, failing which the full amount would become payable and Ms Kenny would provide vacant possession of lots 58 and 211 by 24 April 2015.<sup>21</sup> This agreement was never formalised.

- [15] Eventually, in February 2016, the parties entered into a further agreement, called Deed of Variation #2, the effect of which was to vary the 2014 Deed of Acknowledgment, as varied in October 2014.<sup>22</sup> The recitals to the 2016 Deed record that:

“Since entering into the Deed of Acknowledgment of Debt, Kenny has sold the 30 acre block [which is lot 2] and Lots 20 and 110 from the 300 acre block and has paid Ask sums totalling \$353,330.08 in reduction of the Debt.”

- [16] The 2016 Deed:

- (a) provided that if Ms Kenny paid Ask Funding \$250,000 by 30 April 2016,<sup>23</sup> Ask Funding would accept that payment in full and final satisfaction of the debt; and would provide Ms Kenny with a release of mortgages over lot 58 (referred to as the “factory block”<sup>24</sup>) and lot 211;
- (b) made reference to a further dispute between Ms Kenny and Ask Funding, in letters during 2014 and 2015, as well as a further complaint to the Financial Ombudsman Service in November 2015;
- (c) provided that Ms Kenny releases and discharges Ask Funding from any claim arising from any of the allegations comprising those matters of further dispute;
- (d) contained an acknowledgment by Ms Kenny that entry into the 2016 Deed resolves the dispute about which Ms Kenny made a further complaint to the Financial Ombudsman Service;
- (e) contained an acknowledgment by Ms Kenny that she has no other complaints or disputes with Ask Funding, and that she will not lodge any further complaints with the Financial Ombudsman Service about Ask Funding or its treatment of her; and
- (f) was again accompanied by an independent solicitor's certificate, signed by Mr Bigby.<sup>25</sup>

- [17] The \$250,000 was not paid.

- [18] On 30 May 2016 the solicitor for Ask Funding, Mr Boyd, sent an email to the solicitor for Ms Kenny, Mr Bigby, saying:

“Anthony

It has now been a month since your client was required to have paid the capped amount to Ask Funding and we have not, in that month,

---

<sup>21</sup> AR 505 and 506.

<sup>22</sup> AR 310.

<sup>23</sup> The date originally proposed was 31 March 2016; but it was extended to 30 April 2016: AR 311; 546.

<sup>24</sup> See the definition of “Security Properties” in the 2014 Deed, at AR 298.

<sup>25</sup> AR 314.

been advised of her having made any progress with respect to the sale of Lot 211. Further, Ask Funding has recently received notice of an equitable mortgagee's caveat having been lodged against Lots 58 and 211 by Panoramic Finance Pty Ltd.

Ask Funding requires vacant possession of the two remaining properties for the purpose of exercising its power of sale and I have been instructed to cause a notice to that effect to be served on your client.

Please advise by close of business on Wednesday whether your client is prepared to provide possession without the necessity for a notice being served and, if she is, when possession is proposed to be provided.”<sup>26</sup>

- [19] On 15 September 2016, a notice, dated 6 June 2016, requiring vacant possession of lot 58 and lot 211, was served on Ms Kenny.<sup>27</sup>

### **The District Court proceedings**

- [20] As Ms Kenny did not voluntarily deliver up possession, in May 2017 proceedings were commenced in the District Court, seeking an order for recovery of possession of lots 58 and 211, pursuant to s 78(2) of the *Land Title Act 1994* (Qld).<sup>28</sup>
- [21] Ms Kenny was initially represented by Aden Lawyers, who filed a defence on her behalf in June 2017. From 30 August 2017, Ms Kenny acted for herself in the proceedings.
- [22] On 22 December 2017 Ask Funding filed a summary judgment application, firstly, seeking possession of lot 58 and lot 211; and alternatively an order striking out parts of Ms Kenny's defence or for particulars of parts of it. That application was not listed for hearing until 9 February 2018 (having been served on Ms Kenny on 12 January 2018<sup>29</sup>).
- [23] On 9 February 2018 Ms Kenny applied for an adjournment of the summary judgment application, on the basis that she had only recently spoken to LawRight. A firm of solicitors was willing to assist her on a pro bono basis, but they required six to eight weeks to consider the material.
- [24] In the course of the adjournment application, Ms Kenny also made submissions to the primary judge about Ask Funding “disallowing” (preventing the settlement of) the contract for the sale of lot 211. She said if the hearing was adjourned she could get an affidavit from her former solicitor, Anthony Bigby, to prove that.<sup>30</sup>
- [25] Ms Kenny also made reference to her health problems, but as noted by the primary judge, she did not suggest she would be much better placed physically to deal with the applications in six to eight weeks' time.
- [26] There were three affidavits of Ms Kenny filed on 9 February 2018, and relied upon in relation to the adjournment application:

---

<sup>26</sup> AR 547.

<sup>27</sup> AR 99 (affidavit of Templeton at [5(z)]; AR 558 (notice).

<sup>28</sup> AR 39-45.

<sup>29</sup> Affidavit of Boyd filed 9 February 2018 (CFI 12).

<sup>30</sup> AR 642-643.

- (a) an affidavit sworn 8 February 2018, which contained no content other than annexing:
- (i) a settlement statement regarding the sale of a property at 654 Kenny Road, Linthorpe on 16 January 2015;<sup>31</sup>
  - (ii) a settlement statement regarding the sale of lot 20 and lot 110 on 31 October 2014;<sup>32</sup>
  - (iii) an undated and unsigned contract for the sale of lot 58, naming Brian Costigan as buyer, for a purchase price of \$155,000;<sup>33</sup>
  - (iv) a contract for the sale of lot 211, dated 20 April 2016, naming Richard and Susan English as buyers, for a purchase price of \$345,000. The contract is signed by Ms Kenny only. It refers to the incorporation, as a special condition, of an electronic signing clause, but that too is signed by Ms Kenny only.<sup>34</sup>
- (b) a further affidavit, also sworn 8 February 2018, enclosing copies of medical certificates dated 6 June 2015 and 16 January 2016, referring to Ms Kenny’s two “potentially life-threatening conditions”;<sup>35</sup> and
- (c) a further affidavit, also sworn 8 February 2018, which begins by saying “I am writing to let the Judge know how the Impact Capital (now Ask Funding) loan came about. As executor for my mothers will I obtained a litigation loan to fund the litigation...” and then attaching 16 handwritten pages which, among other things, contain allegations that Bill Boyd (Ask Funding’s solicitor) “flatly refused to let the sale [of lot 58] go ahead”, because “he told me we want all of your assets. So they would not let lot 58’s sale go ahead” and then also prevented the sale of lot 211 going through because Bill Boyd/Ask Funding “refused to wait the 5 days for the money”; and seeking judgment “giving my (2) deeds back Lot 211- and Lot 58, and throw this out please”.<sup>36</sup>
- [27] Ms Kenny’s application for an adjournment was granted. The hearing of the summary judgment application was adjourned to 13 April 2018, about two months later.<sup>37</sup>
- [28] The primary judge declined to adjourn the strike out application. His Honour made orders striking out most of Ms Kenny’s defence filed in June 2017 (other than paragraphs 1, 2, 3 and 6(a), which contain various admissions, including an admission of the default in repayment) but giving her leave to file an amended defence by 30 March 2018.<sup>38</sup> His Honour also made orders for Ms Kenny to file affidavits in response to, and submissions in relation to, the summary judgment application, by 30 March 2018.

---

<sup>31</sup> AR 560.

<sup>32</sup> AR 561.

<sup>33</sup> AR 562-575.

<sup>34</sup> AR 576-589.

<sup>35</sup> AR 590-592.

<sup>36</sup> AR 593-609.

<sup>37</sup> AR 660-662 (reasons given on 9 February 2018 for granting the adjournment application). See also Reasons at [79]-[81].

<sup>38</sup> See the Reasons at [72] and [82] (in relation to the defence and reasons for striking it out).

- [29] I observe that on 9 February 2018 Judge Porter QC patiently and comprehensively explained to Ms Kenny the procedure that would be followed, and also explained the nature of the applications which Ask Funding had made, firstly, for summary judgment of its claim to recover possession of the two properties and, second, if that failed, to strike out Ms Kenny’s defence. His Honour also patiently assisted Ms Kenny to identify the material on which she wished to rely. At the hearing of the appeal Ms Kenny asserted that Judge Porter QC said to her “you want to get used to not having those two blocks of ground ... because I’m taking it off you”, and that his Honour “told me to be quiet and sit down”. That is not borne out at all by the transcript.
- [30] Ms Kenny did not comply with the directions made by Judge Porter QC on 9 February 2018.
- [31] Correspondence tendered at the resumed hearing on 13 April 2018 indicates Ms Kenny provided a “defence document” to the solicitors for Ask Funding on 5 April 2018 (although it was not filed).<sup>39</sup>
- [32] On 11 April 2018 (two days before the resumed hearing) Judge Porter QC received by mail an envelope addressed to him from Ms Kenny. His Honour’s associate sent an email to both Ms Kenny (at the email address provided by her in the notice of acting in person) and the solicitor for Ask Funding, advising of the receipt of the envelope and advising that it would remain unopened until the hearing of the application.<sup>40</sup> That was an appropriate course to adopt, in relation to correspondence sent by one party, directly to the Judge with responsibility for hearing the matter, without the prior consent of the other party.
- [33] Ms Kenny did not appear at the resumed hearing on 13 April 2018. At the hearing, the envelope which had been sent directly to the Judge was provided to counsel for Ask Funding to open, in case there was any objection to its contents. In due course the envelope and its contents (save for the document described as an amended defence, which was filed) were all marked as exhibits. The contents of the envelope were:
- (a) A medical certificate dated 10 April 2018, certifying that Ms Kenny has:
- “1. A large uterine polyp, which haemorrhages frequently, occasionally very heavily.
  2. A massive goitre (thyroid gland) which is enveloping her trachea.
  3. Feels dizzy after haemorrhaging.”
- Together with earlier medical certificates dated 6 June 2015 and 16 January 2016, in relation to those same conditions (exhibit 5) and a photograph of the uterine polyp (exhibit 6).
- (b) A handwritten letter to the Judge from Ms Kenny, which states, among other things, that she will not be attending court on Friday (13 April) “as I am losing a lot of blood and I would not be able to walk – or sit or have any stress. I now leave this business in God’s hands so his will can be done” (exhibit 7).

---

<sup>39</sup> Reasons at [88].

<sup>40</sup> The email was filed on the District Court file (CFI 21). See Reasons at [89]-[90].

- (c) An amended defence, handwritten by Ms Kenny, which was filed in court by leave granted on 13 April 2018.<sup>41</sup> In this defence, among other things, Ms Kenny pleaded that:
- (i) She was pressured by Ask Funding to sign the “1<sup>st</sup> and other deeds of agreement”, referring to her life threatening conditions in this context.
  - (ii) Ask Funding prevented the sale of lot 58 to Mr Costigan in May 2015 – “as soon as Ask Funding were told of the offer of sale the answer came back within 48 hours that unless I moved off both properties within 24 hours they (Ask Funding) would not release the mortgage of Lot 58”, which Ms Kenny alleged was “to string out the time factor (the daily interest on the loan was around \$400 a day)”.
  - (iii) Ask Funding prevented the sale of lot 211 in April/May 2016 (by refusing to extend the date for payment under the 2016 deed of variation to 10 May 2016).
  - (iv) The loan started out as a litigation loan, taken out by Ms Kenny in her capacity as executor [of her mother’s estate] and turned into a personal loan, and she does not understand how that happened. When “my mothers other children from other relationships removed me as executor (2 yrs after my mother passed away) then the assets of my mother’s estate were taken by the new executor” and “all land went into his name – leaving me with just my 30 acres I lived on to sell to pay Ask Funding”.
  - (v) Ask Funding breached clause 24 of the (standard) terms of the loan(s), by unduly harassing or threatening Ms Kenny.
  - (vi) Ask Funding failed to comply with clause 23 of those terms, which provides that a loan contract may be able to be changed if a borrower is, among other things, sick.<sup>42</sup>
- [34] No further affidavit material supporting Ms Kenny’s contentions was filed, or informally provided to the court.
- [35] There can be no doubt that Ms Kenny was aware of the directions regarding the filing of further material. Ms Kenny was present in court on 9 February 2018 when the directions were made. A copy of the District Court order made on that day was emailed to her by Ask Funding’s solicitor, on 22 February 2018 (exhibit 10). In addition, on 5 April 2018 Ask Funding’s solicitor wrote to Ms Kenny, after receiving her amended defence document, and again referring to the orders made for filing of affidavits (exhibit 9).
- [36] The primary judge proceeded to hear the summary judgment application and, for detailed reasons given on 4 May 2018, made the orders sought for Ask Funding to recover possession of lot 58 and lot 211 from Ms Kenny.

**Reasons for granting summary judgment of the claim to recover possession of lots 58 and 211**

---

<sup>41</sup> AR 56-77.

<sup>42</sup> See also Reasons at [91] and [92] in relation to the amended defence.

- [37] In his Reasons, the primary judge set out at some length the factual background and procedural history of the matter. Favourably to Ms Kenny, his Honour took into account her three affidavits filed and read in relation to the earlier adjournment application, and the handwritten amended defence. His Honour accurately summarised the relevant principles which apply on a summary judgment application,<sup>43</sup> and there is no contention on this appeal that his Honour erred in that regard.
- [38] His Honour found that Ask Funding had made out its claim for recovery of possession under s 78(2) of the *Land Title Act* – requiring as that does proof of a registered mortgage over the relevant lot, that the terms of the mortgage do not modify the right and that there has been default under the mortgage by the mortgagor.<sup>44</sup> There is no challenge on the appeal to his Honour’s conclusion in this respect.
- [39] His Honour then turned to the various defences raised, or arguably raised, by Ms Kenny, for the purposes of determining the question under r 292(2)(a) – whether the defendant “has no real prospect of successfully defending all or a part of the plaintiff’s claim” – namely:
- (a) whether Ask Funding engaged in unconscionable conduct in entering into the various formal documents with Ms Kenny, by taking unconscientious advantage of her illness (Reasons at [113]-[119]);
  - (b) whether Ask Funding unlawfully frustrated the sale of lots 58 and 211 (Reasons at [120]-[133]);
  - (c) even if it did, whether that would give rise to a defence to the claim for possession (Reasons at [134]-[143]);
  - (d) whether Ms Kenny could be held personally liable for costs incurred in her capacity as executor (Reasons at [144]-[149]); and
  - (e) other matters raised in the amended defence (Reasons at [150]).
- [40] Having considered all of those matters, carefully and in some detail, the primary judge concluded that Ms Kenny had no real prospect of defending the claim for possession of lots 58 and 211.
- [41] His Honour was also satisfied there was no need for a trial of the claim, saying:
- “[151] I do not consider this is a case where there is a need for a trial of the claim despite the lack of any prospect of the defending the claim on the current material. Ms Kenny is self-represented and faces many difficulties. That is accepted. However, this proceeding has been conducted in a manner which gave her reasonable opportunities to formulate and put forward a case. Most starkly, that is demonstrated by the adjournment for two months to permit advice to be taken from the solicitors she had retained with the help of Law Right.
- [152] Further, this is not a case where there has been any challenge to the plaintiff’s positive case. The evidence required to make good Ms Kenny’s complaints was hers to give or locate. She

---

<sup>43</sup> Reasons at [95]-[99].

<sup>44</sup> Reasons at [100]-[111].

clearly understood that, particularly in relation to the Lot 58 and 211 complaints.

- [153] Finally, the evidence discloses that Ask has been very willing to comprise [sic, compromise] the amount of its claim and delay enforcement action at Ms Kenny's request over many years.

#### Conclusion

- [154] I am acutely conscious that Ms Kenny has suffered much ill fortune in her life and faces grave health difficulties. I am also conscious that she seems also to have been unable to manage the challenges of conducting the administration of her mother's estate. However, those matters are not of themselves defences to the claim for possession. In my view, she has no real prospect of defending the claim for possession advanced by Ask."

#### **The appeal**

- [42] In her notice of appeal Ms Kenny did not identify grounds of appeal as such. Under the heading "grounds", she wrote:

"Ask Funding had a deed of agreement with me for \$600,000. I had given them \$353,000 there was only \$250,000 owing. I had the sale of Lot 58 lined up in 15-5-15 Ask Funding refused to allow the sale to go through

\$155,000 was the price this would have given Ask Funding a total of \$500,000 and they could have walked away (3 yrs ago) they have kept pursuing me even though they knew I was dying from (2) inoperable medical conditions

I have a large tumour around my trachea also I have a massive uterine polyp that has been haemorrhaging 24/7 for past 9 years

So the interest on the loan was building at \$400 a day – (\$2,800 a week) (\$11,200) a month I begged them to let me sell further Real Estate (they held all my deeds) to finish up loan, they refused on several occasions the last one was when the sale to Richard and Sue English was going ahead for (Lot 211) \$345,000 Ask Funding rang my then lawyer Anthony Bigby telling him they were not allowing the sale to proceed. I was absolutely devastated I care for my young son (who has a terminal lung condition – he was born with) I wanted to leave him with a roof over his head. (Lots 211) represents my wages for past 40 years I worked for my mother – and she did not pay a wage she said Leone I will leave you the farm. She did but it was taken off me.

This loan company (Ask) has been bullying and harassing me for 10 very long years. (The interest added to the \$250,000 I owed on 15-5-15 through til 30-4-16 is \$124,000 a year x 3

\$124,000

\$124,000

\$372-000

So Ask Funding allowed this interest to add up even though I was willing to finish it up on 30-4-16 with sale of Lot 211.

I would like this case to go to court so justice will be done – this loan company keeps going until they destroy you. I face eviction out on the street with my son – through no fault of my own.

Please – please help me,  
that is my dying wish.”<sup>45</sup>

[43] In a document filed on 1 August 2018, headed Outline of Arguments, the grounds of appeal are identified as follows:

- “1. The Honourable Judge Bernard Porter did not acknowledge ASK Funding Limited’s behaviour towards myself in regards to the sale contracts of Lots 58 and 211.
2. The Honourable Judge Bernard Porter did not acknowledge that my only ability to pay the debt was through the sale of some of my real-estate.
3. The Honourable Judge Bernard Porter did not evaluate ASK Funding Limited’s behaviour towards myself in regards to the repayment of the loan.
4. The Honourable Judge Bernard Porter did not achieve an accurate understanding of the background of the case between ASK Funding Limited and myself, which has resulted in legal error.
5. Due to my ailing health I was not able to appear in the District Court on the 13<sup>th</sup> of April 2018.”

[44] Further to point 4 above, at paragraph 6.8 on page 7 of this document Ms Kenny also asserts that Judge Porter QC “presented a bias approach towards Ask Funding Limited by remarks made during the trial”.

[45] Ms Kenny has also filed, in this court, two affidavits. At the hearing of the appeal the court reserved the question of whether leave would be granted to Ms Kenny to rely on these affidavits.

[46] The first affidavit, filed 1 August 2018, annexes the following documents:

- (a) the undated and unsigned contract for the sale of lot 58;
- (b) the contract for the sale of lot 211, dated 20 April 2016, signed by Ms Kenny;
- (c) the settlement statement for 654 Kenny Road, Linthorpe;
- (d) the settlement statement for lot 20 and lot 110,  
(each of which were annexed to one of the affidavits of Ms Kenny filed in the District Court on 9 February 2018);
- (e) a document headed “annexure ‘A’, which appears to be a document which was annexed to the first application made to (then) Impact Capital for

---

<sup>45</sup> AR 6-10.

funding, by Ms Kenny in May 2008<sup>46</sup> – the document states that “[f]unding is sought to provide for my living expenses in addition to funding this Estate Litigation”; the remaining pages of this application (albeit out of order) are also annexed to the affidavit;

- (f) the front page of the loan agreement entered into in June 2008;<sup>47</sup>
- (g) an incomplete email chain, which includes an email from David Power (of Bernays Lawyers) to “Anthony” (presumably Anthony Bigby) of Aden Lawyers on 8 April 2016, and another sent on 15 April 2016, which will be discussed below;<sup>48</sup>
- (h) the email from Bill Boyd to Anthony Bigby sent on 30 May 2016;<sup>49</sup>
- (i) email correspondence from Ask Funding’s solicitors to Ms Kenny, after summary judgment was given, enclosing a copy of the judgment;
- (j) a letter dated 13 October 2011 from ARC Legal, on behalf of Ask Funding, advising that it wishes to have all the properties valued;
- (k) handwritten notes from Ms Kenny; and
- (l) medical certificates dated 10 April 2018, 28 March 2018, 19 August 2014, 13 February 2013, 6 June 2015, 16 January 2016, 27 April 2014 and 13 February 2013.

[47] Of those annexures, the documents that were not in evidence before the District Court are those referred to in (g), (i), (j), (k) and some of the medical certificates in (l). The documents at (i) and (j) are not relevant to the issues raised on the appeal. I would accept the handwritten notes as a submission by Ms Kenny, but not evidence of what is set out in the notes. The medical certificates, which were not previously supplied, were available prior to the hearing in the District Court, are repetitive of those that were provided to the court below and do not paint any different picture. The emails at (g) are potentially relevant to Ms Kenny’s main argument. Affording Ms Kenny some leniency given that she is representing herself, I would give leave to rely on the affidavit only to the extent that it annexes the emails described at (g), with the handwritten notes to be considered a submission.

[48] The second affidavit, filed 28 September 2018, attaches a further approximately 70 handwritten pages from Ms Kenny, by way of submissions, and annexes again some of the documents attached to the earlier affidavit. I would give leave to rely on this affidavit, only by way of submissions, but note that much of what is contained in the 70 pages is not relevant to the issues on the appeal (and to some extent reflects the contents of various of the handwritten letters that were sent to Ask Funding over the years, which were in evidence before the court below, in so far as Ms Kenny’s recording of her life history is concerned).

[49] Turning then to the grounds of the appeal.

---

<sup>46</sup> See AR 339-342 (part of the annexures to Mr Templeton’s affidavit, relied on by Ask Funding in the court below).

<sup>47</sup> Which appears at AR 104 (also part of the annexures to Mr Templeton’s affidavit).

<sup>48</sup> These emails were not part of the material before the District Court.

<sup>49</sup> Which appears at AR 547 (also part of the annexures to Mr Templeton’s affidavit).

***Ground 1 – whether the primary judge erred in the conclusions he reached about Ms Kenny’s assertions about Ask Funding’s conduct in relation to the sale of lots 58 and 211***

[50] This is the main point agitated by Ms Kenny.

[51] Firstly, in so far as the **potential sale of lot 58** is concerned, Ms Kenny has not identified any basis to doubt the correctness of the conclusion reached by the primary judge, for the reasons given at [121]-[128] of the Reasons, that there is no real prospect of Ms Kenny establishing that Mr Boyd frustrated the sale of lot 58 in May 2015.<sup>50</sup>

[52] The letter from Ms Kenny to Ask Funding, received on 26 June 2015<sup>51</sup> (referred to at [125] of the Reasons), tells strongly against the assertions of Ms Kenny in this regard. In that letter, Ms Kenny said:

“On the table at the moment is (Lot 58) on Moran Rd, we have a potential buyer for \$165,000. I will sign this only if Ask Funding gives me back (Lot 211) mortgage free immediately...”

[53] As the primary judge observed, at [126]-[127] of the Reasons:

“It is strange that Mr Boyd or Ask would refuse to let a sale go ahead in circumstances where they had, for years before and after this alleged refusal, given Ms Kenny numerous opportunities to sell Lot 58 (and Lot 211) at her request, and repeatedly delayed requiring repayment for that purpose and had done the same for other lots which ultimately were sold. Further, Ms Kenny was represented by Aden’s Lawyers at the time. It is remarkable that they were not asked to complain about this sudden intransigence. (Finally, I note Ms Kenny stated an intention to obtain evidence from Mr Bigby about these matters. None has been provided.)

The evidence sworn to by Ms Kenny lacks detail and is conclusory. It swears to no actual act or omission by Mr Boyd at any particular time or at all. It is directly inconsistent with the context of the parties’ dealings.”

[54] Further, I note that in a letter Ms Kenny apparently wrote to the Financial Ombudsman Service, dated 1 November 2015,<sup>52</sup> she appears to attribute the failure of the sale of lot 58<sup>53</sup> to the conduct of the real estate agent that was acting for her, who she said was charged with criminal offences and as a consequence failed to turn up at the auction. She goes on to say “[s]o I now have (Lot 58) for sale with an agent for \$225,000 and my son will show the property to potential buyers”.<sup>54</sup> There is no mention of any conduct by Ask Funding preventing an earlier sale of this lot being completed.

---

<sup>50</sup> For completeness, there is a typographical error in [128] of the Reasons, which refers to lot 155, but must be taken to refer to lot 58.

<sup>51</sup> See AR 517-525, particularly at AR 524; see also [5(v)(x)] on p 8 of Mr Templeton’s affidavit, as to the date of receipt.

<sup>52</sup> The letter commences at AR 529; see also Mr Templeton’s affidavit at [5(v)(xii)], p 8.

<sup>53</sup> It is not entirely clear, as there is no reference to lot 58 at AR 531-532; it is to be inferred this is what is being referred to, however, from the statement at the bottom of AR 533 that: “So now I have (lot 58) for sale with an agent...”.

<sup>54</sup> AR 531-533.

- [55] Moreover, all of that occurred prior to the parties entering into the Deed of Variation #2 in January 2016 (referred to at paragraphs [15] and [16] above). Ms Kenny had the benefit of independent legal advice from Mr Bigby prior to entering into the 2016 Deed under which, among other things, Ms Kenny released and discharged Ask Funding from any of her previous claims and complaints.
- [56] The assertions made by Ms Kenny about frustration of the sale of lot 58 are not supported, to any extent, by the material which she has put before the District Court or this court. The primary judge was right to conclude that there is no real prospect of defending the claim to recover possession on this basis, and no need for a trial.
- [57] Secondly, in relation to the assertions concerning the **potential sale of lot 211**. Again, in my view, Ms Kenny has identified no basis on which to find error in the primary judge's conclusion that she has no real prospect of establishing that Ask Funding, by Mr Boyd, frustrated this sale, as explained at [129]-[133] of the Reasons.
- [58] Ms Kenny's contention is that Ask Funding, by Mr Boyd, refused to grant her requested extension of the payment date under the 2016 Deed, to 10 May 2016, and as a consequence the contract for the sale of lot 211 was lost. Although Ask Funding submits that there was no evidence there ever was a binding contract for the sale of lot 211, the primary judge did not deal with Ms Kenny's assertions on that basis.
- [59] The evidence included a contract signed only by Ms Kenny, not the putative purchasers. The emails attached to Ms Kenny's affidavit filed in this court on 1 August 2018, from David Power to Anthony Bigby, of 8 and 15 April 2016, could be said to support the fact that the putative purchasers, Mr and Mrs English, had agreed to purchase the property.<sup>55</sup>
- [60] Assuming, favourably to Ms Kenny, that a contract was entered into, between her and Mr and Mrs English, on 20 April 2016 for the sale of lot 211, in my view no error has been shown in the learned trial judge's findings, at [131]-[133] of the Reasons, as follows:

“[Ms] Kenny's evidence does not contain any statement by Mr Boyd that Ask would prevent the sale going ahead or any step which had that effect. The evidence does not make out the allegation in the amended defence.

Further, like the Lot 58 allegation, the suggestion that Ask would not let the sale go through ... is inconsistent with the contemporaneous dealings of the parties. The Second Variation required payment of

---

<sup>55</sup> After the hearing of the appeal, on 24 October 2018 Ms Kenny attempted to file further documents with the registry, including a copy of the signed contract for the sale of lot 211. Ms Kenny asserts in her covering handwritten letter that the appeal court judges “asked me to send the signed copy”. At the hearing of the appeal there was no request made, or leave given, by this court for Ms Kenny to provide any further documentation. However, again acknowledging the difficulties faced by an unrepresented litigant, it is noted that the documents provided on 24 October 2018 do include a further copy of the contract for the sale of lot 211, dated 20 April 2016, which does bear signatures of Richard English and Susan English, as well as Ms Kenny. It is not known whether these documents were served on the respondent. However, since the learned trial judge proceeded to deal with Ms Kenny's argument about the sale of lot 211 effectively on the assumption, and accepting, that there had been a binding contract; and since on this appeal I have adopted the same assumption (prior to the receipt of this further copy of the document), the provision of this further documentation does not have any impact on the outcome of the appeal.

\$250,000 by 30 April 2016. However, even if there was a refusal to extend that date yet again, such a refusal would not comprise a refusal to provide a release on settlement of the sale. In addition, on 30 May 2016, Mr Boyd emailed Mr Bigby of Aden Lawyers observing that Ask had not had any report of progress in sale of Lot 211. No challenge to that assertion appears in the material.

The evidence sworn to by Ms Kenny swears to no act or omission by Mr Boyd which comprises stating an intention to prevent the sale of Lot 211. It is directly inconsistent with the context of the parties' dealings. In my view, on the evidence before the Court, there is no real prospect of Ms Kenny establishing that Mr Boyd frustrated the sale of Lot 211 in April 2016."

[61] Having considered the whole of the material which was in evidence before the primary judge, and taking into account Ms Kenny's submissions, and the additional emails, I agree with his Honour's conclusions in this regard. The course of correspondence, and negotiations, between Ms Kenny and Ask Funding over the many years that the loans have been outstanding demonstrates many occasions on which Ask Funding was prepared to negotiate, and compromise, and delay enforcement proceedings. The assertions made by Ms Kenny about frustration of the sale of lot 211 are not supported, to any extent, by the material which she put before the District Court or this court.

[62] On the contrary, the email from Mr Boyd of 30 May 2016 tells strongly against those assertions. As already noted above, in that email to Mr Bigby, Mr Boyd said:

"It has now been a month since your client was required to have paid the capped amount to Ask Funding and we have not, in that month, been advised of her having made any progress with respect to the sale of Lot 211. Further, Ask Funding has recently received notice of an equitable mortgagee's caveat having been lodged against Lots 58 and 211 by Panoramic Finance Pty Ltd.

Ask Funding requires vacant possession of the two remaining properties for the purpose of exercising its power of sale and I have been instructed to cause a notice to that effect to be served on your client."<sup>56</sup>

[63] The first part underlined is inconsistent with Ask Funding, or Mr Boyd, having done anything to prevent the sale of lot 211 being completed, and also inconsistent with the notion that, had the sale of lot 211 been completed, even after 30 April 2016, Ask Funding would have refused to accept payment in satisfaction of the obligation of Ms Kenny under the 2016 Deed. The second part underlined is also significant, as it explains why, from that point on, Ask Funding would no longer delay enforcement proceedings. Not only had all attempts to compromise, and facilitate Ms Kenny's requests, been unsuccessful; but there was now another potentially competing interest in the property.

[64] Ms Kenny was granted a two month adjournment of the summary judgment application, in part, so that she could obtain affidavit evidence from Mr Bigby in relation to her contentions. She provided no such evidence.

---

<sup>56</sup> Underlining added.

- [65] As the primary judge observed, the evidence was hers to give or locate. As the applicant for summary judgment, Ask Funding bore the persuasive onus of proof on the application. However, having made out a prima facie case for the relief which it sought – which is not challenged on this appeal – there was an evidentiary onus on Ms Kenny, to show some basis for arguing that there was a real prospect of her successfully defending that claim.<sup>57</sup> She did not do so.
- [66] Again, in my respectful view, the primary judge was right to conclude that there is no real prospect of defending the claim to recover possession on this basis.
- [67] The primary judge went on to consider whether, even if he had reached a different conclusion in relation to the assertions about frustration of the sale of lots 58 and 211, those assertions could provide a defence to the claim for possession, which arose under s 78(2) of the *Land Title Act* 1994. His Honour found they would not.<sup>58</sup>
- [68] In my view, that alternative conclusion was also correct. It is unnecessary to say anything more about the assertions regarding lot 58, given the matters addressed at [52]-[56] above. In relation to the assertions regarding lot 211, as already noted, Ms Kenny's argument is that Ask Funding, by Mr Boyd, unreasonably refused to grant her requested extension to the date for payment under the 2016 Deed of Variation, and as a consequence the sale was lost. Even if it be assumed, favourably to Ms Kenny, that she could prove the refusal to extend time for payment under that Deed; and that such refusal was in breach either of a contractual obligation,<sup>59</sup> or another legal obligation;<sup>60</sup> and that there was a causal link between such refusal, and the loss of the sale, at best for Ms Kenny that may give her a basis to challenge the amount which Ask Funding sought to recoup from the sale of the land, after taking possession of it, on the basis of a counterclaim for damages or compensation. It would not provide her with a basis to defend the claim of Ask Funding, as mortgagee, to obtain possession of the mortgaged lots for the purpose of exercising the power of sale. That was the only relief which Ask Funding sought in the District Court proceeding.
- [69] The agreement reflected in the 2016 Deed of Variation was a negotiated compromise of the debt owed by Ms Kenny to Ask Funding, under the loan agreement entered into in January 2010, secured by registered mortgages. The loan agreement and the mortgages were admitted, as was the default and the non-payment of the debt. Ms Kenny's assertions, of frustration of the sale of lot 211, do not affect the enforceability of the mortgages.<sup>61</sup>
- [70] Although Ms Kenny does not, in terms, seek an injunction to restrain Ask Funding from exercising its right under the mortgages to recover possession of the properties in consequence of the default, that is the effect of her opposition to the relief sought by Ask Funding in the District Court proceeding. In that regard, and by analogy, the general rule established in *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161 applies, namely, that where a mortgagor seeks to prevent a

---

<sup>57</sup> *National Australia Bank Ltd v Troiani* [2002] QCA 196 at [11]; *Queensland Pork Pty Ltd v Lott* [2003] QCA 271 at [34] and [41]; *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105 at [22]. See also the Reasons at [97].

<sup>58</sup> Reasons at [134]-[143].

<sup>59</sup> For example, an implied term in the 2016 Deed of Variation.

<sup>60</sup> For example, unconscionable conduct under the relevant provisions of the *Australian Securities and Investments Commission Act* 2001 (Cth).

<sup>61</sup> Cf *National Australia Bank Limited v McCall* [2011] QSC 25 at [5]-[7], [13] and [41]; and *Morel v Bank of Queensland Limited* [2015] QCA 58 at [25].

mortgagee from exercising the power of sale, the mortgagor must either pay the mortgage debt, if this is not in dispute, or, if the amount is in dispute, pay the amount claimed by the mortgagee, into court.<sup>62</sup> The rationale for that rule is, as explained by Walsh J in *Inglis* at 165 that:

“The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed.”

- [71] The circumstances which may invite a more flexible approach, such as where the existence of the power of sale, or whether it is exercisable at all, is in question, are not present here. The only potential dispute is about the amount due for payment, by reference to the compromise agreement reflected in the 2016 Deed of Variation. There has been no offer to pay anything into court. In fact, what Ms Kenny wants is to be excused from the debt altogether, and have lot 58 and lot 211 returned to her free of the mortgages.
- [72] In my view, the primary judge was correct to conclude that the assertions raised by Ms Kenny, about frustration of the sale of lot 58 and lot 211, even if they could be proved, would not provide any basis to defend the claim by Ask to recover possession.

***Ground 2 – whether the primary judge erred by failing to acknowledge that Ms Kenny’s only ability to pay the debt was through the sale of some of her real estate***

- [73] I am unable to discern any basis for intervention in the primary judge’s decision on this ground. The order that has been made is for Ask Funding to recover possession of lot 58 and lot 211, in respect of which it holds mortgages to secure the debt owed by Ms Kenny. The order enables the property to be sold, in order to repay the debt, which is the purpose of the security provided by way of mortgage. This was a particular type of loan from the outset, not based on an analysis of income capacity to service and repay the loan, but based upon an expectation of distribution of property from a deceased estate.

***Ground 3 – whether the primary judge erred by not evaluating Ask Funding’s behaviour towards Ms Kenny in regards to the repayment of the loan***

***Ground 4 – whether the primary judge erred in not achieving an accurate understanding of the background of the case between Ask Funding and Ms Kenny, which resulted in legal error***

- [74] Both of these grounds also lack merit. The Reasons show that the primary judge was at pains to try to identify, and then evaluate, any possible defence that may be raised by Ms Kenny on her material, including those potentially raised by Ms Kenny’s assertions regarding Ask Funding’s behaviour towards her. The Reasons also demonstrate the primary judge’s careful consideration of the factual circumstances

---

<sup>62</sup> See also *Harvey v McWatters* (1948) 49 SR (NSW) 173; *Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1971] 1 WLR 43 at 50-51 per Russell LJ; *Clarke v Japan Machines (Australia) Pty Ltd (No 2)* [1984] 1 Qd R 421; and *Clairview Developments Pty Ltd v Law Mortgages Gold Coast Pty Ltd* [2007] 2 Qd R 501 at [6]-[8] per McMurdo P, [35]-[43] per Jerrard JA and at [48] and [53] per Helman J.

based on the evidence, and pleadings, before him. Ms Kenny does not identify any respect in which she contends the primary judge's summary of the factual background was inaccurate, let alone resulted in legal error.

***Ground 5 – whether the primary judge erred in not further adjourning the summary judgment application, when Ms Kenny did not appear on 13 April 2018***

- [75] Ms Kenny's fifth ground states that "[d]ue to my ailing health I was not able to appear in the District Court on the 13<sup>th</sup> of April 2018". I would treat this as a contention that the primary judge erred in failing to further adjourn the summary judgment application on 13 April 2018, when Ms Kenny did not appear.
- [76] Ms Kenny had been given considerable notice of the first hearing date for the summary judgment application (9 February 2018), having been served with the application and supporting material on 12 January 2018. The hearing was then adjourned for a further two months, until 13 April 2018, for the reasons already discussed above. That was a lengthy adjournment, but one which was fair and just in the circumstances, having regard to the nature of the relief sought by Ask Funding, the fact that Ms Kenny was then unrepresented, but had made arrangements to obtain legal advice through the assistance of LawRight, and her request for time to be able to obtain affidavits to support the arguments she wished to raise by way of defence.
- [77] The medical certificate provided by Ms Kenny to the primary judge, dated 10 April 2018 (exhibit 5) described the conditions she suffers from (to which extensive reference was also made, elsewhere in the material before the judge), but did not provide any evidence of incapacity to attend court on 13 April 2018. The other two certificates were not current, being dated 6 June 2015 and 16 January 2016, respectively.
- [78] The documents posted directly to the Judge included a handwritten letter from Ms Kenny (exhibit 7), which is dated 2 April 2018 (eight days earlier than the medical certificate, dated 10 April 2018). In that letter, Ms Kenny says "I will not be attending court on Friday as I am losing a lot of blood and I would not be able to walk – or sit or have any stress. I now leave this business in God's hands so his will can be done". It is reasonable to infer from this that Ms Kenny was not requesting a further adjournment of the hearing; but rather flagging her intention not to attend.
- [79] By rule 5 of the *Uniform Civil Procedure Rules 1999*, the court and the parties are under an obligation to facilitate the just and expeditious resolution of the real issues in civil proceedings. The court is expressly required to apply the UCPR with the objective of avoiding undue delay, expense and technicality. The parties are expressly required to proceed in an expeditious way.
- [80] In addition to the interests of the parties, there is a public interest in the efficient use of court resources. Consequently, the effect of delay in hearing one matter, on the availability of the court's resources more generally, and the interests of other litigants waiting to be heard, are also relevant factors.<sup>63</sup>
- [81] In my view, proceeding to hear and determine the summary judgment application on 13 April 2018, despite the absence of Ms Kenny, involved no error.

---

<sup>63</sup> *Sali v SPC Ltd* (1993) 116 ALR 625 at 629 and 636; *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [26]-[27], [30], [35] per French CJ and at [92]-[95] and [98] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

***Additional ground – whether the primary judge presented a biased approach***

- [82] Finally, although not articulated as a separate ground, Ms Kenny asserts, in her “outline of argument”, at page 7, that the primary judge “presented a bias approach towards Ask Funding Limited by remarks made during the trial”. The only particularisation of this serious allegation appears in Ms Kenny’s handwritten submissions attached to her affidavit filed in this court on 1 August 2018 (pp 11-12), in which she asserts that at the initial hearing on 9 February 2018 Judge Porter QC told her he was going to give her two lots of land (lots 58 and 211) to Ask Funding on 13 April 2018 and she “was never given a chance to get my story out there or defend myself against these people”. Ms Kenny reiterated this at the hearing of the appeal.
- [83] There is no basis to the allegation of bias on the part of Judge Porter QC. The transcript of the hearing on 9 February 2018 clearly demonstrates the inaccuracy of the assertions made in this regard by Ms Kenny in the handwritten submissions.

**Proposed order**

- [84] No error has been shown in the decision of the primary judge to grant summary judgment of Ask Funding’s claim for recovery of possession of lot 58 and lot 211. I would order that the appeal be dismissed, with costs.