

SUPREME COURT OF QUEENSLAND

CITATION: *Edwards v Pepper Finance Corporation Limited* [2019] QCA 152

PARTIES: **WANDA MARGARET EDWARDS**
(appellant)
v
PEPPER FINANCE CORPORATION LIMITED
ACN 094 317 647
(respondent)

FILE NO/S: Appeal No 8348 of 2018
SC No 12261 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 152 (Mullins J)

DELIVERED ON: 2 August 2019

DELIVERED AT: Brisbane

HEARING DATE: 12 November 2018

JUDGES: Gotterson and Philippides JJA and Boddice J

ORDER: **The appeal be dismissed with costs on the standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – DEFAULT JUDGMENT – SETTING ASIDE – PROCEDURAL AND OTHER MATTERS – where the appellant and her husband entered into a loan agreement under which the respondent would advance \$937,000 to them, secured by a registered mortgage against a residential property – where the appellant defaulted under that mortgage and the respondent commenced proceedings against the appellant and her husband seeking recovery of possession of the mortgaged property – where default judgment was entered against the appellant on the basis that she and her husband were served personally with a claim and statement of claim but failed to file a notice of intention to defend – where the appellant contended that the default judgment should be set aside as irregularly entered on the basis that the claim and statement of claim had in fact not been personally served on her and that the primary judge erred in not finding so – where the issue of service turned on the evidence of the appellant, her husband and the process server at trial – where the appellant, her husband and the process server were cross examined – where the primary judge made findings as to that

evidence – whether the primary judge erred in finding that the appellant and her husband were personally served with the claim and statement of claim and that therefore default judgment was regularly entered

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – DEFAULT JUDGMENT – SETTING ASIDE – DISCRETION – where the appellant contended that the primary judge erred in exercising the discretion in r 290 *Uniform Civil Procedure Rules* 1999 (Qld) to dismiss her application to set aside the default judgment – where the appellant advanced voluminous grounds of appeal seeking to impugn the mortgage – where, *inter alia*, the appellant contended she entered into the mortgage as a consequence of actual undue influence on the part of her husband or that the equity in *Yerkey v Jones* (1939) 63 CLR 649 was available to her – where the primary judge found that the appellant did not have a *prima facie* defence – where the appellant contended that the primary judge either wrongly rejected her arguments or failed to consider them – whether the primary judge erred in exercising the discretion to dismiss the appellant’s application to set aside default judgment

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – EXECUTION AGAINST PROPERTY – OTHER MATTERS – where the appellant contended that the primary judge erred in exercising the discretion under r 894(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) to grant leave to commence enforcement proceedings for the recovery of possession of the mortgaged property – where the primary judge found that leave to commence enforcement was not required by r 72 of the *Uniform Civil Procedure Rules* 1999 (Qld) as enforcement was not within the description of taking a step in the proceeding – where the primary judge found that leave to commence enforcement was not required by s 58(3) of the *Bankruptcy Act* 1966 (Cth) as a proceeding to enforce a judgment for the recovery of possession of property mortgaged to a secured creditor against a bankrupt is not a remedy in respect of a provable debt – where the primary judge found that the respondent’s conduct in accepting further loan repayments after the default judgment was granted did not give rise to a waiver or estoppel as those payments were accepted without prejudice to the rights of the respondent – whether the primary judge erred in exercising the discretion to grant leave to commence enforcement proceedings

Uniform Civil Procedure Rules 1999 (Qld), r 290, r 894(1), r 894(3)

Barnes v Addy (1874) LR 9 Ch App 244, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
*National Mutual Life Association of Australasia Limited v
 Oasis Developments Pty Ltd* [1983] 2 Qd R 441, followed
Schulz v Bank of Queensland Ltd [2016] 2 Qd R 86; [\[2015\]
 QCA 208](#), applied
Yerkey v Jones (1939) 63 CLR 649; [1939] HCA 3, applied

COUNSEL: L G Smits (*sol*) for the appellant
 S Cooper for the respondent

SOLICITORS: Leonardus Smits Lawyer for the appellant
 Thomson Geer for the respondent

- [1] **GOTTERSON JA:** I agree with the order proposed by Philippides JA and with the reasons given by her Honour.

PHILIPPIDES JA:

Chronology

- [2] By an agreement dated in November 2006, the respondent, Pepper Finance Corporation Limited (Pepper Finance), agreed to advance a loan of \$937,000 to the appellant, Mrs Edwards, and her husband, in their own capacity and as trustee of The Edwards Family Trust. The loan was secured by a registered mortgage over a property at Fig Tree Pocket. Mr and Mrs Edwards defaulted under the agreement and the registered mortgage number 710233121 in or around June 2009.
- [3] On 3 November 2009, Pepper Finance brought a proceeding as plaintiff seeking recovery of possession of the property against Mrs Edwards and her husband as defendants. The basis for the claim for possession was an entitlement to possession upon Mr and Mrs Edwards being in default under the mortgage and failing to comply with the notice of default in reliance on the provisions of the mortgage pursuant to s 78 of the *Land Title Act* 1994 (Qld).
- [4] On 21 October 2010, default judgment was entered against Mrs Edwards and her husband on the basis that the claim and statement of claim were served personally on Mr and Mrs Edwards on 14 November 2009 by Mr Hawks, a process server, in accordance with his affidavits of service, but that no notice of intention to defend was filed. Although Pepper Finance obtained enforcement warrants for possession of the property on two occasions, the judgment has not been enforced and Mr and Mrs Edwards remained in possession of the property when the matter came before the primary judge.
- [5] Mr Edwards, who is a lawyer, became bankrupt on 29 August 2013 and his bankruptcy has been extended to 11 September 2021. The trustees in bankruptcy lodged caveat number 715301237 on 9 September 2013 against Mr Edwards' interest in the subject property.
- [6] An application to set aside the default judgment was filed by Mr and Mrs Edwards on 16 March 2017 but withdrawn with the consent of Pepper Finance when Mr Edwards' trustees in bankruptcy refused to continue with the application.

- [7] On 19 September 2017, a further application was filed on behalf of Mrs Edwards to set aside the judgment and to seek a declaration that the mortgage granted by Mr and Mrs Edwards did not support repayments of any loans made by Pepper Finance to Mr and Mrs Edwards. That application was amended on 15 December 2017, by which Mrs Edwards sought additional orders for the conduct of a mediation or case appraisal and for relief on a variety of bases, including unconscionable dealing or misleading and deceptive conduct, or on the basis of the authority of *Yerkey v Jones*.¹
- [8] On 8 March 2018, Pepper Finance sought leave under r 894(1) of the *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR) to enforce the default judgment (which was amended to seek leave to join the trustee in bankruptcy of Mr Edwards) as the judgment has not been enforced within six years after the day it was made. It also sought leave pursuant to r 72 of the UCPR to proceed against Mr Edwards given he was bankrupt.
- [9] On 24 May 2018, the primary judge heard an application to set aside the default judgment as irregularly entered on the basis that the claim and statement of claim had not been personally served. The primary judge gave *ex tempore* reasons finding that personal service had been effected and the default judgment was regularly entered. Subsequently, on 6 July 2018, her Honour gave judgment² dismissing Mrs Edwards' application to set aside the default judgment in the exercise of her discretion under r 290 of the UCPR and granting leave under r 894(1) of the UCPR to Pepper Finance to commence enforcement proceedings.
- [10] Mrs Edwards appeals against the decision of the primary judge contending that her Honour erred in:
- (a) finding that the default judgment against her was regularly entered;
 - (b) exercising the discretion under r 290 of the UCPR by dismissing her application to set aside the judgment; and
 - (c) exercising the discretion under r 894(1) of the UCPR by granting leave to commence enforcement proceedings.
- [11] For the reasons that follow, I do not consider that Mrs Edwards has demonstrated that any appealable error was made by her Honour in concluding that the default judgment was regularly entered, nor has any error in the *House v The King*³ sense been demonstrated concerning the exercise of the discretions under r 290 or r 894(1) of the UCPR.

Whether the default judgment was regularly entered

- [12] Mrs Edwards' contention⁴ that the primary judge erred in finding that the default judgment was regularly entered turned on the issue of whether her Honour erred in being satisfied that Mrs Edwards was personally served with the claim and statement of claim.

¹ (1939) 63 CLR 649.

² *Pepper Finance Corporation Limited v Edwards & Anor* [2018] QSC 152 (Reasons) at [58].

³ (1936) 55 CLR 499 at 505.

⁴ Ground 6.

- [13] In considering the issue of service, the primary judge had regard to affidavits sworn by Mrs Edwards, her husband and Mr Hawkes, all of whom were cross examined. Her Honour noted that Mr Hawkes was present in the courtroom when Mr and Mrs Edwards gave evidence, however, did not consider that to have tainted his evidence. Her Honour observed in an *ex tempore* judgment that Mr Hawkes did not claim to have a current memory of having served Mrs Edwards and that much of his evidence concerned the systems in place for effecting service. In preferring the evidence of Mr Hawkes to that given by Mr and Mrs Edwards, her Honour explained that she did not consider that Mrs Edwards had a reliable memory of what had occurred in 2009. Her Honour expressed caution as to the evidence of Mr Edwards, whose evidence went into great detail as to what had occurred although it was many years ago. Her Honour concluded that she was unpersuaded that it displaced the evidence of Mr Hawks.
- [14] There was no error in her Honour's approach to the evidence. Her Honour had the advantage of observing the witnesses during the course of giving evidence and was entitled to find that personal service had been effected so that the default judgment was regularly entered. Arguments as to the failure to serve Mrs Edwards in her representative capacity are meritless.

Exercise of the discretion in refusing to set aside default judgment

- [15] There can be no doubt that her Honour addressed the application to set aside the default judgment by reference to the correct legal principles. In considering the exercise of her discretion to set aside a default judgment that was regularly entered, the primary judge, referring to *National Mutual Life Association of Australasia Limited v Oasis Developments Pty Ltd*,⁵ identified the relevant matters to be taken into account as including whether there is an explanation for the delay in defending the claim and whether Mrs Edwards had an arguable or *prima facie* defence on the merits.⁶
- [16] The primary judge concluded that, while there was an explanation for Mrs Edwards' delay in bringing the application to set aside the default judgment, she was not satisfied that there was a *prima facie* defence.
- [17] The crux of the complaint raised by Mrs Edwards was that, in deciding her application, the primary judge either wrongly rejected her arguments or failed to consider her arguments.

Factual background and findings

- [18] It is necessary to set out in some detail the factual background outlined by her Honour and the inferences and findings of fact made before considering whether there was error in concluding that the proposed defences lacked viability. Those facts and findings are as follows.
- [19] The Fig Tree Pocket property was purchased by Mr and Mrs Edwards in 1998 from Mr and Mrs Finney. By transfer registered number 702864522, Mr and Mrs Finney transferred the fee simple to Mr and Mrs Edwards as joint tenants and Mr and

⁵ [1983] 2 Qd R 441 at 449-450.

⁶ Reasons at [5].

Mrs Edwards as trustees as tenants in common in the shares of 51 per cent and 49 per cent respectively. Her Honour stated:⁷

“It is apparent the intention was that Mr and Mrs Edwards in their own capacity as joint tenants would be the registered owners of a share of 51/100 of the estate in fee simple in the subject property and they as trustees would hold a 49/100 share in the property. The transfer document itself did not identify the trust on which Mr and Mrs Edwards held the 49/100 share in the property, but in accordance with Titles Office requirements at the time, reflecting the terms of s 110(3) of the *Land Title Act* 1994, a document specifying details of the trust, or the document creating the trust, would have been deposited with the instrument of transfer. Section 110(5) then provided for the registrar to keep a certified copy of the document and return the original to the person who deposited it.”

[20] Her Honour stated⁸ that by 26 June 1998, according to Mr Edwards’ affidavit, Mr and Mrs Edwards were the trustees of The Edwards Investment Unit Trust (EIUT). Mr Edwards asserted implicitly that their intention was to hold the 49 per cent share in the property as the trustees of the EIUT. The EIUT was established by trust deed dated 1 November 1995 between Mr Edwards as the trustee and Mr and Mrs Edwards as the unit holders. Mrs Edwards subscribed to one unit as the trustee for The Edwards Superannuation Fund. Mr Edwards subscribed to one special unit. Clause 10.3 of the deed applied restrictions to the special units. The holders of special units would be entitled to receive an amount equivalent to 0.001 per cent of the trust fund in proportion to their holdings. The provisions of the deed relating to the equality of rights of unit holders and proportionate entitlement to the trust fund were expressly excluded in respect of special units or the holders of special units. Her Honour found that effectively gave Mrs Edwards, as trustee for The Edwards Superannuation Fund, the entitlement to the trust fund, apart from 0.001 per cent of the trust fund.

[21] A copy of the mortgage (number 702864536) given by Mr and Mrs Edwards to the National Australia Bank Limited at the time they purchased the Fig Tree Pocket property was exhibited to Mr Edwards’ affidavit. In his affidavit, he asserted that the mortgage was given by him and Mrs Edwards for and on behalf of the registered owners, including themselves as trustees of the EIUT. Her Honour made the following observations:⁹

“The mortgage instrument does not identify on its face, as part of the description of the trustees, the trust of which [Mr and Mrs Edwards] were the trustees. Similarly, [Mr and Mrs Edwards] granted a mortgage over the Fig Tree Pocket property to the Commonwealth Bank of Australia in 2000 and although Mr Edwards asserts it was given by [Mr and Mrs Edwards] for themselves personally and as trustees of the EIUT, the mortgage merely recites that the mortgagors were Mr and Mrs Edwards and Mr and Mrs Edwards ‘as trustees under instrument 702864522’ which refers to the trust that was notified to the Titles Office, when the transfer under dealing number 702864522 was lodged. Although Mr Edwards asserts that mortgage

⁷ Reasons at [10].

⁸ Reasons at [11]-[12].

⁹ Reasons at [13].

number 709124971 in favour of Heritage Building Society Limited was also given by [Mr and Mrs Edwards] for themselves personally and as trustees of the EIUT, the identification of the mortgagor in the mortgage does not extend to identifying the relevant trust, other than by reference to instrument 702864522.”

- [22] Her Honour noted¹⁰ that, at the time the loan was negotiated on behalf of Mr and Mrs Edwards with Pepper Finance, they had granted existing mortgages over the Fig Tree Pocket property in favour of Heritage Building Society Limited that secured about \$630,000. Mr Edwards completed the loan application to Pepper Finance with the assistance of a finance broker, Mr Worth, whom Mr Edwards asserted Mrs Edwards never met. Mr Edwards also asserted that Mr Worth recommended that the loan purpose should be to refinance the Heritage Building Society mortgages, pay his tax debt (which was about \$80,000) and provide funds for “wealth creation”. Mr Edwards had been referred to Mr Worth by clients whom Mr and Mrs Edwards proposed to join in a venture in purchasing land at Coppabella to construct an accommodation village for mine workers, which was the project for which Mr and Mrs Edwards sought additional funds for investment from Pepper Finance.¹¹
- [23] The application to Pepper Finance was signed by Mr and Mrs Edwards on 27 October 2006. Both the Fig Tree Pocket property and a property they owned in Moranbah were to be first mortgage security. Solicitors, Cooper Grace Ward Lawyers (Cooper Grace Ward), acted for Pepper Finance in respect of the loan to Mr and Mrs Edwards and, by a letter addressed to Mrs Edwards dated 21 November 2006, provided copies for Mrs Edwards of a loan agreement, general terms and conditions, the mortgage for each secured property and the memorandum referred to in the mortgage. Mrs Edwards was instructed to contact Mr Edwards as trustee for The Edwards Family Trust to sign the original documents. The borrowers were shown in the loan agreement as Mr and Mrs Edwards and then Mr and Mrs Edwards in their own capacity and as trustee for The Edwards Family Trust.
- [24] Her Honour inferred¹² that the Moranbah property was owned by Mr and Mrs Edwards as joint tenants and that it was therefore always the intention of Pepper Finance that, to the extent it was dealing with Mr and Mrs Edwards as trustees, it was dealing with them as the trustees of The Edwards Family Trust.
- [25] The Edwards Family Trust was created by deed made on 17 September 1981 pursuant to which Mrs Edwards was designated the original trustee in respect of the settlement sum of \$50. By deed made on 26 June 1998 between Mrs Edwards and Mr Edwards, Mrs Edwards appointed Mr Edwards to be a trustee, with her, of The Edwards Family Trust.¹³
- [26] The loan agreement commenced with a note to the borrower recommending that the borrower consider obtaining legal and financial advice in relation to the loan and her Honour noted that, before the execution page, there were declarations set out that applied to the borrower by signing the loan agreement, including the following:¹⁴

¹⁰ Reasons at [14].

¹¹ Reasons at [15].

¹² Reasons at [16].

¹³ Reasons at [17].

¹⁴ Reasons at [18].

“You have carefully read this loan agreement and the Pepper General Terms & Conditions and understand that each document between you and us establishes a legal contract between you and us. If you have any questions, ask before you sign.”

- [27] Further warnings were included in a box that was headed ‘IMPORTANT’ with instructions on matters that the borrower needed to know before signing the document. There was also a further page to be completed, if the borrower chose not to obtain legal advice despite the page being headed “Legal Advice” and followed by a statement that “The Lender encourages you to obtain legal advice in relation to this loan”.¹⁵
- [28] Mrs Edwards in her affidavit filed on 11 April 2018,¹⁶ deposed to her custom of signing legal documents as and when Mr Edwards asked her to do so without reading the documents or questioning him about them. Her evidence was that she placed “complete trust and confidence” in her husband in relation “to all legal matters” and that she did not read the documents relating to Pepper Finance because her husband told her that they were part of obtaining finance for a development project at Coppabella (which her husband told her they should invest in). Her Honour found¹⁷ that it was apparent from Mrs Edwards’ affidavit that she was aware at the time she entered into the loan agreement with Pepper Finance that she and Mr Edwards were using the loan funds to repay the loans to the Heritage Building Society (\$630,000) and to invest about \$280,000 in the Coppabella project.
- [29] By transfer registered number 710233115 signed by Mr and Mrs Edwards on 28 November 2006, they, as trustees under instrument 702864522, transferred an interest of 49 per cent of the estate in fee simple in the Fig Tree Pocket property to themselves as trustees of The Edwards Family Trust. Her Honour noted¹⁸ that the consideration was originally described in the transfer as being “Pursuant to the transferors’ wish to correct the error relating to the trust pursuant to the terms of which the property is held by them as trustees”. Transfer 710233115 was originally signed by Mr and Mrs Edwards on the same day that they signed the mortgage over the Fig Tree Pocket property in favour of Pepper Finance.
- [30] When the mortgage was signed it showed as mortgagor both Mr and Mrs Edwards in their personal capacity, as well as in their capacity as trustee under instrument number 702864522 (which was the instrument by which they became the registered owners of the Fig Tree Pocket property). Her Honour noted¹⁹ that even before the amendments made to transfer 710233115, it had been prepared on the basis that Mr and Mrs Edwards’ interest of 49 per cent in the property would be transferred to themselves as trustees of The Edwards Family Trust. It appeared that Mr Edwards prepared the transfer that was given dealing number 710233115 and attended personally to the stamping of the transfer. For that purpose Mr Edwards prepared a statutory declaration.
- [31] On 7 December 2006, Mr and Mrs Edwards, as trustees by deed made with Mr Edwards as appointor, altered the deed of settlement constituting The Edwards Family Trust by revoking the original clause 4 of the deed and replacing it with

¹⁵ Reasons at [19].

¹⁶ Reasons at [20].

¹⁷ Reasons at [20].

¹⁸ Reasons at [21].

¹⁹ Reasons at [22].

provisions set out in the deed dated 7 December 2006, which expanded the powers of the trustees. Her Honour noted Mr Edwards' assertion that that was done at the request of Cooper Grace Ward.²⁰

- [32] The funds advanced by Pepper Finance under the loan were disbursed on 11 December 2006 with \$629,738 paid to Heritage Building Society Limited, \$37,685 on a line of credit with Heritage Building Society, \$50,000 on account of Mr Edwards' tax liability and \$277,575 for the Coppabella project.²¹
- [33] Transfer 710233115 and the mortgage in favour of Pepper Finance (that was given registered number 710233121) were lodged in the Titles Office in the normal course by Cooper Grace Ward on 5 January 2007 in acting for the mortgagee (which was why the requisition on the transfer was directed to Cooper Grace Ward).²² Her Honour observed²³ that the amendments subsequently made to transfer 710233115, after lodgement at the Titles Office, were made by Cooper Grace Ward with the authority given to them by Mr Edwards asserted by him to be on behalf of both Mr and Mrs Edwards, in order to answer a requisition from the Titles Office, which stated:

“The consideration should be expanded firstly by reference to the dealing number under which the error occurred and then by an explanation of the full nature of the error.

Finally the intention of the transferees to hold as trustees under the newly deposited Deed of Trust should be expressed, if such is the case.”

- [34] Her Honour noted²⁴ that the authority had been requested by Cooper Grace Ward in their letter dated 22 January 2007 addressed to Mr and Mrs Edwards, but sent by email to Mr Edwards, and the subject matter of the letter was shown as “Pepper Home Loans and The Edwards Family Trust Transfer – Unit Trust to Family Trust”.
- [35] That letter referred to a letter from Mr Edwards, dated 18 January 2007, giving information that resulted in the suggested amendments to items 4 and 5 in transfer 710233115 on which Mr and Mrs Edwards were asked to comment. Mr Edwards' letter dated 18 January 2007 was located on the Cooper Grace Ward file and exhibited to the affidavit of Pepper Finance's solicitor, Ms Mundt, filed on 16 May 2018. Mr Edwards had attached to the letter of 18 January 2007 the statutory declaration which he said he supplied to the Stamps Office when the transfer was stamped “setting out how the error occurred”.²⁵
- [36] The statutory declaration was not signed, but her Honour inferred²⁶ from the contents of the letter of 18 January 2007 that it reflected the terms of the statutory declaration that was signed and lodged by both Mr and Mrs Edwards. Paragraph 1 of the declaration stated:²⁷

²⁰ Reasons at [23].

²¹ Reasons at [24].

²² Reasons at [25].

²³ Reasons at [25].

²⁴ Reasons at [26].

²⁵ Reasons at [27].

²⁶ Reasons at [27]. No affidavit from Mr Edwards was filed in response to Ms Mundt's affidavit to assert that the statutory declaration was not lodged in the terms of the copy attached to Mr Edwards' letter of 18 January 2007.

²⁷ Reasons at [27].

“We are the registered joint proprietors as beneficial owners of 51% of the property known as [description of Fig Tree Pocket property set out]. We are both also registered as owners of the remaining 49% of the property as Trustees of the Edwards Superannuation Fund No 2.”

[37] In para 4 of the statutory declaration, Mr and Mrs Edwards asserted that “shortly before 1st November 1995 we had acquired a tax compliance superannuation fund entitled The Edwards Superannuation Fund”, but “we did not ever activate the fund although it later became our intention to do so” once the purchase of the Fig Tree Pocket property was completed.²⁸ Her Honour observed²⁹ that para 6 of the declaration suggested that it was always the intention of Mr and Mrs Edwards, at the time of the purchase of the Fig Tree Pocket property, to register themselves as joint owners as to 51 per cent of the property and as trustees of The Edwards Family Trust as to the remaining 49 per cent. Her Honour further observed that in the statutory declaration it was also asserted³⁰ that the conveyancing clerk in the solicitor’s practice that was being conducted by Mr Edwards at the time “mistakenly registered ‘The Edwards Superannuation Fund’ as one of the mortgagors’ of the Fig Tree Pocket property in lieu of ‘The Edwards Family Trust’ and filled in the Form 24 with the wrong name of the Superannuation Fund (which was inactive) and by adding the notation ‘No 2’ when there was no Edwards Superannuation Fund No 2.”

[38] Her Honour stated³¹ that the letter of 18 January 2007 suggested that Mr Edwards had confirmed from a search prior to finalising the transaction with Pepper Finance that the trust under which 49 per cent of the property was held was the EIUT. Her Honour noted that, “Curiously, the statutory declaration suggests that Mr and Mrs Edwards were registered as owners of 49 per cent of the property as trustees of the Edwards Superannuation Fund No 2, but always intended to own the 49 per cent interest as trustees of The Edwards Family Trust”.

[39] After the amendments were made by Cooper Grace Ward to items 4 and 5 of the transfer, the consideration was ultimately described in the transfer as follows:³²

“Pursuant to the transferors’ wish to correct the error under Dealing No 702864522 relating to the trust pursuant to the terms of which the property is held by them as trustees, and the transferors’ desire to correct the error by having the interest in the property held by the transferee.”

[40] Her Honour observed³³ that in relation to transfer 710233115, Mr Edwards’ affidavit filed on 23 January 2018 stated in para 30:

“(d) It is self-evident from the Transfer that the Edwards Family Trust did not hold the 49% interest before it was transferred to the Trustees of that Trust by means of that Transfer and that Wanda and I held it as Trustees of another Trust, which could only have been the EIUT in the circumstances expounded herein; however, the transfer was an improvident transaction,

²⁸ Reasons at [28].

²⁹ Reasons at [28].

³⁰ Reasons at [28].

³¹ Reasons at [28].

³² Reasons at [29].

³³ Reasons at [30].

entirely voluntary and seemingly without motivation from the perspective of the Transferors, who gave no consideration to such matters;

- (e) To the contemporaneous knowledge of [Pepper Finance], Doc. 18 is a copy of a letter dated 22 January 2007 which was addressed by [Pepper Finance’s] Lawyers to Wanda and myself and was sent to me via email recommending changes to the text of the last said Transfer, with a view to ensuring that the 49% Interest was held by Wanda and myself as Trustees of the Edwards Family Trust in lieu of the EIUT; however, it now appears to me that Wanda as the remaining Trustee of the EIUT has a duty to set aside the Trust Transfer and at least in such event or otherwise as the remaining Trustee of the Edwards Family Trust she has a duty to set aside the Loan Agreement and [Pepper Finance’s] Mortgage, as unconscionable transactions. Had I been aware of the associated breaches of trust, Wanda and I would not have proceeded with the [Pepper Finance’s] Loan; ...”

- [41] Mr Edwards asserted in his affidavit that he was told by Cooper Grace Ward that Pepper Finance did not want to take a mortgage from a unit trust for policy reasons and that it was necessary to make the amendments to the transfer to answer the requisition raised by the Titles Office, which was not copied to him. Her Honour, however, observed³⁴ that the assertion overlooked that the loan agreement showed that Pepper Finance only intended to deal with Mr and Mrs Edwards as trustees of the Edwards Family Trust. In that regard, her Honour found:³⁵

“Mr Edwards was obviously mistaken about not receiving the requisition. Mr Edwards was also mistaken in characterising the letter from [Cooper Grace Ward] dated 22 January 2007 as seeking changes to the transfer with a view to ensuring the 49 per cent interest in the Fig Tree Pocket property was held by Mr and Mrs Edwards as trustees of The Edwards Family Trust in lieu of the EIUT. Transfer 710233115 was prepared by Mr Edwards himself and the trust deed for The Edwards Family Trust was the document that was submitted with that transfer to the Titles Office on behalf of Mr and Mrs Edwards to correct the so-called ‘error’ as to the trust that pertained to transfer 702864522.”

- [42] On 17 November 2008, Mr and Mrs Edwards sold the Moranbah property for \$385,000 and paid the net proceeds of \$374,382.09 to Pepper Finance, but the Coppabella project did not proceed as anticipated. Her Honour commented that it appeared that Mr and Mrs Edwards’ investment in the project “may have been imprudent” referring to the following assertions by Mrs Edwards in her affidavit:³⁶

“26. Had I known the commercial risks associated with the Coppabella project and that we could lose our residence if it

³⁴ Reasons at [31].

³⁵ Reasons at [31].

³⁶ Reasons at [33].

failed, I would not have agreed to borrow \$280,000 from [Pepper Finance] for that project under a first mortgage over our residence.

27. Similarly, had I been advised properly about the probable pitfalls of the Coppabella project and the [Pepper Finance] Loan, I would have asked David to stay with the Heritage Loan or to keep the [Pepper Finance] Loan around the same level, so that it could be reduced from the sale of the Moranbah property which we expected to sell at a substantial profit.”

Submissions before the primary judge

[43] Her Honour set out the arguments advanced on behalf of Mrs Edwards as follows:³⁷

“Mr Smits relies on the fact that Mrs Edwards received no explanation or advice whatsoever from [Pepper Finance], when the loan application signed by Mr and Mrs Edwards disclosed that Mrs Edwards earned minimal net income and had been engaged in domestic duties for 30 years, there was no evidence there was any independent verification of Mr Edwards’ gross or net disposable income, Mr and Mrs Edwards did not sign the business purpose declaration, and the loan was a home loan based on the value of the assets which were mortgaged in favour of [Pepper Finance]. Mrs Edwards is characterised as a ‘partial volunteer’ which makes the principle in *Yerkey* at 685 applicable to her.

Mr Smits submits that the amendments made by [Pepper Finance’s] solicitors to transfer 710233115 had the effect of depriving Mrs Edwards of her interest in the property as the majority unitholder in the EIUT. His argument is that the mortgage in favour of [Pepper Finance] was executed by Mr and Mrs Edwards as trustee under instrument 702864522 which meant they executed the mortgage as the trustees of the EIUT. He submits that there was no authority from Mrs Edwards for the mortgage in favour of [Pepper Finance] to be amended by changing the number of the instrument that related to trust in respect of which she had executed the mortgage. Mr Smits alleges that the change in the instrument number for the trust shown in mortgage number 710233121 made by [Pepper Finance’s] solicitors in order to answer the requisition was a fraud committed against Mrs Edwards’ interests by Mr Edwards with [Pepper Finance’s] knowledge. (For good measure, Mr Smits also relied on s 76(2)(b) of the *Land Title Act* 1994, but that relates to amendments of a registered mortgage, whereas the amendments were made to mortgage number 710233121 to obtain registration of that instrument.)

Mr Smits also seeks to rely on s 11A of the *Land Titles Act* 1994 in relation to the amendment to mortgage 710233121 to change the reference to the instrument number under which Mr and Mrs Edwards were trustees and submits that there could not have been ‘a proper

³⁷ Reasons at [34]-[40].

verification of the trustee mortgagor’ which makes the mortgage a nullity.

It is submitted that any ‘competent, independent and objective adviser’ would have advised Mrs Edwards not to execute a transfer of her interest in the Fig Tree Pocket property under the EIUT, except for adequate consideration, and not to borrow any funds for the Coppabella project in the absence of satisfactory expert due diligence and appropriate agreements with the co-venturers. Mrs Edwards is described in the submissions as ‘a commercially unsophisticated borrower who received no independent or any advice ... or explanations from her husband, [Pepper Finance] or any third party’.

Mrs Edwards exhibited a proposed defence and counterclaim to her affidavit, although Mr Smits did raise in oral submissions that matters had progressed since that was drafted and the written submissions that he filed should be taken as representing Mrs Edwards’ up-to-date position. The draft defence includes that transfer 710233115 was an improvident transaction from Mrs Edwards’ perspective, that Mr Edwards and [Pepper Finance] knew that she had no solicitor and no independent advice and of her special disadvantages or disabilities in respect of the subject transactions, Mr Edwards took advantage of those special disadvantages or disabilities, and [Pepper Finance] has an accessorial liability for the breaches of trust owed by Mr Edwards to act in the interests of Mrs Edwards as a beneficiary of the EIUT.

With respect to the service of a default notice by [Pepper Finance] on Mrs Edwards pursuant to s 84 of the *Property Law Act 1974* (Qld), the loan agreement (described in the default notice as the credit contract) and the mortgage, Mrs Edwards’ proposed defence pleads that no such notice was given personally to her by [Pepper Finance]. During the hearing of the application, Mrs Edwards gave evidence that she had not been served with the notice and had never been to Redbank Plaza where the process server deposed to having served the notice on her. It is implicit in paragraph 35 of Mr Edwards’ affidavit filed on 23 January 2018, that he did receive the default notice, although he had not located a copy of it.

Mrs Edwards also relies on [Pepper Finance’s] acceptance of payments made by [Mr and Mrs Edwards] after the entry of the default judgment as constituting a waiver or an estoppel against [Pepper Finance] in respect of the enforcement of the default judgment.”

[44] Her Honour set out the position advanced by Pepper Finance as follows:³⁸

“[Pepper Finance] relies on the fact that Mrs Edwards was herself a borrower under the loan agreement and liable for the total amount of the loan which distinguishes her position from cases where a wife agreed to act as surety for her husband’s obligations without

³⁸ Reasons at [41]-[46].

understanding the effect of the guarantee and obtained no benefit from the transaction. Mrs Edwards obtained the full benefit of her pre-existing loans with Heritage Building Society being fully paid out and the benefit of the additional funds of \$280,000 to enable her to invest them with Mr Edwards in the Coppabella project.

Although it was a requirement of [Pepper Finance] that it would advance the funds to Mr and Mrs Edwards in their capacity as trustees only if the trust were The Edwards Family Trust, rather than the EIUT, it was a matter for Mr and Mrs Edwards to decide between themselves as to whether or not they wished to borrow from [Pepper Finance] and substitute The Edwards Family Trust as the relevant trust for which they held the 49 per cent interest in the Fig Tree Pocket property. That was a decision made by them before entering into the loan agreement with [Pepper Finance]. Because the mortgage secured the personal obligations of both Mr and Mrs Edwards under the loan agreement, Mrs Edwards was always personally liable for the total amount of the debt irrespective of which trust was the beneficiary of the 49 per cent share in the property held by Mr and Mrs Edwards as trustees.

Even if Mrs Edwards were considered to be in a situation of disadvantage, the evidence does not show that [Pepper Finance] knew or should have known of that disadvantage, or that [Pepper Finance] took unconscientious advantage of Mrs Edwards' position in its dealings with her.

To the extent that Mrs Edwards argues that Mr Edwards caused her to be deprived of her interest in the EIUT, neither [Pepper Finance] nor its solicitors knew or ought to have known that the transfer of the trust interest in the Fig Tree Pocket property from EIUT to The Edwards Family Trust amounted to any breach of trust on Mr Edwards' part or raise any conflict of interest between Mr Edwards and Mrs Edwards, when Mr and Mrs Edwards made a statutory declaration for the purpose of stamping transfer 710233115 that asserted that the relevant interest in the property was always intended to be held by The Edwards Family Trust.

There is nothing in Mrs Edwards' affidavit or the draft defence and counterclaim which clearly identifies the evidence from which facts could be proved that could be relied upon to establish the proposed grounds of defence. The draft defence is deficient in form and substance. It relies on broad assertions of misconduct by [Pepper Finance] under various heads including unconscionable conduct, misleading and deceptive conduct and knowing participation in a breach of trust without pleading the facts that are necessary to make those claims. Mrs Edwards had not adduced relevant and admissible evidence.

[Pepper Finance] relies on the affidavits of service from a licensed process server Mr Gregory Edwards who deposed to service of each of Mr Edwards and Mrs Edwards with the default notice on 10 August 2009 at 5:20pm at Redbank Plaza. The delay in the making of the allegation by Mrs Edwards that she was not served with the

default notice has prejudiced [Pepper Finance], as Ms Mundt in her affidavit filed on 23 April 2018 deposed that she had been unable to confirm the current contact details for this process server.”

The primary judge’s finding that there was no *prima facie* case

[45] In finding that there was no *prima facie* case, her Honour noted³⁹ that submissions made on behalf of Mrs Edwards based on the amendments made to transfer 710233115 and mortgage 710233121 after Mrs Edwards signed the documents:

- (a) did not address the fact that the expressed intention of Mr and Mrs Edwards, “as set out in the statutory declaration prepared by Mr Edwards, to transfer the 49 per cent interest they held in the Fig Tree Pocket property to themselves as trustees of The Edwards Family Trust before they signed the mortgage (in favour of [Pepper Finance]) to correct the ‘error’ that arose from The Edwards Family Trust not being the trust that was specified at the time transfer 702864522 was lodged for registration”.⁴⁰
- (b) overlooked the fact that the agreement to lend the money depended on the 49 per cent interest in the property being held by Mr and Mrs Edwards as trustees of The Edwards Family Trust.⁴¹

[46] Her Honour held that:⁴²

“The original reference to instrument number 702864522 on the mortgage signed by Mr and Mrs Edwards in favour of [Pepper Finance] was, in fact, wrong in the light of the transfer that was signed by Mr and Mrs Edwards to correct the particulars of the trust on which they held their 49/100 share and was corrected to show the correct dealing number 710233115 for the transfer prepared by Mr Edwards and signed by Mr and Mrs Edwards that was lodged (and intended to be lodged) prior to the mortgage in favour of [Pepper Finance]. No issue arose under s 11A of the *Land Title Act* 1994 in the terms in which it stood when the mortgage was lodged on 5 January 2007, as it applied to ascertaining that the person who executed the mortgage was identical with the person who was or was about to become the registered proprietor of the lot. That was relevantly Mr Edwards and Mrs Edwards who had executed the mortgage.”

[47] Her Honour held⁴³ that, although the gravamen of Mrs Edwards’ complaints was directed at the fact that she and Mr Edwards refinanced with Pepper Finance in order to obtain the funds to invest in the Coppabella project, “[i]t is apparent from Mrs Edwards’ affidavit that, at the time the refinancing took place, she was more than willing to leave it to her husband to make decisions for them both on the re-financing, so that they could invest in the project”.

³⁹ Reasons at [47].

⁴⁰ Reasons at [47]. That statutory declaration was relied on by Mr and Mrs Edwards for the purpose of stamping transfer 710233115 that was stamped as “Queensland Duty Exempt”.

⁴¹ Reasons at [47].

⁴² Reasons at [48].

⁴³ Reasons at [49].

[48] The primary judge observed⁴⁴ that to make Pepper Finance liable for “what turned out to be the bad investment decision” in respect of the Coppabella project, Mrs Edwards needed to point to facts which would enable her to hold Pepper Finance liable for her husband’s advice to her. Her Honour stated that it appeared that Mr and Mrs Edwards had decided on the course of action involving the investment in the Coppabella project before applying to Pepper Finance for finance. In that regard, they had the assets in the form of their Fig Tree Pocket property and the Moranbah property to support the application for the loan.

[49] Her Honour held in relation to the applicability of the principle in *Yerkey*:⁴⁵

“Despite Mr Smits’ extensive submissions and reliance on many case authorities, the law can apply in favour of Mrs Edwards only if she can point to evidence relevant to establishing the necessary constituent facts. The affidavits of Mr and Mrs Edwards fall far short of disclosing relevant admissible evidence that would make [Pepper Finance] liable for the bad investment decision to invest in the Coppabella project. Mrs Edwards was a borrower from [Pepper Finance] for the total amount of the loan for which she obtained real benefit and cannot be characterised as a surety of her husband’s debt and thus a volunteer to invoke the protection given in *Yerkey*.”

[50] Her Honour addressed Mrs Edwards’ claims that she was deprived of her interest in the EIUT by the transfer of the 49 per cent share in the Fig Tree Pocket property from the EIUT to The Edwards Family Trust, which was effected by the transfer prepared by Mr Edwards and signed by Mr and Mrs Edwards as transferors on 28 November 2006 and as transferees on 7 December 2006 in anticipation of the settlement with Pepper Finance on 11 December 2006, finding:⁴⁶

“None of the amendments made to that transfer after it was lodged with the Titles Office for the purpose of answering the requisition altered the nature of the transfer effected by instrument 710233115. Those amendments were made by Cooper Grace Ward on authority given to them by Mr Edwards holding himself out as acting on behalf of himself and Mrs Edwards. The dealing evidenced by the transfer was consistent with the loan agreement between [Pepper Finance] and Mr and Mrs Edwards as trustees of The Edwards Family Trust and not as trustees of the EIUT.”

[51] Her Honour concluded⁴⁷ that Mrs Edwards had failed to show that she had an arguable or *prima facie* defence on the merits to Pepper Finance’s claim to enforce its registered mortgage over the Fig Tree Pocket property by recovery of possession based on the dealings that took place between Mrs Edwards and Pepper Finance when the loan was advanced.

The primary judge’s finding as to non-service of the default notice

[52] As to the asserted defence concerning non-service of the default notice, her Honour stated:⁴⁸

⁴⁴ Reasons at [49].

⁴⁵ Reasons at [49].

⁴⁶ Reasons at [50].

⁴⁷ Reasons at [51].

⁴⁸ Reasons at [52].

“If the only available defence were based on Mrs Edwards’ assertion that she had not been served with the default notice, the length of time that has passed since the default judgment was entered would then be a relevant consideration. This is particularly so, as Mr Edwards did not deny being served with the claim and statement of claim which pleaded expressly that by notice in writing dated 28 July 2009 and posted to [Mr and Mrs Edwards] on or about that date, [Pepper Finance] gave [Mr and Mrs Edwards] notice of default. If the default notice had not been served either by post or by personal service, it would be surprising if Mr Edwards as a lawyer had not taken that point when served with the statement of claim. In any case, there has also been real prejudice identified by [Pepper Finance] in relation to Mrs Edwards’ claim made so late after [Pepper Finance] claims to have served the default notice that the process server is unable to be located. I would therefore not exercise the discretion to set aside the default judgment based solely on Mrs Edwards’ assertion that she was not served with the default notice that preceded the commencement of the proceeding.”

Whether there was error by the primary judge in dismissing the application to set aside the default judgment

[53] Voluminous grounds of appeal were raised in the notice of appeal, much of which reformulated the arguments raised before the primary judge. Those grounds were premised on the contentions that the primary judge erred in rejecting the defences advanced, or that her Honour failed to consider them. As mentioned, there is no substance in those contentions and Mrs Edwards has not established that the primary judge made an error in rejecting submissions as to the existence of a *prima facie* defence. In that regard, it is useful to keep in mind the following findings of the primary judge:

- (a) it was always the intention of Pepper Finance that, to the extent that it was dealing with Mrs Edwards and her husband as trustees, it was dealing with them as the trustees of The Edwards Family Trust;⁴⁹ and
- (b) the transfer which Mrs Edwards sought to impugn was prepared by her husband⁵⁰ and was explained in a statutory declaration signed by both Mr and Mrs Edwards suggested that it was always their intention to register themselves as owners of a 49 per cent interest in the property as trustees of The Edwards Family Trust.⁵¹

Inadequate consideration of merits

[54] It was argued⁵² that the primary judge did not individually address each one of the numerous proposed defences raised in the outline of submissions filed at the hearing of the applications.⁵³ That the primary judge did not reject individually each proposed defence raised in that lengthy written outline, but rather took the course of making finding in general terms, is not cause for criticism. Her Honour expressly

⁴⁹ Reasons at [16].

⁵⁰ Reasons at [22].

⁵¹ Reasons at [27]-[28].

⁵² Ground 3 and also grounds 15 and 16.

⁵³ AB2 at 91.

identified the material she had considered, which included the written submissions filed at the hearing of the applications⁵⁴ before considering whether any of the proposed grounds of defence raised in those submissions amounted to a *prima facie* defence. Her Honour's identification⁵⁵ of the gravamen of Mrs Edwards' complaints in general terms does not warrant the conclusion that all of the proposed defences were not considered in deciding whether a *prima facie* defence had been demonstrated. Her Honour was simply pinpointing the crux of the complaints raised.

Proposed defences relating to amendments to the transfer and the mortgage

- [55] Mrs Edwards advanced a number of proposed defences⁵⁶ premised on the contention that the borrower under the loan agreement (Mrs Edwards and her husband as trustees of the Edwards Family Trust) and the mortgagor of the property (Mrs Edwards and her husband as trustees of the EIUT) were different. It was contended in ground 7 that the primary judge should have found that the mortgage was ineffective since it was not executed in Mr and Mrs Edwards' capacities as trustees of the Edwards Family Trust. However, as the primary judge correctly identified,⁵⁷ the argument overlooks that the original form of the mortgage incorrectly included a reference to the transfer instrument by which Mrs Edwards and her husband became registered as owners as trustees of the EIUT, which was corrected by an amendment to the mortgage by Pepper Finance solicitors, who were authorised to make the amendment, so that it was binding on Mrs Edwards. The amendment was in conformity with the express intention of Mr and Mrs Edwards as set out in the statutory declaration. After that amendment, the trustee capacity in which Mrs Edwards borrowed the monies under the loan agreement and mortgaged a 49 per cent interest in the property in favour of Pepper Finance was the same.
- [56] Grounds 10 and 11 are entirely without merit in seeking to agitate non-compliance with s 11A of the *Land Title Act* 1994 (Qld) which is concerned with the common identity of the person signing the mortgage and becoming the registered proprietor of the lot and not the issue of that person's capacity, as the primary judge rightly found.⁵⁸
- [57] Ground 12 may be dismissed briefly. The primary judge was not concerned with the position vis-à-vis Mrs Edwards and her husband and what recourse she might have against him.

Proposed defences concerning unconscionable conduct

- [58] Mrs Edwards relied on the principles stated in *Commercial Bank of Australia Ltd v Amadio*⁵⁹ in grounds 28(d) and (f). However, as was submitted on behalf of Pepper Finance, even if the features of Mrs Edwards' relationship with her husband demonstrated that she was in a situation of special disadvantage or that she entered into the transaction as a consequence of actual undue influence on the part of her

⁵⁴ Reasons at [38].

⁵⁵ Reasons at [49].

⁵⁶ See grounds 7, 10-12, 17-21, 26-27 and 29.

⁵⁷ Reasons at [47]-[48].

⁵⁸ Reasons at [48].

⁵⁹ (1983) 151 CLR 447.

husband, there was no evidence that Pepper Finance was aware of any special disadvantage or any actual undue influence.

- [59] Nor is there any basis for the contention in ground 28(a) that the primary judge erred in failing to find that there was an arguable defence based on the principles in *Yerkey*. In *Schulz v Bank of Queensland Ltd*,⁶⁰ this Court held that the equity identified in *Yerkey* only arises in relation to a transaction where the vulnerable party not only did not understand the purported effect of the transaction, but additionally was a volunteer, that is, obtained no gain from the transaction. The insurmountable difficulty for Mrs Edwards is that, in the circumstances of this case, Mrs Edwards was not a volunteer. Rather, she was a borrower under the loan agreement and she received a benefit in respect of the borrowed monies. There was no arguable case, as the primary judge correctly found, that the *Yerkey* principle was able to provide a viable defence in this case.

Proposed defences concerning knowledge of breaches of trust and fiduciary duties and equities defeating indefeasibility

- [60] It was contended that the primary judge erred in not being satisfied that there were arguable defences in relation to Pepper Finance’s knowledge of breaches of trust and fiduciary duties by Mr Edwards,⁶¹ and equities defeating indefeasibility.⁶² It was contended⁶³ that the primary judge “apparently ignored” submissions to the effect that Pepper Finance had benefited from Mr Edwards’ breach of trust. The argument is totally without substance. The primary judge set out the arguments concerning breach of trust⁶⁴ before rejecting them.⁶⁵ As was argued by Pepper Finance, any breaches on the part of Mr Edwards would only invalidate the mortgage if the evidence showed that Pepper Finance accepted the mortgage with knowledge of the breaches, but there was no evidence of such knowledge. While the outline of argument made numerous assertions to what Pepper Finance knew or ought to have known about her position and the effect of the transaction upon her interests,⁶⁶ it did not identify precisely what relevant evidence the primary judge overlooked. Indeed, the submissions made on behalf of Mrs Edwards failed to address the finding by the primary judge as to the inadequacy of the evidence.⁶⁷
- [61] Without ruling specifically on objections taken by Pepper Finance to the material relied on by Mrs Edwards, her Honour found that the affidavits of Mr and Mrs Edwards “fall far short of disclosing relevant admissible evidence that would make [Pepper Finance] liable for the bad investment decision to invest in the Coppabella project”.⁶⁸ Her Honour considered that no arguable case was capable of being made out that Mrs Edwards was subject to any relevant disadvantage known to Pepper Finance such that it took unconscientious advantage of her position in its dealings. Of particular significance in this regard was that the evidence before the primary judge was not capable of establishing that Pepper Finance was aware of

⁶⁰ [2016] 2 Qd R 86 per Boddice J at [37] and [38] (the other member of the Court agreeing).

⁶¹ See grounds 28(b) raising the application of *Barnes v Addy* (1874) LR 9 Ch App 244, ground 28(c) raising *Keech v Sandford* [1724] 25 ER 223 and ground 28(e) raising *Hastings v Bass* [1975] Ch 25. Ground 32.

⁶² Outline of argument at [75].

⁶³ Reasons at [35] and [38].

⁶⁴ Reasons at [47]-[50].

⁶⁵ For example, see outline of argument at [68(i),(j),(m)], [69], [70], [76], [78(d)] and [89].

⁶⁶ Reasons at [49].

⁶⁷ Reasons at [49].

Mrs Edwards' need for independent legal and financial advice. Indeed, it was to the contrary, including the declarations in the loan agreement referred to by the primary judge.⁶⁹ These included that, by signing the loan agreement, Mrs Edwards was declaring that she had carefully read the loan agreement and its terms and conditions and that she had been given the opportunity to obtain legal advice on the nature and effect of the agreement but had chosen not to do so, that she understood the obligations and risks involved in signing the agreement and that she signed the agreement freely, voluntarily and without pressure from any person.

- [62] Proposed defences based on the principles in *Barnes v Addy*⁷⁰ and arguments concerning alleged breaches of fiduciary obligations by Mr Edwards were also fatally misconceived. They proceeded from the premise that Pepper Finance ought to have been aware that the transfer of the registered title from Mrs Edwards and her husband as trustees of the EUIT to Mrs Edwards and her husband as trustees of the Edwards Family Trust involved a breach of trust in respect of Mrs Edwards' interest in the EUIT, apparently because Peppers Finance or its solicitors might have obtained the EIUT Deed upon a search in the Land Titles Office, or by requesting it. The flaw in the viability of the proposed defences lies in the primary judge's finding (not challenged on the appeal) that it was always the intention of Pepper Finance that, to the extent that it was dealing with Mrs Edwards and her husband as trustees, it was dealing with them as trustees of the Edwards Family Trust.⁷¹ It follows that Pepper Finance had no cause to obtain the terms of the EUIT Deed and no reason to consider how a transfer between the trustees might affect Mrs Edwards' beneficial interest under the different trusts. There was simply no evidence capable of supporting a finding that Pepper Finance knew, or ought to have known, about any breaches of trust as contended.
- [63] Given none of the defences upon which an equity might be based have been shown to raise an arguable or *prima facie* defence, it follows that the complaint in ground 32 concerning the primary judge's failure to consider whether equities arose to defeat the indefeasibility of the mortgage has no substance.

Proposed defence based on non-compliance with the Uniform Consumer Credit Code

- [64] It was contended in grounds 17-21 that the primary judge failed to determine that performance of the loan agreement was governed by the Uniform Consumer Credit Code and was in non-compliance with various provisions of that Code. But the contention is unmeritorious for the same reason that ground 7 is unmeritorious. It is premised on the same flawed argument that Mr and Mrs Edwards were not acting as trustees of the Edwards Family Trust when the mortgage was executed.
- [65] It may be observed that it was also contended in ground 30 that the primary judge failed to deal with a proposed defence asserting that Pepper Finance breached a prudential code. But that was understandable in the circumstances where, as was argued before this Court by Pepper Finance, there was no evidence before her Honour that it was bound by a prudential code or, if it was, the terms of such a code.

Proposed defence of waiver or estoppel

⁶⁹ Reasons at [18]-[19].

⁷⁰ (1874) LR 9 Ch App 244.

⁷¹ Reasons at [16].

[66] It was contended in ground 31 that the primary judge did not consider the viability of defences of waiver or estoppel. Her Honour had express regard to the arguments made as to these proposed defences and rightly rejected them on the basis that the acceptances of payments were made on a without prejudice basis.⁷² Her Honour referred to the affidavit of Ms Mundt filed on 23 April 2018 explaining that Pepper Finance had not enforced the judgment earlier as Mr and Mrs Edwards had made payments from time to time to reduce the amount owing by them, the last payment being on 9 August 2016. The affidavit exhibited letters dated 23 November 2010, 27 July 2012 and 13 November 2013, which were sent without prejudice to Pepper Finance’s rights to enforce the judgment, and indicated Pepper Finance’s willingness to defer further recovery action while Mr and Mrs Edwards continued to make monthly loan payments which would be accepted on a without prejudice basis. Her Honour held⁷³ that “In the absence of any evidence from Mr and Mrs Edwards of conversations or conduct contrary to that disclosed in [Pepper Finance’s] material on this point, it is not arguable that [Pepper Finance’s] conduct in accepting those loan repayments after judgment was entered did give rise to a waiver or estoppel”. Her Honour’s reasoning is unimpeachable.

Complaint that necessary parties were not joined

[67] It was contended in grounds 8 and 9 that the primary judge erred in failing to join various parties, such as Mr Edwards’ trustee in bankruptcy, in the application under r 874 of the UCPR. However, Mr Edwards’ bankruptcy trustees were not necessary parties to the application due to s 58(5) of the *Bankruptcy Act* 1966 (Cth).

[68] Further, as for Mr and Mrs Edwards, they were parties to the proceeding and were represented at the hearing of the applications. As was pointed out by counsel for Pepper Finance, they had the opportunity to make submissions in any capacity in which they claimed to have an interest in the property or to be affected by the mortgage. In those circumstances, all necessary parties were before the Court.

Proposed defences based on invalidity of default notice

[69] It was contended in grounds 4 and 5 that the primary judge erred in accepting that there was any evidence of service of the default notice on Mrs Edwards either personally or as a trustee and that her Honour failed to determine that the default notice was defective.

[70] At the hearing of the applications, Pepper Finance relied upon evidence that a notice in the proper form had been served on Mrs Edwards,⁷⁴ which was disputed by Mrs Edwards.⁷⁵ The primary judge held that if the only defence available to Mrs Edwards was based on her assertion of not having been served with the notice, her Honour would not have exercised her discretion to set aside the default judgment, given the prejudice caused by the delay in bringing the application (because of the inability to locate the process server).⁷⁶ That approach discloses no error.

⁷² Reasons at [54].

⁷³ Reasons at [54].

⁷⁴ Reasons at [46].

⁷⁵ Reasons at [39].

⁷⁶ Reasons at [52].

- [71] As to the contention that the default notice was defective because it was not addressed to Mrs Edwards in her capacity as trustee, it is evident that Mrs Edwards and her husband borrowed in different capacities, that is personally and as trustees, but that did not imbue them with different legal personality for the purpose of the giving of the notice in the circumstances of this case. It is evident that the default notice given to Mrs Edwards was given to her as borrower under the loan agreement for all capacities in which she borrowed, whether or not each of those capacities was set out on the face of the notice.

Error in the exercise of the discretion in granting leave to commence enforcement proceedings

- [72] Her Honour observed that the judgment that was sought to be enforced against Mr and Mrs Edwards was for the recovery of possession of the Fig Tree Pocket property so that it could be sold to realise it as security. Counsel for Mr Edwards submitted that leave was not required under r 72 of the UCPR as enforcement proceedings follow after the judgment in the proceeding and, therefore, are not within the description of taking a step in the proceeding. Her Honour accepted that characterisation of the nature of enforcement proceedings in respect of a judgment for recovery of possession and also held that leave to enforce the judgment against Mr Edwards was not required under s 58(3) of the *Bankruptcy Act* 1966 (Cth) as the proceeding to enforce the judgment for recovery of possession of property mortgaged to a secured creditor against a bankrupt was not a remedy in respect of a provable debt. Her Honour held that it was appropriate that the judgment be enforced against both Mr and Mrs Edwards as they both remain in occupation of the property.
- [73] In finding that the affidavit material filed by Pepper Finance satisfactorily addressed the issues relevant to the exercise of the discretion under r 894(3) of the UCPR, her Honour observed that the amount of the debt secured on the property as at March 2018 was in excess of \$900,000 and the reason for the delay in enforcing the judgment was to accommodate the willingness of Mr and Mrs Edwards to continue to make loan repayments.
- [74] There was no sensible basis to find that there was noncompliance with the default judgment at the date of the application. Furthermore, given the primary judge concluded that the application to set aside the default judgment should be dismissed, there was also sufficient basis for the primary judge to be satisfied of Pepper Finance's entitlement to enforce the default judgment and Mrs Edwards' liability. The primary judge correctly determined⁷⁷ Pepper Finance's conduct in accepting further loan repayments after the default judgment was granted did not give rise to a waiver or estoppel as those payments were accepted without prejudice to the rights of Pepper Finance.
- [75] As was submitted on behalf of Pepper Finance, the only practical result of a refusal to grant leave to commence enforcement proceedings of the default judgment would have been to compel Pepper Finance to commence fresh proceedings based upon the continued default on the part of Mrs Edwards and her husband under the loan agreement and the mortgage since the date the default judgment was given. Since the primary judge was rightly satisfied that there was no *prima facie* defence to

⁷⁷ Reasons at [54].

Pepper Finance's claim, the primary judge's reasoning that this was an appropriate case to grant leave under r 894(1) of the UCPR was entirely correct.

Order

- [76] No error on the part of the primary judge has been demonstrated.
- [77] The appeal should be dismissed with costs on the standard basis.
- [78] **BODDICE J:** I agree with Philippides JA.