SUPREME COURT OF QUEENSLAND

CITATION:	*Big Sky Credit Union Ltd v Kokai* [2003] QSC 264
PARTIES:	**BIG SKY CREDIT UNION LTD** ACN 087 651 358 (applicant/plaintiff) v **FERENC KOKAI** (first named defendant) **MAUREEN LESLEY KOKAI** (respondent/second named defendant)
FILE NO:	1988 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2003
JUDGE:	Wilson J
ORDER:	**1. Adjourn the application to a date to be fixed at least 10 days after completion of disclosure by the plaintiff;** **2. Liberty to apply on 2 business days' notice;** **3. Costs are reserved.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – application by plaintiff against female defendant – where defendants mortgaged their home – where defendants subsequently divorced – where Family Court ordered male defendant to assume all liability in respect of mortgage payment – where default in payment of moneys secured by mortgage – where male defendant directed superannuation fund to pay lump sum to plaintiff – where lump sum deposited into another account held by male defendant with plaintiff – whether female defendant has realistic prospect of successfully defending the claim – where disclosure has not taken place – where disclosure could be completed within fortnight *Uniform Civil Procedure Rules* 1999 (Qld), r 292 *Bernstrom v National Australia Bank* [2002] QCA 231, applied *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2002] QCA 224, applied

COUNSEL: P Looney for the applicant/plaintiff
T Morgan for the respondent/second named defendant

SOLICITORS: MacGillivrays for the applicant/plaintiff
Bill Cooper & Associates for the respondent/second named defendant

[1] **WILSON J**: This is an application by the plaintiff against the female defendant for summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld).

[2] On 21 May 1996 the defendants mortgaged their matrimonial home at 83 Grendon Street, North Mackay to the plaintiff, which was then called BHP Group Employees Credit Co-Operative Limited, to secure the repayment of $80,250 plus interest. The plaintiff's case is that there has been default in the payment of moneys secured by the mortgage, and that it is entitled to possession of the property. In her defence the female defendant pleaded -

> "2. The defendant Maureen Kokai denies that she is in default under the mortgage as alleged in paragraph 7 of the Statement of Claim and says that on the 1st of July 1999 the sum of $48,124.71 was paid by Queensland Coal and Oil Shale Mining Industry Superannuation Fund to the Plaintiff to extinguish the debt and says that through no fault of the female defendant Maureen Kokai the plaintiff paid such sum to Ferenc Kokai in contravention of the Family Court orders dated the 22nd of May, 1998".

Further, she denied receiving a notice dated 11 February 2003 demanding possession of the property.

[3] The defendants' marriage failed, and their property was divided by order of the Family Court made on 22 May 1998. So far as relevant, that Court ordered:

> "1. That the husband transfer all his right, title and interest in the former matrimonial home situated at 83 Grendon Street North Mackay more particularly described as Lot 1 on RP713683 County of Carlisle Parish of Basset contained in Certificate of Title Reference 20485191 [sic].
>
> 2. In the event the property described in paragraph 1 hereof is transferred to the wife free of encumbrances the wife is to pay to the husband the sum of $15 000.00.
>
> 3. That the husband assume all liability in respect of monies presently outstanding to BHP Group Employees Credit Co-Operative Limited and indemnify the applicant in respect of same save for the amount of $15 000.00.
>
> 4. That in the event of the husband leaving his employment any superannuation entitlement of the husband be frozen and paid

to extinguish the joint liabilities of the parties to BHP Credit Union save as to the amount of $15 000.00.

5. That in the event of the husband ceasing his employment any termination benefits including voluntary redundancy payments and long service leave entitlement be frozen and paid to extinguish any outstanding liability to the BHP Credit Union save as to the amount of $15 000.00.

6. That each party retain such other items of property and/or chattels as is in their respective possession or control and that each party shall be solely liable for and indemnify the other against any other liability owed in respect of or encumbering such property and/or financial resource.

6.[sic] That pursuant to section 84 of the Family Law Act 1975 the Registrar or Deputy Registrar of the Family Court of Australia at Townsville is hereby appointed to execute all deeds and documents in the name of the husband and do all acts and things necessary to give validity and operation to all such deeds and documents so as to effect the transfer of the interest of the said property situate at 83 Grendon Street North Mackay".

[4] The female defendant continued to reside in the property and the male defendant moved to Caloundra.

[5] On 30 June 1999 the male defendant signed a request addressed to Queensland Coal & Oil Shale Mining Industry Superannuation Fund in the following terms:

> "I refer to a Court Order made in The Family Court of Australia held in Townsville on 22nd May 1998. This Court Order states that my 'superannuation entitlement be frozen and paid to extinguish the joint liabilities of the parties to BHP Credit Union save as to the amount of $15,000.00'.
>
> Now that I have made application to have my superannuation paid to me, I authorise QCOS to pay the amount of $48,124.71 direct to the BHP Credit Union. Any remaining amount is to be paid to myself in the form of a cheque to my postal address. I also request to have the amount stated above electronically transferred direct to the BHP Credit Union. The details of my account are as follows:
>
> | | |
> |---|---|
> | | BHP Credit Union |
> | BSB: | 803228 |
> | A/c: | 22180-S1 |
> | Name: | F Kokai". |

The details of the amount and the account particulars had been completed in handwriting. There was a handwritten instruction at the bottom of the document in these terms:

"Please pay the rest into my N.A.B. acc: 084-641
63289-3433 ➔ $16,723-02
F Kokai".

[6] The male defendant had three accounts with the plaintiff - all identified by the same membership number (22180) and then called -

S1 - On Call Savings A/c

S2 - On Call Savings No 2 A/c

L6 - Mortgage Secured Loan A/c.

[7] Mark Richard McCall, the plaintiff's Finance and Compliance Manager, has sworn -

> "9. When a lump sum payment is received by the Plaintiff it will be deposited into the member's savings account. This will occur unless other instructions to deposit the moneys elsewhere are received from one of three sources:
>
> (a) from the entity depositing the funds, via a notation or narration on the electronic funds transfer;
>
> (b) from the member;
>
> (c) from a third party, such as a Court or Child Support Agency.
>
> […]
>
> 12. The records of the Plaintiff disclose that as at 1 July 1999:
>
> (a) the Plaintiff was not aware of the existence of the Family Court orders dated 22 May 1998;
>
> (b) no specific instructions were received from the member, namely the first named Defendant as to the manner in which the payment was to be dealt with;
>
> (c) no notation was received by the Plaintiff on the electronic funds transfer from the Queensland Coal and Oil Shale Mining Industry Superannuation Fund.
>
> 13. In the absence of any such instructions the payment was automatically deposited into the First Defendant's savings account held with the Plaintiff. […]"

[8] The $48,124.71 was deposited into the male defendant's S1 - On Call Savings Account. As at that date there was $63,456.76 owing under the mortgage. No repayments had been made for at least six months. The next day $5,848.00 was transferred from the S1 account into the L6 account in payment of arrears. Thereafter, there were weekly payments of $246.00 into the L6 account until 30 April 2000. Those payments were made from S1 until late January 2000, and then

sometimes from S1 and sometimes from S2. On 4 November 1999 $35,000.00 was transferred from S1 to S2.

[9] It was apparently fortuitous that the $48,124.71 was deposited into the very account which the male defendant nominated on his request to the superannuation fund (ie the S1 account). It is odd that despite his reciting the critical part of the Family Court order in his request to the superannuation fund, the male defendant nominated his S1 account, and subsequent transactions on his accounts were inconsistent with any intention on his part to apply those funds in a lump sum towards discharge of the mortgage. It may be that he nominated the amount to be paid to the plaintiff by reference to the balance owing under the mortgage as at 31 May 1999 ($63,124.71, that is $48,124.71 + $15,000.00). Even if that were so, it does not necessarily follow that he intended to reduce the amount owing by the payment of a lump sum of $48,124-71, and there is presently no evidence to suggest that the plaintiff knew or should have known that was his intention. And, of course, the plaintiff was not bound by the Family Court order.

[10] Under r 292(2) of the *UCPR* -

> "(2) If the court is satisfied that -
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate".

The Court must consider whether there is a realistic as opposed to a fanciful prospect of success: *Bernstrom v National Australia Bank Ltd* [2002] QCA 231; *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2002] QCA 224 at [7].

[11] Under the mortgage, upon default in the payment of moneys thereby secured, at the option of the plaintiff (the plaintiff not being obliged to notify the exercise or non-exercise of the option) all the moneys thereby secured became immediately due and payable. Upon the mortgagee's exercising that option, the plaintiff was entitled to take possession of the property without notice to the defendants: see clauses 26 and 29. Therefore, nothing turns on whether the female defendant received the notice of demand.

[12] In his written submissions counsel for the female defendant said -

> "9. Until disclosure, including third party disclosure, is complete, it will not be precisely known what information the Plaintiff had at the time of allocating funds received from Q.C.O.S. to the savings account of the male defendant.
>
> 10. In the circumstances set out in paragraphs 2, 4, 5, 6, and 7 herein it could be reasonably argued that the Plaintiff has

> failed to act in a reasonably diligent way in the management of funds received, to substantially to discharge the obligations secured by the mortgage.
>
> 11. It could reasonably be argued that the Plaintiff owed an obligation (either in contract or in tort or both) to the female respondent to properly manage the funds received.
>
> 12. It could be reasonably argued that the Plaintiff should be estopped from taking advantage of the situation created by its own action or inaction according to the principles of (a) *estoppel by negligence*, (b) *promissory estoppel* (that the defendant entered into the mortgage on the assumption that the lender would act diligently and in good faith in the administration of the loan account) or more basically (c) *equitable estoppel* (equitable relief is available when to insist on the parties [sic] rights at law in the proved circumstances would offend conscience)."

[13] I was informed by counsel for the plaintiff that disclosure by his client could be completed within a fortnight. The female defendant has already had non-party disclosure against the superannuation fund.

[14] The circumstances are sufficiently curious for me to hesitate before being satisfied that the female defendant has no real prospect of successfully defending the claim. At present the suggested defences are speculative, but on balance I think the female defendant ought to have the benefit of disclosure before this application is determined.

[15] I adjourn the application to a date to be fixed at least 10 days after the completion of disclosure by the plaintiff. I give liberty to apply on 2 business days' notice. I reserve costs.