

SUPREME COURT OF QUEENSLAND

CITATION: *MSW Property P/L v Law Mortgages Queensland P/L* [2004] QCA 47

PARTIES: **MSW PROPERTY PTY LTD** ACN 063 814 479
(plaintiff/respondent)
v
LAW MORTGAGES QUEENSLAND PTY LTD
ACN 010 858 107
(defendant/appellant)

FILE NO/S: Appeal No 7541 of 2002
SC No 891 of 2001

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgment delivered 7 November 2003
Further Order delivered 27 February 2004

DELIVERED AT: Brisbane

HEARING DATE: 17 June 2003

JUDGES: McPherson and Jerrard JJA and Fryberg J
Judgment of the Court

FURTHER ORDERS: **1. The defendant is to pay the plaintiff's costs of the hearing and determination of the default interest issue and of and incidental to the application brought on 15 June 2001**
2. Subject to paragraph one, the plaintiff is to pay the defendant's costs of the proceedings

CATCHWORDS: PROCEDURE - COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where on appeal defendant had judgment reversed on one issue but not another – whether defendant entitled to costs order on an indemnity basis pursuant to clause in mortgage requiring plaintiff as mortgagor to pay all costs and expenses incurred by mortgagee

PROCEDURE - COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – CONDUCT TENDING TO LITIGATION – whether defendant entitled to costs order based on an offer to settle under UCPR 360 or 361

Uniform Civil Procedure Rules 1999 (Qld), r 360, r 361

Australia and New Zealand Banking Group Ltd v Alirezai [No 2] [2002] QSC 205, referred to
Ex p Prackert [1987] 2 Qd R 560, distinguished
Westpac Banking Corporation v Daydream Island Pty Ltd [1985] 2 Qd R 330, distinguished

COUNSEL: S L Doyle SC, with M R Bland, for the appellant
P A Keene QC, with B J Clarke, for the respondent

SOLICITORS: Quinn & Box for the appellant
Plastiras Meredith Mohr for the respondent

[1] **THE COURT:** This appeal was determined by orders made on 7 November 2003, which by a majority: (1) allowed with costs the appeal of the defendant Law Mortgages, and (2) declared that registered mortgage No. 702565285 over land at Jindalee and an associated guarantee secured money lent by the defendant to the plaintiff MSW Mortgages under an agreement of loan by the former to the latter in connection with land at Kenmore. The order of 7 November (3) set aside the order for costs made at first instance, and (4) gave leave to the parties to provide written submissions about those costs; that is, the costs of the proceedings below including the costs of the hearing or trial.

[2] At the trial there were two issues. One was whether the plaintiff MSW Mortgages was in substance entitled to redeem the mortgage without discharging its liability, if any, for the Kenmore loan. This was the issue that was decided on appeal by order no. (2) in favour of the defendant Law Mortgages, reversing in that respect the decision of the primary judge. There was another issue at the hearing which the primary judge decided in favour of the plaintiff, which was whether the defendant had given an effective notice to the plaintiff bringing into operation a provision for payment of “default interest”. On appeal the decision of the primary judge on this issue was affirmed.

[3] The plaintiff in its written submissions to this Court on the costs of the primary hearing says that the trial of the default interest issue “would in any event have taken two days” and that “the whole trial lasted two days”. We are not in a position to determine the accuracy of these statements, which is a matter for taxation or assessment. In the result, the appropriate course to follow is to order that the plaintiff pay the general costs of the proceedings below, but that the defendant pay the plaintiff’s costs of the hearing and determination of the default interest issue.

[4] The defendant has advanced some other reasons why the plaintiff should pay the costs below and should be ordered to do so on an indemnity basis. One is based on the provisions of cl 22.15(a) of the mortgage which requires the plaintiff MSW Mortgages as mortgagor to pay on an indemnity basis all costs and expenses incurred by the mortgagee Law Mortgages. Provisions in this general form are capable of affecting the discretion as to costs, or even of conferring a right to the costs of enforcement of the mortgage. See *Westpac Banking Corporation v Daydream Island Pty Ltd* [1985] 2 Qd R 330, 332; and *ex p Prackert* [1987] 2 Qd R 560, 562-570; but in those cases the relevant clause in the mortgage expressly provided for payment of costs incurred in enforcing the mortgage on default or in the preservation of the security. Here cl 22.15(a) speaks only of costs and expenses

incurred or paid by the mortgagee in respect of the “transaction documents” which is a much narrower conception, and appears to be confined to their creation rather than their enforcement or to the security they gave rise to. The defendant is therefore not entitled to indemnity costs by virtue of cl 22.15(a) or under any discretion which the Court might be persuaded to exercise in its favour.

[5] The defendant also relies on UCPR 360 and 361, on the basis of an offer to settle the action for \$160,000 which it made on 14 December 2001. Conditions for the application of those rules include that the defendant (plaintiff on the counterclaim) obtain a judgment no less favourable than the offer to settle (UCPR 360); and that the plaintiff (on the claim) obtain a judgment that is not more favourable to it than the offer to settle (UCPR 361).¹ To demonstrate compliance with those conditions the defendant exhibited a calculation claiming an entitlement under the judgment on appeal to \$172,407.27. However that amount included over \$48,000 in legal fees. Because these must be apportioned in the manner stated in the preceding paragraph, the defendant fails to demonstrate such compliance. Moreover, it is not a simple matter to apply UCPR 360 to cases like this in which, as well as a monetary claim by the defendant for default interest and otherwise, there were claims for competing declarations: see *Australia and New Zealand Banking Group Ltd v Alirezai [No 2]*.²

[6] The plaintiff seeks an order for the reserved costs of its interlocutory application made on 15 June 2001. The application sought a declaration as to “the highest amount of the monies which may be secured” by the mortgage and the release of the balance of the outstanding monies (then held in trust pending determination of the matter). The application was opposed on the ground that the defendant was entitled also to have sufficient funds retained to secure ongoing costs and expenses in relation to the mortgage, and an affidavit by a costs assessor was filed on behalf of the defendant opining that its likely costs in respect of this and another action would be in the vicinity of \$119,000. At the time the funds in trust were approximately \$470,000 and the surplus the subject of the application was approximately \$227,000. The parties reached an agreement after estimating the reasonable costs and expenses to be secured, whereupon funds in excess of that amount, i e \$85,000, were paid out. It seems to follow that the amount agreed to be held for the ongoing costs and expenses in relation to the mortgage was \$142,000. That would include the litigation costs referred to in the costs assessor’s opinion.

[7] The fact that costs were reserved suggests that the Judge deciding the application thought that a relevant consideration in deciding the costs order would be the ultimate outcome of the action. That outcome is now known. It is unclear how much of the \$142,000 is recoverable by the defendant, but having regard to the point in para [4], it is likely to be substantially less than half of it. In addition, the defendant is not entitled to recover default interest. When these facts are added to the fact that as a result of the application the plaintiff was successful in having \$85,000 paid out, the proper conclusion is that the plaintiff should have succeeded on the application. It should have its costs.

[8] The further orders for the costs of the proceedings at first instance should be:

1. *Charter Pacific Corporation Limited v Belrida Enterprises Pty Ltd* [2002] QSC 319.
2. [2002] QSC 205.

1. Order that the defendant pay the plaintiff's costs of the hearing and determination of the default interest issue and of and incidental to the application brought on 15 June 2001;
2. Subject to paragraph one, order that the plaintiff pay the defendant's costs of the proceedings.

Under the UCPR those costs will all be assessed on the standard basis.³

3. *Uniform Civil Procedure Rules* 703(1).