SUPREME COURT OF QUEENSLAND

CITATION:	*Kostopoulos v G E Commercial Finance Australia Pty Ltd* [2005] QCA 173
PARTIES:	**CHRISANTHOS KOSTOPOULOS** (applicant) **v** **GE COMMERCIAL FINANCE AUSTRALIA PTY LTD** ACN 086 855 076 (respondent)
FILE NO/S:	Appeal No 3985 of 2005 SC No 3336 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore on 20 May 2005 Reasons delivered on 27 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2005
JUDGE:	Jerrard JA
ORDERS:	**1. Application for a stay of execution dismissed** **2. Applicant to pay the respondent's costs of the application to be agreed or assessed on the standard basis**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – STAYING PROCEEDINGS – trial judge dismissed application for injunctions restraining mortgagor from proceeding with both a demand for payment acceleration under a mortgage and a notice to vacate the mortgaged property – trial judge allowed the applicant 21 days to vacate the mortgaged property which was his residence – applicant sought a stay of execution until his appeal had been determined – balance of convenience for a stay in the applicant's favour – whether the applicant established any prospects of success on appeal *Canberra Advance Bank Ltd v Benny* (1992) 208 ALR 207, cited
COUNSEL:	S Di Carlo for the applicant T P Sullivan for the respondent

SOLICITORS: The applicant appeared on his own behalf
Mallesons Stephen Jaques for the respondent

[1] **JERRARD JA:** In this proceeding Mr Kostopoulos filed an application on 17 May 2005 seeking an order that two orders made by the court on 3 May 2005 be stayed until the final determination of an appeal from those orders, an injunction to restrain GE Commercial Finance Australia from entering into possession of property the subject of a registered mortgage situated at 9 Maud Street, and likewise restraining GE from exercising any power of sale over that property until final determination of the appeal. The second order is too wide in its terms, but what he wants is an injunction restraining GE from exercising rights in accordance with the orders made by the court.

[2] A chronology of the relevant facts was supplied by the respondent, and re-read on this application. On 8 October 2002 AMP Bank Ltd granted a commercial equity facility of $500,000 to Mr Kostopoulos, which financed his purchase of 9 Maud Street for $550,000. That was an interest only loan, and repayment of the capital was secured by a mortgage registered over a property at Rochedale jointly owned by Mr Kostopoulos, and by a mortgage over 9 Maud Street. The loan was for five years, and renewable at the bank's discretion.

[3] The provisions of the mortgage agreement between Mr Kostopoulos and AMP Bank Limited included (in clause 11.1) that after a (defined) Event of Default occurred, and despite any previous omission to exercise any of its rights or any waiver of those rights and any agreement or arrangement between Mr Kostopoulos and the bank to the contrary, the bank might immediately exercise any of its rights arising from a default by Mr Kostopoulos; and all of the Secured Money was immediately due and payable. The secured money was the $500,000, and an Event of Default occurred when a representation or warranty made or taken to be made by Mr Kostopoulos was incorrect or misleading when made or taken to be made; when any encumbrance was sought to be enforced against 9 Maud Street; or when Mr Kostopoulos had not satisfied on time any other monetary obligation. An encumbrance was defined to include a caveat. Clause 4.1 provided that Mr Kostopoulos represented and warranted that he had good or indefeasible title to 9 Maud Street free from any such encumbrance, and he also represented and warranted that there were no actual, impending, or threatened proceeding, suit or other action which was affecting, or might reasonably be expected to affect him or 9 Maud Street "before any Governmental Agency or which may otherwise have a Material Adverse Effect". A Governmental Agency was defined to include the Crown, a Government Department, and a judicial or quasi-judicial body. A Material Adverse Effect was defined to include a material adverse effect on his capacity to comply on time with his obligations under the mortgage.

[4] The representations and warranties that Mr Kostopoulos made by clause 4.1 were deemed by clause 4.2 to be made each month on the last business day after the date the mortgage was entered into. Thus Mr Kostopoulos became in breach of the representation if there were any such proceedings before a court which might reasonably be expected to affect him or 9 Maud Street, or which might have a material adverse effect on his ability to continue his interest payments. Likewise, he would be in breach if a caveat was entered over his title to 9 Maud Street.

[5] Both of those events occurred. On 29 October 2002 Mr Kostopoulos was charged with drug trafficking and other offences, and on 18 November 2002 the Director of Public Prosecutions obtained an order pursuant to the *Crimes (Confiscation) Act* 1989[1] restraining any dealings by Mr Kostopoulos with, inter alia, 9 Maud Street. The DPP subsequently registered a caveat over the property; there is no evidence of AMP Bank Ltd taking any steps in response to those events.

[6] In June 2003 GE acquired AMP Bank Ltd's commercial loan portfolio. That purchase included the assignment of Mr Kostopoulos' indebtedness and the Mortgagee's rights against 9 Maud Street. On 10 September 2003 GE became aware of the DPP's restraining order and its caveat.

[7] After that date Mr Kostopoulos continued to make his interest payments, and was up to date at the time of the hearing on 3 May 2005. The DPP had notified the Department of Natural Resources in December 2003 that it did not object to GE registering its transfer of the mortgage from AMP, and registration of that had been obtained by GE on 13 January 2004. What occurred thereafter was that Mr Kostopoulos disputed the amount of his assessment for land tax, and did not pay the assessed amount. On 23 July 2004 an indictment was presented against him charging him with one count of trafficking and four counts of unlawfully supplying a dangerous drug, and it so happened that three days later GE received a requisition from the Office of State Revenue to pay the unpaid land tax. On 18 November 2004 the restraining order was extended, with Mr Kostopoulos' consent, until 31 May 2005.

[8] GE asserted in the proceedings under appeal that after becoming aware of the extension of that restraining order, which had occurred without any consultation with it, and knowing that land tax was due and owing on the property, it had become concerned about Mr Kostopoulos' capacity to comply on time with his obligations pursuant to the mortgage, and concerned about its ability to exercise its right under that mortgage. On 13 January 2005 GE served a notice on Mr Kostopoulos, which notice declared that four defined Events of Default had occurred, namely:

- a breach of the obligation to pay land tax on the due date;
- a breach of a representation or warranty, (that there were no proceedings before a court which could reasonably be expected to affect him or 9 Maud Street);
- a material adverse affect existed (upon his capacity to meet on time the interest and make the capital repayments);
- there had been enforcement against 9 Maud Street (the caveat over Mr Kostopoulos' title).

[9] That notice advised that pursuant to clause 11.1, as a result of the Events of Default, GE declared that the secured money was immediately due and payable. The outstanding amount was $508,611.62, which sum Mr Kostopoulos has not paid and cannot pay. He has maintained interest payments. He did pay the disputed land tax on 31 January 2005.

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1 Now replaced by the *Criminal Proceeds Confiscation Act* 2002, in force since 1 January 2003

[10] On 7 April 2005 GE gave a Notice of Exercise of Power of Sale to Mr Kostopoulos, and on 26 April 2005 he filed an application for an injunction restraining GE from proceeding on its demand dated 13 January 2005 for an acceleration of the payments, for an injunction to restrain GE from proceeding to enforce a Notice to Leave the premises dated 1 April 2005, and for other orders. He filed an affidavit describing how the monthly interest repayments continued to be made by direct debit from another account he operated, describing his dispute over the amount of land tax with the Office of State Revenue, and describing how GE had known of the caveat and restraining order but had continued to accept his interest only payments on his loan.

[11] When the matter came on for hearing GE filed a cross application by leave, for orders to recover possession of the land and costs. It filed affidavits in support of that application exhibiting the restraining order made by de Jersey CJ on 18 November 2002, a copy of the caveat, and other affidavit material annexing the relevant transaction documents, including the mortgage. That mortgage contained terms (clause 25.12) entitling AMP Bank Ltd to assign its rights under the mortgage without Mr Kostopoulos' consent. The mortgage also provided in clause 17.4 that if an instalment of Secured Money was due for payment by Mr Kostopoulos after an Event of Default and was paid, the mortgagee might apply that money in satisfaction of the instalment and otherwise in satisfaction of the remainder of the outstanding indebtedness. It also provided that any waiver by the mortgagee was effective only if it was in writing signed by it, and that no failure on the mortgagee's part to exercise, or any delay on its part in exercising, any of its rights, operated as a waiver of them.

[12] After argument the learned judge made orders dismissing Mr Kostopoulos' application, and orders that GE recover possession of 9 Maud Street on 24 May 2005, thus allowing Mr Kostopoulos three weeks in which to arrange his affairs. He had been living at number 9. The judge also ordered he pay GE's costs. Mr Kostopoulos filed a notice of appeal on 17 May 2005 against all the orders made that day (including some procedural ones), on the following grounds. First that the judge had erred in refusing Mr Kostopoulos an adjournment which would have enabled him to file a further affidavit as to conduct by GE relevant to the issues of waiver, estoppel and unconscionable conduct; second that the judge erred in holding that Mr Kostopoulos' default was incapable of being remedied and accordingly that the court had no power to entertain any application under s 95 of the *Property Law Act* 1974 (Qld) for relief against the acceleration clause; third that the judge erred in holding that the non-waiver clause in the mortgage could not itself be waived by GE's conduct or that GE could not be estopped from relying on that clause where to do so would constitute unconscionable conduct; and finally the judge erred in declining to exercise general equitable jurisdiction to grant relief to Mr Kostopoulos against unconscionable conduct by GE. The judge did not in fact so decline, since no submission was made urging the exercise of any such general equitable jurisdiction. That was only advanced on this application for a stay.

[13] On the hearing of the application for a stay Mr Di Carlo, counsel for Mr Kostopoulos, submitted that, subject to his identifying an arguable ground of appeal, the balance of convenience was all in Mr Kostopoulos' favour in support of a stay. That is, should his appeal succeed, he would lose the fruits of his success if not granted a stay, in that 9 Maud Street would in all likelihood be sold by the time the appeal was heard. On the other hand, providing he continued to meet his interest

payments, GE would suffer no disadvantage if held out from its judgment for a period in which it received interest on its loan, and during which it was unlikely that the secured property would decrease in value. He submitted there was no evidence before the learned trial judge demonstrating that GE's security was at any risk from the restraining order or caveat, and in fact GE did not suggest that it was. GE submitted on this application that it had been entitled to, and did, take the position that Mr Kostopoulos' capacity to meet his interest payments was threatened by possible lengthy imprisonment.

[14] I agree that Mr Kostopoulos shows that this is an appropriate case for a stay provided that he can demonstrate that there is a good arguable case on appeal. He will certainly be disadvantaged if that is the position and a stay is not ordered, and there is no competing disadvantage to the respondent outweighing any disadvantage to it if one is granted.

[15] The problem for Mr Di Carlo was establishing any good arguable ground. His argument on the application did not suggest any prospects of success on the second ground, that dealing with s 95. He did not argue at all against the finding that Mr Kostopoulos had been, and continued to be, in default in his warranties and undertakings, and that he could not remedy that continuing default. His principal submission was that he had an arguable case for the exercise of a general equitable power to restrain GE from relying on the terms of the mortgage, that power deriving from its unconscientious conduct in continuing to accept interest payments for over a year before taking action to accelerate the liability to repay the money lent.

[16] That argument had at first depended on the submission that there was also an arguable case for a waiver by GE, derived from its conduct, of the "waiver only in writing" and "no waiver" provisions in clause 25.8. Mr Di Carlo referred to *R v Paulson* [1921] 1 AC 271 at 283, and to *Canberra Advance Bank Ltd v Benny* (1992) 208 ALR 207 at 220-221, to support the submission that a "waiver only in writing" clause can be waived by the conduct of a party. The problem with that submission is not the possibility that such waiver can occur by conduct (including oral agreement), but that Mr Kostopoulos did not place any affidavit evidence before the learned trial judge or myself which could evidence any such conduct by GE. His senior counsel did tell the learned trial judge that "We also want to give some evidence about conversations we had with the receivers", whom senior counsel submitted were the agents of GE, but when the judge enquired what those conversations were, counsel was unable to assist, merely remarking that "I haven't had an opportunity to go through in detail all the material".

[17] When the learned trial judge returned to the issue of the content of those conversations at a latter stage, the judge received the reply that the senior counsel had not "canvassed that to the – getting it ready to put it in an affidavit. I only know the areas – the topics that we're going to cover in the affidavit." Mr Di Carlo was equally unable to inform me of the contents of the foreshadowed affidavit(s), or what it was that Mr Kostopoulos said GE's agents had said which would constitute conduct from which the critical waiver might be inferred. In the absence of evidence Mr Kostopoulos must fail in his application for a stay based on the possibility of demonstrating before the Court of Appeal either that the learned judge was wrong in refusing an application for an adjournment to adduce evidence which counsel could not describe, or in not holding that either the non-waiver clause had

been waived and there had been waiver of past and future default, or that GE could be estopped from relying on it.

[18] Mr Di Carlo was eventually obliged to fall back on statements of very general principle describing an equitable jurisdiction to give relief against unconscionable or unconscientious conduct. He referred to *Shiloh Spinners Ltd v Harding* [1973] 1 All ER 90, and the statement by Lord Simon of Glaisdale therein at 104 that:

> "The last 100 years have seen many examples of relaxation of the stance of regarding contractual rights and obligations as sacrosanct and exclusive of other considerations; although those examples do not compel equity to follow – certainly not to the extent of overturning established authorities – they do at least invite a more liberal and extensively based attitude on the part of courts which are not bound by those authorities. I would therefore myself hold that equity had unlimited and unfettered jurisdiction to relieve against contractual forfeiture and penalties."

That case itself did not result in an example of the application of any such unfettered discretion, and Lord Simon's other statements stressed that a prominent consideration was the desirability of observing and respecting contractual promises and rights. Mr Sullivan, for the respondent, made the point that acceleration of a liability to repay a debt has not been treated in the past as equivalent to a penalty against which relief can be given. He cited, inter alia, the judgments in *Lamson Store Service Co Ltd v Russell Wilkins & Sons Ltd* (1906) 4 CLR 672 at 683-4 and 691-2; and from *Property Law and Practice in Queensland* (Duncan and Wallace, Lawbook Co 2003) at 7.4310.

[19] Mr Di Carlo also referred to *Mutual Federal S & L Assn v Wisconsin Wire Works* 205 NW 2d 762 at 766-767, to the effect that it is well settled (in Wisconsin) that explicit contractual obligations may accelerate the obligation to pay the debt in full and are not contrary to public policy; whether they may be utilised in a particular case is dependent upon the facts and whether the invocation of the acceleration clause would be inequitable under the circumstances. The judgment cites the Florida Court of Appeal as holding that a mortgagee has a right to accelerate on the default of the mortgage conditions only if those are necessarily related to the preservation of the security, and that a Florida court will refuse to entertain a foreclosure judgment when the acceleration of the due date would be unconscionable and the result would be inequitable and unjust. It refers to a similar position taken by New York courts; decisions from California courts quoted in *Mutual Federal v Wisconsin Wire Works* emphasize more a mortgagor's right to insist by contract on security for a loan.

[20] Those statements of general principle Mr Di Carlo quoted, if applicable in this country, still do not establish a good arguable case for hearing on appeal that it was inequitable for GE to rely on the terms of the contract to accelerate repayment of the debt owing to it, even where there was no immediate risk of damage to its security from breach of the mortgage provisions by the other party, and where it delayed doing so for 16 months. It is rational and not inequitable for GE to consider that imprisonment, if it occurs, will materially and adversely affect Mr Kostopoulos' capacity to pay interest and repay the capital; and rational for GE to see a commercial risk to it in the circumstances, which now include that a term of

imprisonment is a real chance because an indictment for trafficking has been presented in this Court against Mr Kostpoloulos.

[21] On 20 May 2005 I made an order dismissing the application for a stay with costs, and undertook to provide reasons, which I now do.