

SUPREME COURT OF QUEENSLAND

CITATION: *Turcinovic & Anor v Westpac Banking Corporation* [2007] QSC 193

PARTIES: **ALE TURNCINOVIC AND JOSEPHINE HELEN TURCINOVIC**
(plaintiff)
v
WESTPAC BANKING CORPORATION
ABN 33 007 457 141
(defendant)

FILE NO/S: BS 9327 of 2006

DIVISION: Trial Division

PROCEEDING: Application to strike out

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 3 August 2007

DELIVERED AT: Brisbane

HEARING DATE: 20 April 2007

JUDGE: Moynihan J

ORDER: **1. Amended statement of claim be struck out.**
2. The plaintiff pay the defendant's costs of and incidental to the defendant's application, to be assessed on a standard basis.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – application to strike-out – where deficiencies in the statement of claim – whether cause of action shown.
Australian Securities and Investment Commission Act 2001 (Cth)
Uniform Civil Procedure Rules 1999 (Qld) 149(1), 149(4), 155, 171(1)
Trade Practices Act 1974 (Cth)
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494, cited.

COUNSEL: L Nevison for the plaintiff.
GD Sheahan for the defendant.

SOLICITORS: VC Catanzaro for the plaintiff.
Allens Arthur Robinson for the defendant.

- [1] The defendant seeks to strike out the amended statement of claim filed on 9 March 2007 in this action, alternatively to strike out paragraphs 8A, 21, 22, 23, 26 and 27(a), (b), (c) and (d) pursuant to *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*), 171(1). This relevantly provides that a pleading or parts of a pleading may be struck out if it does not disclose a cause of action, or has a tendency to prejudice or delay a fair trial.
- [2] The plaintiffs were long standing clients of the defendant's Mt Isa branch. By a letter dated 15 December 1992 the defendant advised them that it had approved a term loan (identified by the numbers 034203 920021) in the amount of \$400,000. The plaintiffs signed the necessary documentation; the money was advanced but has not been repaid in full.
- [3] Over the years there have been a number of arrangements between the plaintiffs and the defendant relating to the outstanding loan monies. These can, at the risk of over simplification, be conveniently summarized as follows:
- **15/12/1992**
\$400000 1 year fixed @ 7.8% plus 1.75% margin Interest Only.
Term 10 years [**the original transaction**]
 - **31/12/1993**
\$400000 2 year fixed @ 7.15% plus 1.25% margin. Repayment-Principal, Interest and Fees of \$3916.00 per month. Term 10 years.
 - **29/12/1995**
\$372000 1 year fixed @ 8.65% plus 1.25% margin. Repayment-Principal, Interest and Fees of \$4283.00 per month. Term 15 years (indicative only).
 - **13/2/1997**
Letter of variation pertaining to terms and conditions letter of 29 December 1995.

\$355000 1 year fixed @ 7.10% plus 1.25% margin. Repayment-Principal, Interest and Fees of \$4159.00 per month. Term of loan remains unchanged.
 - **13/8/1998**

New business Finance Agreement whereby the existing Term Loan was converted to a Business Development Loan-Residential property.

\$328000 1 year fixed @ 6.99%. Repayment-Principal, Interest and Fees of \$3958.00 per month. *Term 10 years. To expire 30/12/2003.*

- **18/11/1999**

Letter of variation. Loan refixed for a further 1 year @ 7.25%. Repayments-Principal, interest and Fees to remain unchanged at \$3958.00 per month.

Loan was changed to a variable rate following expiry of fixed loan term in November 2000. ... [A] redraw option was subsequently added ...

The documentation for the various transactions included provisions for variation in the repayment instalments and as to early repayment.

- [4] Aspects of these arrangements are contentious but the issue cannot be resolved on this application. There was a misstatement of the expiry date as 30 December 2003 in relation to the last transaction but that appears to be irrelevant for present purposes.
- [5] At the risk of further over-simplification, the essence of the plaintiffs' case is that they entered into the original transaction on the basis of a representation, which in the event proved to be false, that the loan would or could be repaid within 10 years.
- [6] The plaintiffs allege they would not have accepted the loan if it was 'unable to be repaid in full by 31 December 2003' and that the representations were false because the loan was not paid out by that date.
- [7] In considering the amended statement of claim it is to be borne in mind that if a pleading pleads a conclusion of law or raises a point of law it must also plead the material facts in support of the conclusion or point of law.¹
- [8] The plaintiffs allege a continuing belief that the loans referred to in the transactions identified in [3] would expire on and be repaid in full by 31 December 2003 and the defendant was in breach of a continuing obligation by omitting to provide the plaintiffs with a copy of a letter or make them aware of any change in terms of the loan (amended statement of claim paragraphs 8(b), (c) and (d)).
- [9] Paragraph 8A of the amended statement of claim alleges that the plaintiffs 'unknowingly accepted' the term of a letter of offer of 3 January 1996 as a consequence of the defendant's failure to make them aware of the terms of the letter; in particular that the offer related to loan 034203 920021. The plaintiffs acted on the basis of a 'continuing belief' that the loan was repayable within 10 years, since it was not repaid in that time the letter constituted misleading or deceptive conduct.
- [10] In submissions counsel for the plaintiffs stated that 'unknowingly accepted' conveyed that the plaintiffs were not aware that they were signing 'a document in respect of the initial loan'.
- [11] Paragraph 21 of the amended statement of claim pleads that the defendant's alleged representation that the loan would be paid out in full by 31 December 2003 was false because 'it would not be paid out in full' within a 10 year period or by 31 December 2003. Paragraph 22 then alleges that 'the defendant's representations and omissions' constituted deceptive or misleading conduct.

¹ UCPR 149(1) and (4).

- [12] Paragraph 23 alleges that the plaintiffs would not have accepted the loan if it was ‘unable to be repaid in full’ ‘on the terms and conditions approved from time to time by the defendant’. No terms or conditions are identified.
- [13] The factual foundation of the various phrases ‘unable to be repaid’, ‘would not be repaid’ is not pleaded and their use is embarrassing in that they are inconsistent and at best ambiguous.
- [14] Paragraphs 24 and 25 of the amended statement of claim then alleged a duty of care to the plaintiffs to provide accurate information and advice and negligence by failing to do so but there is no connection, for reasons already canvassed, between any breach of such a duty, the loan not being repaid and, as will emerge, damages.
- [15] Put shortly, the amended statement of claim does not plead the factual basis for assertions, for example that the loan ‘would not be repaid in 10 years’ or the facts establishing a casual relationship between the defendant’s alleged acts or omissions and the loan not being repaid within 10 years.
- [16] Moreover, the pleading is silent as to the reasons for the loan not being repaid by 31 December 2003. It is not, for example, pleaded that the plaintiffs were precluded from repaying the loan by the specified date by some contractual provision or other impediment for which the defendant was responsible.
- [17] It seems that the specified repayments were in any event insufficient to effect repayment by the relevant date. There is however no pleading, that for example, the defendant was in breach of any obligations in the calculation of the repayment instalments.
- [18] In other words there does not appear to have been impediment to the plaintiffs repaying the loan by the specified date had they chosen to do so. It is not pleaded on the basis that they could have repaid the loan in the relevant time but for the conduct of the defendant.
- [19] It is alleged that as a consequence of the defendant’s negligence and breach of the *Trade Practices Act 1974* (Cth) and the *Australian Securities and Investment Commission Act 2001* (Cth).² The plaintiffs are entitled to the following relief:
- (a) An order pursuant to para 12GN of the *Australian Securities and Investments Commission Act 2001* (Cth) (the *ASIC Act*) for restitution in the sum equivalent to all amounts paid on and after 31 December 2003 for contravention of that section.
 - (b) Alternatively damages pursuant to s 12GF of the *ASIC Act* in a sum equivalent to all amounts paid by the plaintiffs to the defendant on or after 31 December 2003 for contravention of s 12DA of the *ASIC Act*.
 - (c) Further or in the alternative an injunction restraining enforcement of the loan so as to prevent further contravention of s 12DA of the *ASIC Act*.

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Relevantly for present purposes there is no need to distinguish between the provisions of these Acts.

[20] *UCPR 155* relevantly provides to the effect that a claim for general damages must include particulars of:

- (a) the nature of the loss or damages suffered;
- (b) the exact circumstances in which it was suffered;
- (c) the basis on which the amount claimed has been worked out or estimated,

and any matter relating to damages which may surprise the opposite party if not pleaded must all be pleaded.

[21] The pleading of damages does not satisfy *UCPR 155*. Assuming the plaintiffs are successful, and speaking in general terms, the relief to which they are entitled would be to put them in a position that they would have been in but for the defendant's contravening or negligent conduct.

[22] Paragraph 23 of the amended statement of claim asserts that the plaintiffs would not have accepted the loan but for the representation. There is, however, no plea as to any alternative course they would have taken of greater benefit or less detriment had they not been contractually bound by various agreements. That would appear to be a relevant matter: *Marks v GIO Australia Holdings Ltd.*³

[23] There is no issue that the plaintiffs received and had the benefit of the \$400,000. That benefit has not been brought to account in the pleading nor has their obligation to repay the loan. There is no basis pleaded for them being relieved from this. The claim of an injunction to prevent enforcement in further contravention of s 12D of the *ASIC Act* is not founded on any pleaded facts.

[24] For these reasons the pleading lays no basis for the claim for relief in respect of repayments made on or after 31 December 2001. More generally the pleading does not plead material facts, as distinct from assertions, as to the causal relationship between the defendant's alleged acts or omissions, an adverse outcome or the alleged consequential damages.

[25] It follows in my view that:

- the amended statement of claim does not disclose a cause of action for the funding relief sought.
- paras 8A, 21, 22, 23, 26 and 27 tend to delay or prejudice the fair trial of the action and should be struck out. These allegations are at the heart of the plaintiff's case.

[26] The amended statement of claim should be struck out. I will hear submissions as to costs.

³ (1998) 196 CLR 494, 19-24, 46-61.