SUPREME COURT OF QUEENSLAND

CITATION:	*Bradshaw & Anor v Secure Funding Pty Ltd (formerly Liberty Funding Pty Ltd)* [2011] QSC 184
PARTIES:	**JAMES TODD BRADSHAW and IRENE BRADSHAW (plaintiffs)** **v** **SECURE FUNDING PTY LTD ACN 081 982 872 (FORMERLY LIBERTY FUNDING PTY LTD) (defendant)**
FILE NO:	Cairns Supreme Court 225 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application for summary judgment
DELIVERED ON:	23 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2011
JUDGE:	Mullins J
ORDER:	**1. Judgment for the defendant against the plaintiffs.** **2. Liberty to either party to apply on two days' notice in writing to the other.** **3. The issue of costs is adjourned to a date to be fixed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE - QUEENSLAND – PROCEDURE UNDER RULES OF COURT – summary judgment – defendant's application for summary judgment – where plaintiffs' loan from the defendant secured by mortgage over their home – where plaintiffs aggrieved by the defendant's delay in processing the plaintiffs' repayments and debit entries for default fees – where plaintiffs successfully defended two Supreme Court proceedings brought by the defendant to recover possession of the plaintiffs' home and the loan – where plaintiffs sued the defendant for damages for malicious prosecution, trespass, unconscionable conduct and breach of contract – where defendant rectified errors in the loan account – where plaintiffs unable to plead their claims in four versions of the statement of claim – whether the plaintiffs have any real prospect of success – whether a trial of the plaintiffs' claims is necessary *Australian Securities and Investments Commission Act* 2001 (Cth), s 12CA, s 12CB, s 12CC *Uniform Civil Procedure Rules* 1999, r 293

A v New South Wales (2007) 230 CLR 500, followed
Avenhouse v Hornsby Shire Council (1998) 44 NSWLR 1, considered
Gray v Motor Accident Commission (1998) 196 CLR 1, considered
Hawkins v Permarig Pty Ltd [2004] 2 Qd R 388; [2004] QCA 76, considered
Queanbeyan Leagues Club Ltd v Poldune Pty Ltd [2000] NSWSC 1100, followed
Williams v Spautz (1992) 174 CLR 509, followed

COUNSEL: JT Bradshaw in person
TF Pincus for the defendant

SOLICITORS: Norton Rose Australia for the defendant

[1] The plaintiffs, Mr and Mrs Bradshaw, borrowed from the defendant which has a mortgage over their home. On 7 August 2009 the defendant issued a default notice for the amount of $1,471.06 and fees of $60 to the plaintiffs and then in September 2009 commenced Supreme Court proceeding number 10307 of 2009 (the first proceeding) for the total amount then claimed to be owing under the loan of $270,159.10 and recovery of possession of the plaintiffs' home. In December 2009 while the first proceeding was current, a further default notice for the amount of $656.33 was issued to the plaintiffs and a second Supreme Court proceeding number 1150 of 2010 (the second proceeding) based on the second default notice was commenced against the plaintiffs for the total amount then claimed to be owing under the loan of $270,868.48 and recovery of possession of the plaintiffs' home. Both proceedings were defended by the plaintiffs on the basis that they had deposited on 20 August 2009 at the ANZ Bank to the credit of the defendant an amount of $18,000 and were not in default under the mortgage. On 11 June 2010 the court made consent orders in both proceedings dismissing the proceedings and ordering the defendant to pay the plaintiffs' costs of the proceedings on a standard basis.

[2] Mr and Mrs Bradshaw commenced this proceeding on 4 May 2010 claiming damages, including punitive damages, for misleading or deceptive conduct or, in the alternative, unconscionable conduct and damages, including punitive damages, for the tort of maliciously instituting civil process.

[3] After the plaintiffs filed an amended statement of claim on 21 October 2010, the defendant applied for summary judgment pursuant to r 293 of the *UCPR* or, alternatively, to strike out all or parts of the amended statement of claim. A further amended statement of claim was filed on 2 March 2011. On 4 May 2011 Philippides J struck out that further amended statement of claim and the plaintiffs were given liberty to re-plead. The defendant's application for summary judgment was adjourned for further hearing on 30 May 2011.

[4] The re-pleaded statement of claim was filed on 24 May 2011. The defendant pursued its application for summary judgment at the hearing on 30 May 2011. Mr Bradshaw appeared by telephone on behalf of the plaintiffs to oppose that application. At the conclusion of the hearing, I gave directions permitting the

plaintiffs and the defendant to file and serve further written submissions. A lengthy written submission from Mr Bradshaw was received in my chambers on 7 June 2011 for which I give the plaintiffs leave to file. The defendant did not provide any further submissions in response.

Analysis of the statement of claim filed 24 May 2011

[5] Paragraphs 1 to 18 of the statement of claim set out factual matters on which the plaintiffs rely in relation to the mortgage, the issue of the first default notice, the steps the plaintiffs took to remedy that default by depositing the amount of $18,000, the commencement of the first proceeding, the issuing of the second default notice, the commencement of the second proceeding and the consent dismissal of both proceedings. In addition, the plaintiffs plead in paragraph 10 that the defendant acknowledged that they credited the amount of $18,000 on 6 October 2009 against the plaintiffs' loan. Paragraph 11 pleads:

> "11.(a) The financial statement for the period June – December 2009 received by the Plaintiffs in January 2010 imposed a number of fees, charges and penalties which were not lawful;
>
> (b) On 7 December 2009 professional fees of $6,326.07 were imposed when the Defendant knew that the Plaintiffs disputed the Defendant's claim as set out in paragraph 7."

[6] The plaintiffs plead in paragraph 13 (which is not disputed by the defendant) that they paid the sum of $7,800 into the defendant's account on 29 December 2009.

[7] The plaintiffs allege in paragraph 14(c) of the statement of claim that on 5 February 2010 the defendant knew of the payment of $18,000 which had been received by the defendant on 21 August 2009, the amount claimed in the first proceeding and the monthly repayment obligations of the plaintiffs under the mortgage, and that therefore the issue of concurrent proceedings was an abuse of process.

[8] In relation to the second proceeding, the plaintiffs allege in paragraph 16(b) of the statement of claim that at the time the second proceeding was issued by the defendant:

> "i) the unlawful fees and charges set out in the December 2009 statement had not been reversed;
>
> ii) payment on 29 December of $7,800 and a further payment of $4,200.00 in March had not been credited to the Plaintiffs' account;
>
> iii) interest on the Plaintiffs' payments from the date of receipt by the Defendant had not been credited."

[9] It is pleaded in paragraph 17 that in the July 2010 statement (for the plaintiffs' account with the defendant) the defendant:

> "admitted liability for the damages set out in Writ 225/10 and reversed the charges."

[10] Paragraph 19 of the statement of claim pleads:

> "19. At all times the Defendant has used the superior financial position to intimidate and harass the Plaintiffs and to justify demands in common default notices which they knew were baseless to exercise their power to foreclose."

[11] There are four headings in the statement of claim which appear to denote the causes of action that are pursued by the plaintiffs. The first heading "Abuse of Process" appears before paragraph 20 in which the allegation is made that the defendant engaged in "an abusive (*sic*) process by issuing concurrent writs attempting to intimidate, bully and harass the Plaintiffs." The only particulars provided in this paragraph in respect of abuse of process are the issue of the first and second proceedings.

[12] Paragraphs 21 to 28 of the statement of claim are under the heading "Trespass". Paragraphs 21 appears to repeat the allegations implicit in paragraph 20. Paragraphs 22 to 25 deal with the defendant's knowledge arising from the plaintiffs' defence of the first proceeding which meant there was no basis for issuing the second proceeding. The allegation is made in paragraph 25 that as the defendant knew the second proceeding was not a lawful process and an abuse of process, there was no justification in law for a process server to enter the plaintiffs' property with that process.

[13] Paragraphs 29 to 34 are set out under the heading "Unconscionable Conduct:"

> "29. The Plaintiffs repeat and rely on paragraphs 1 to 19.
> 30. The Plaintiffs rely on the Defendant's resolution of a $6,000.00 claim in 2002 and the resolution individually of Writs 10307/09 and 1155/10 on a party/party basis.
> 31. The use of their vast financial superiority to their advantage and unconscionably inflating the Plaintiffs' financial obligation.
> 32. The imposition of further legal costs on 2 December 2010 in excess of $5,000.00.
> 33. The persistent attempts to foreclose after 11 years forcing the Plaintiffs into unnecessary expenses.
> 34. Their overall conduct including their misuse of the legal process, vastly superior financial position to litigate and the serious consequences inflicted on the Plaintiffs."

[14] Under the heading "Breach of Contract", the plaintiffs assert reliance on paragraphs 2, 3, 6(a), 10, 11, 15(c) and 16 of the statement of claim.

[15] The plaintiffs provide particulars of the damages claimed in paragraphs 35 to 37 of the statement of claim. A short description of each category of loss is set out in subparagraphs A to H of paragraph 35.

[16] Aggravated damages are claimed in paragraph 36:

> "36. Particulars of Aggravation
> The Defendant's stubborn and obdurate continuance of legal proceedings, imposition of wrongful fees, charges and penalties to confuse and obfuscate the Defendant's legal liability and endeavours to block the Plaintiffs' (*sic*) from litigating the dispute and prevent the Plaintiffs from seeking the reversal of the penalties and fees wrongfully imposed in July to December 2010."

[17] Paragraph 37 deals with the claim for exemplary damages:

> "37. Exemplary Damages

> The award must be sufficient to sting the Defendant and is based solely on the Defendant's conduct and has no regard to the compensatory damage but in the context of the foreclosure on the Plaintiffs' matrimonial home for 23 years after 11 years repayments."

Additional facts

[18] The plaintiffs relied on the account statement received from the defendant for the period 1 July to 31 December 2009 (exhibit 1). That showed a cash payment of $18,000 credited to the account on 6 October 2009 and the debit entries for a number of default fees including professional legal costs debited on 7 December 2009 of $4,372.54.

[19] The material relied on by the defendant shows that the plaintiffs' loan account was in arrears on 30 July 2009, that Mr Bradshaw was notified of that by telephone on 4 August 2009 and he responded by depositing the sum of $18,000 at the ANZ Bank to the credit of the defendant's account on 20 August 2009. The depositor's name was recorded incorrectly by the ANZ Bank as "J.RINGNSHM" with the notation "unclear", but with the correct telephone for Mr Bradshaw also recorded. The defendant did not identify this deposit as having been received from the plaintiffs until 6 October 2009.

[20] This delay in identifying the deposit resulted in the defendant giving the instructions to its solicitors to issue the first proceeding based on non-compliance with the default notice issued on 7 August 2009. I interpolate that this was compounded by administrative error on the part of the defendant in delaying the identification of the depositor of the sum of $18,000 and the plaintiffs' failure to make direct contact with the defendant confirming the deposit of $18,000 at the time it was made. There was no obligation on the plaintiffs to make such contact, but their failure to do so taken with the defendant's failure to telephone the number of the unidentified depositor for the deposit of $18,000 affected the relationship between the parties. Because the defendant's legal fees for the first proceeding were debited to the plaintiffs' loan account on 7 December 2009 (as permitted by the terms of the mortgage), the plaintiffs' account then was in arrears again on the basis of the entries made by the defendant.

[21] The fact that the plaintiffs had made a deposit of a significant lump sum of $18,000 to address the first default notice should have alerted the defendant to the plaintiffs' intention to keep the loan out of default. After the second default notice was issued, Mr Bradshaw again made a deposit to the defendant's account with the handwriting of his name being unclear, but in respect of which the ANZ Bank again recorded correctly the plaintiffs' telephone number. This deposit was not recorded as a credit against the plaintiffs' loan account by the defendant until 12 May 2010. Because the defendant believed there to have been non-compliance with the second default notice, instructions were given to the same firm of solicitors that had issued the first proceeding against the plaintiff to issue the second proceeding. I infer that the defendant gave instructions to issue the second proceeding while the first proceeding remained extant, because the second proceeding was based on the second default notice. It is unfortunate that neither the defendant nor its solicitors contacted the plaintiffs to clarify the position in relation to payments in respect of the loan account before issuing the second proceeding. I am not suggesting that

they were obliged to, but this lack of communication has contributed to the escalation of the concerns of the plaintiffs about the defendant's conduct.

[22] Mr Bradshaw issued a document dated 25 March 2010 entitled "Official Complaint" with reference to the *Australian Securities and Investments Commission Act* 2001 (Cth). There was no statutory justification for the plaintiffs to despatch an official complaint under that Act to the defendant. (I infer that the plaintiffs are relying on the statutory prohibition against unconscionable conduct in relation to the supply of financial services found in ss 12CA, 12CB and 12CC of the Act.) The document was a means, however, for the plaintiffs to bring to the defendant's attention their complaints in respect of numerous matters arising from the defendant's handling of the plaintiffs' loan account, including the first and second proceedings and overcharging of fees. It is apparent from paragraph 15 of the statement of claim and the plaintiffs' written submissions in response to the summary judgment application that the commencement of this proceeding was in part prompted by what the plaintiffs perceived to be the defendant's lack of response to the complaint document. As was expressed by the plaintiffs on page 3 of their submissions filed at the hearing:

> "The essence of the dispute is that the contracting parties are not on a level playing field and the attitude of the defence and their solicitors is that they will decide when and how fees are imposed or reversed, when they will credit payments from the plaintiffs and simply they are the boss and they simply will not tolerate any legitimate complaint, for example ignoring the ASIC demand which included the wrongful fees and in particular the imposition of professional fees on 2 December 2010."

[23] After the commencement of this proceeding, the defendant investigated the complaints of the plaintiff with greater diligence. Mr Allanson who is an Asset Realisation Officer acting on behalf of the defendant swore an affidavit that was filed by leave on 30 May 2011 that explained adjustments that were made by the defendant to the plaintiffs' loan account in response to the complaints, but without admission of liability by the defendant. Mr Allanson's evidence could not be successfully challenged by the plaintiffs. Mr Allanson explained that the defendant's electronic computer records system does not have capacity to allocate credits to an earlier date and, for the statement of account to reflect correctly the loan balance after the adjustments for the deposits made by the plaintiffs, it was necessary for the defendant to make a manual adjustment to the loan balance. This was done on 15 July 2010 to reflect the lower amount of interest which would have been paid, if each of the plaintiffs' payments commencing on 20 August 2009 had been allocated to the loan on the date of deposit.

[24] In September 2010 the defendant undertook a further review of the transactions in respect of the loan account and reversed all charges for default interest, default management fees, expired insurance fees, professional legal costs and other account and administration charges which had been debited to the loan account between 30 April 2009 and 24 September 2010. The defendant became aware that the plaintiff had made a deposit of $12,000 on 2 June 2010 which was credited to the loan on 24 September 2010 and a further manual adjustment of the amount of interest which would have been payable by the plaintiffs if the payment of $12,000 had been credited to the loan on 2 June 2010, rather than on 24 September 2010, was made. Mr Allanson also addressed the plaintiffs' complaint in paragraph 32 of the

statement of claim that the defendant had debited further legal costs in excess of $5,000 against the plaintiffs' loan account on 2 December 2010. Mr Allanson explained that he reversed those costs on 2 March 2011 and that he will ensure that no additional interest is charged for the imposition of those legal costs between 2 December 2010 and 2 March 2011.

Do the plaintiffs have a real prospect of success?

[25] The test that must be satisfied for the defendant's application for summary judgment under r 293 of the *UCPR* to succeed requires consideration of each of the causes of action that are relied on in the latest version of the statement of claim.

[26] The plaintiffs' submissions confuse a party's conduct within a proceeding that is described as an abuse of process with the torts that can be based on conduct which is an abuse of process. Within a court proceeding, characterisation of the conduct of a party as an abuse of process may result in sanctions imposed in the course of that proceeding, such as striking out the proceeding, or ordering one party to pay the other party's costs of wasted steps or applications. That does not necessarily justify the aggrieved party mounting a separate claim for damages, based on the conduct described as an abuse of process, for an action in tort, such as the tort of malicious prosecution or the tort of collateral abuse of process.

[27] For the plaintiffs to maintain a tortious cause of action in this proceeding based on the defendant's commencement of the first and second proceedings, the plaintiffs' statement of claim must disclose the elements of the cause of action. The tort of malicious prosecution can be brought in relation to a civil proceeding that has been dismissed where the party who brought and continued the proceedings acted maliciously and without reasonable and probable cause: *A v New South Wales* (2007) 230 CLR 500 at [1] and [54]. Although the defendant had made errors in dealing with deposits made by the plaintiffs against their loan account with the defendant, the material relied upon by both the plaintiffs and the defendant for the purpose of the summary judgment application precludes the plaintiffs' establishing the positive requirement of malice on the part of the defendant in bringing the first and second proceedings. The defendant made a mistake that was not malicious (not crediting the deposit of $18,000 to the plaintiffs' loan account at the time it was received) but resulted in the issue of the first proceeding and that mistake was then compounded by further debit entries as a result of the mistake which resulted in the second proceeding. The second proceeding is explicable on the basis of the second default notice which related to a default that was treated by the defendant as occurring subsequent to the first default which had been remedied by the time the second default notice was issued. Although the relief sought by the defendant in the first and second proceedings was in practical terms identical, the constituent facts for each proceeding were relevantly different.

[28] The tort of malicious prosecution has not been properly pleaded by the plaintiffs, but there is little point in giving the plaintiffs a further opportunity to plead the cause of action, when the only conclusion from the material on the summary judgment application is that the plaintiffs have no real prospect of succeeding in such a claim. The reasons for this conclusion are equally applicable to dispose of the plaintiffs' submission that the defendant's solicitors should be removed as the solicitors on the record for the defendant. The defendant's solicitors have not participated in an abuse of process.

[29] The tort of collateral abuse of process requires proof that a proceeding was brought as a means of carrying out a collateral and unrelated purpose that was not within the scope of the proceeding and was therefore improper: *Williams v Spautz* (1992) 174 CLR 509, 525. Apart from the fact that the tort of collateral abuse of process has not been properly pleaded by the plaintiffs, the evidence precludes the plaintiffs' having any real prospect of succeeding in such a claim. The purpose of the defendant commencing each of the first and second proceedings was to exercise its rights under the mortgage which it believed had accrued, although it has subsequently been shown that belief was mistaken.

[30] As the trespass claim is based on the allegation in paragraph 21 of the statement of claim that the issue of the second proceeding, while the first proceeding was on foot, was unlawful and an abuse of process (which I have rejected), the plaintiffs have no real prospect of success in respect of the claim for damages of trespass. In addition, the defendant has the benefit of the conditions in the mortgage and the loan agreement which authorised service of any process issued by the defendant on the plaintiffs at their residential address which must apply, even though the defendant made errors in the entries to the plaintiffs' loan account which gave the plaintiffs a defence to the proceedings.

[31] Although the allegations relied on in relation to the claim based on unconscionable conduct traversed other dealings between the parties earlier than 2009 and 2010, the wider allegations are not justified by the facts alleged in the statement of claim. The analysis which I have undertaken of the material for the purpose of the summary judgment application also does not support the allegations of unconscionable conduct in respect of the defendant's dealings with the plaintiffs in 2009 and 2010.

[32] Disregarding that the claim, as filed, did not make a claim for damages for breach of contract, the plaintiffs have failed to plead properly a cause of action based on breach of contract. Although the defendant has now responded to the plaintiffs' complaints about delays in crediting payments and wrongfully debiting the plaintiffs' loan account with default expenses, the plaintiffs arguably have a claim against the defendant for breach of the implied obligation under the mortgage and loan agreement that the defendant would credit the loan account with the payments made by the plaintiffs as soon as practicable after the payments were received by the defendant. This obligation follows from the right of the defendant to calculate interest on a daily basis and that clause 21.5 of the mortgage memorandum expressly states that the defendant "need not credit you with money until as soon as practicable after we actually receive it." The issue is whether the plaintiffs can prove any damages as a result of the breach of such an implied obligation.

[33] The plaintiffs were legally represented in relation to the first and second proceedings. Although they received the benefit of an order for costs assessed on the standard basis in respect of the dismissal of those proceedings, they are out of pocket by the difference between those standard costs and the costs they actually incurred. The problem for the plaintiffs is that there is good authority to support the defendant's submissions that, as the plaintiffs agreed to the dismissal of those proceedings with an order for costs in their favour on a standard basis, they cannot now pursue the defendant for the difference between their standard costs and solicitor/client costs. That is because that claim for the difference in costs as damages was able to be raised when seeking costs in the first and second proceedings. It can be contrasted to claiming the difference in costs as damages for

the tort of malicious prosecution or circumstances where the costs of the original proceeding were not able to be pursued in that proceeding: *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1, 34-35; *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd* [2000] NSWSC 1100 at [45]-[46]; *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388 at [31]-[33] and [38].

[34] The other types of loss particularised in paragraphs A to H of paragraph 35 of the statement of claim have either been addressed by the defendant or have not been the subject of evidence by the plaintiffs. The plaintiffs' claim for aggravated and exemplary damages has no application to a claim for damages for breach of contract: *Gray v Motor Accident Commission* (1998) 196 CLR 1, 4-7. I am satisfied that the defendant has shown that, even if the plaintiffs re-pleaded their claim for damages for breach of contract, the plaintiffs will not prove any damages (other than nominal damages).

[35] It is unfortunate that the state of accounting between the defendant and the plaintiffs was affected by errors which resulted in the commencement of the first and second proceedings and the suspicions that the plaintiffs held about the motives of the defendant. Miscommunication or lack of communication between the parties at critical times has also contributed to the current proceeding. My analysis of the material that was adduced for the purpose of the defendant's summary judgment application has satisfied me that the plaintiffs have no real prospect of succeeding on their claims and that a trial of the plaintiffs' claims is unnecessary. In the circumstances, it is appropriate to exercise the discretion conferred by r 293 of the *UCPR* to bring the proceeding to an end by giving judgment for the defendant against the plaintiffs.

[36] I am mindful, however, that the steps taken by the defendant since the commencement of this proceeding to address the errors in the entries to the plaintiffs' loan account with the defendant have contributed to the plaintiffs' lack of success. That is a relevant consideration in relation to the exercise of the discretion to order costs.

[37] I am proposing to publish my reasons and make the orders which follow, and then give the parties an opportunity to consider these reasons before deciding whether to re-list this matter for a costs argument:

1. Judgment for the defendant against the plaintiffs.
2. Liberty to either party to apply on two days' notice in writing to the other.
3. The issue of costs is adjourned to a date to be fixed.