SUPREME COURT OF QUEENSLAND

CITATION:	*Gardiner & Anor v Australian Executor Trustees Limited* [2012] QCA 145
PARTIES:	**HERBERT MARC GARDINER** **LORRAINE FAYE GARDINER** (applicants) **v** **AUSTRALIAN EXECUTOR TRUSTEES LIMITED** (respondent)
FILE NO/S:	Appeal No 3960 of 2012 DC No 3041 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	1 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2012
JUDGES:	Holmes JA
ORDER:	**The application is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – OTHER MATTERS – where the applicants sought a stay pending appeal of a summary judgment ordering them to pay arrears under a loan agreement, and costs, and that the respondent recover possession of a property subject to a mortgage given as a condition of the loan agreement – where the primary judge ruled that there was no real prospect of the applicants' successfully defending the proceedings on the basis of alleged unconscionable conducted by the respondent lender – whether the applicants could demonstrate they had an arguable appeal *Competition and Consumer Act* 2010 (Cth), s 87 *Trade Practices Act* 1974 (Cth), s 87
COUNSEL:	The applicants appeared on their own behalf J W Peden for the respondent
SOLICITORS:	The applicants appeared on their own behalf Gadens Lawyers for the respondent

[1] **HOLMES JA:** The applicants seek a stay of a District Court judgment ordering them to pay arrears under a loan agreement in an amount of $671,506.19 and costs, and that the respondent, Australian Executor Trustees Limited, recover possession of a property subject to a mortgage given as a condition of the loan agreement.

[2] The applicants are unrepresented; Mr Gardiner argued their case here. They say that the property in question is their home and they cannot afford to rent another property, although they do not descend into detail as to their financial situation. The respondent says that it is being held out of the judgment debt. Given the prospect that the applicants' home will be sold, I have little doubt that the balance of convenience falls in their favour; but it is necessary, of course, to consider whether they have an arguable case on the appeal in order to determine whether a stay ought to be granted.

[3] The major argument at first instance as to why the matter required a trial was that the applicants would seek a finding of misleading or unconscionable conduct by the respondent or its agent, Seiza Capital Pty Ltd, on the basis of which the Court would make an order under what was section 87 of the *Trade Practices Act*, now Section 87 of the *Competition and Consumer Act* 2010, effectively rewriting the loan agreement and mortgage. Seiza Mortgage Company Pty Ltd, presumably a related company to Seiza Capital Pty Ltd, is described in the loan agreement as the "Program Manager" for the loan.

[4] As it was put in the defence, the respondent had failed “to sufficiently disclose” to the applicants that they were dealing not with Seiza but with the respondent, and that the loan and mortgage would be securitised. It was also pleaded that the loan had a “predatory” effect because it had an interest only period during which the applicants paid only part of the accruing interest with the balance added to the principal with the result, of course, that further interest accrued on the total amount.

[5] In opposing the application for summary judgment at first instance, the applicants relied on an affidavit by Mr Gardiner in which he deposed that he was a finance broker and had entered the loan agreement with the respondent to refinance a loan and to obtain further funds as working capital. He had entered the loan thinking that the other party was Seiza, not the respondent, because Seiza was the company which had sent him marketing material and material about the loan application. He did not notice anything that warned him that compound interest would be charged, that the loan might affect his equity in the property, or that it might be more difficult to obtain refinancing if he entered it.

[6] Mr Gardiner's affidavit also raised a letter which he had received in December 2008 from AMAL Pty Ltd advising that the Seiza Group had entered in to a deed of company arrangement. That letter advises that rumours were being circulated, but there was no need for borrowers to take any action to refinance their loans. It appears from the judgment that the applicants indicated they would incorporate in their defence and counterclaim a claim against the respondent if it could be shown that it was responsible for the representation that it was unnecessary to refinance because, they said, they had relied on it, it was misleading and deceptive and caused them damage.

[7] His Honour referred to the letter as "from an entity" not the plaintiff. The applicants take issue with that statement, asserting that AMAL is an agent for the respondent.

That may well be right, but unless there was in fact some risk to the loan arrangement through Seiza's financial difficulties, it is difficult to see how the letter could be of any consequence. If the respondent was the lender, as the loan agreement and other documents indicate, there is no suggestion it did not have the capacity to continue funding the loan. Mr Gardiner says that he has evidence that the respondent was not in fact a credit provider, but it was not before the Judge at first instance and it is not something I could take into account in assessing prospects of appeal here. On the evidence before me, the existence of the letter from AMAL does not seem an aspect of the case likely to found a successful ground of appeal.

[8] His Honour pointed out that the loan agreement plainly described the respondent as "lender". (I mention, also, that the loan application signed by the applicants identified the respondent as the credit provider.) His Honour accepted, for the purposes of the application, that Mr Gardiner's belief was to the contrary. However, he said, it was not shown to have been caused by any representation by the respondent or any agent for it.

[9] Mr Gardiner, in oral submissions, offered a variation, in that he thought the respondent was the lending arm of Seiza, an impression he gained through conversations with others. Neither that nor the fact that, according to Mr Gardiner's affidavit, Seiza provided material about the loan application and marketing material would seem to amount to a representation that the respondent was not the lender in relation to this loan. What is lacking, as the primary Judge said, is evidence of any actual representation by the respondent that the loan agreement which the applicants' entered would be with anyone other than it. The documents which evidence the loan and mortgage are to the contrary.

[10] The primary Judge noted that there was no evidence that the respondent had induced any belief in the applicants about securitisation of the loan or about any difference it might have made to them. Mr Gardiner's affidavit set out matters about which he was informed, but they did not include securitisation; and although Mr Gardiner detailed some features of the loan, which would have caused him not to enter it had he known about them, he did not mention securitisation. The applicants say in their written submissions they do not agree with the Judge's comments, but they do not point to any evidence to show that he was wrong.

[11] The next aspect of unconscionability was that the true nature of the loan agreement was not made known to the applicants. The Judge noted various warnings in the loan agreement about how the loan operated. As well, he said, Mr Gardiner had been in possession of documents which showed that interest would be added to the principal and that the loan to valuation ratio would rise and provided figures showing how the loan balance would increase. Those documents were: HMG4, a work sheet; HMG5, which show the costs of acquiring the property the subject of the loan as against the loan amount; and in particular, HMG6, a document which projected the loan balance over five years, as well as loan to valuation ratios based on a sunny outlook of a 10 per cent annual appreciation in the property's value.

[12] Those documents were submitted by Mr Gardiner's broker to Seiza for the purposes of the loan application. They showed, his Honour said, that Mr Gardiner should have been well informed about how the loan would work. He referred to them as having been in Mr Gardiner's possession for a number of weeks. Mr Gardiner disputed that: he said he did not have them for more than a couple of days after the

loan application was submitted. I do not think that affects anything; the point is that before he and his wife entered the loan agreement, they had material which indicated clearly how loan and the accrual of interest would work. In particular, HMG6, as the respondent pointed out, did accurately project the actual progress of the loan. There is no evidence that the respondent misrepresented the nature of the loan or that the applicants were left unaware of how it would work.

[13] The learned Judge noted that the work sheet, HMG4, which Mr Gardiner's broker furnished to Seiza, showed an increase in the initial loan to valuation ratio of 80 per cent to a final ratio of 90.32 per cent. The applicants, though, complained that Seiza's advertising said that the loan to valuation ratio would increase to 87.5 per cent by the end of the fourth year. Consequently, it was said the loan should not have been approved because it was outside the company's guidelines.

[14] Assuming the applicants' figures to have been correct, that might be an issue for Seiza, but it does not establish that the applicants were under any misapprehension about the effect of the loan. And as the respondent pointed out, if, as Mr Gardiner's affidavit says, he obtained Seiza's material containing the statement about the loan to valuation ratio after entering the loan agreement, it is difficult to see how he could establish reliance on it.

[15] Although it's not mentioned in the defence or the judgment, the applicants say too that a consideration in their entering the loan was that Mr Gardiner thought he could roll it over after two years, obtaining a more advantageous interest rate. The source of that representation, though, according to his affidavit, was his own broker, not the respondent.

[16] The primary Judge concluded that there was no prospect of the applicants successfully defending the claim on an argument of unconscionable conduct by the lender. Having reviewed the arguments made to me today by Mr Gardiner, I do not consider that the applicants can show an arguable case that he made errors in reaching that conclusion. The stay is refused.