

SUPREME COURT OF QUEENSLAND

CITATION: *Secure Funding Pty Ltd v Moon & Anor* [2012] QSC 244

PARTIES: **SECURE FUNDING PTY LTD**
(plaintiff/first defendant by counter claim)
v
TANIA MAREE MOON
(first defendant/second plaintiff by counter claim)
and
GARRY ANTHONY MOON
(second defendant/first plaintiff by counter claim)
and
ASSURED CREDIT MANAGEMENT PTY LTD
(second defendant by counter claim)
and
PAUL EDWIN STEVENSON
(third defendant by counterclaim)
and
CONCATE PTY LTD
(fourth defendant by counterclaim)

FILE NO/S: 12291 of 2009

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING
COURT: Brisbane

DELIVERED ON: 7 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 26 and 27 July 2012

JUDGE: Peter Lyons J

ORDER:

[1] The Plaintiff as mortgagee under registered mortgage no. 711147446 (**Mortgage**) recover possession of property at 731 Tomewin Mountain Road, Currumbin, Queensland, described in the Queensland Land Registry as Lot 7 on RP 149677, County of Ward, Parish of Tallebudgera, Title Reference 15458234 under section 78 of the *Land Title Act* 1994 (Qld);

[2] The Defendants pay to the Plaintiff the amount of \$1,057,916.83 being the amount owing as at 26 July 2012, plus interest on the amount of \$1,057,916.83 at the rate of 11.65% *per annum* to the date of Judgment;

- [3] The Counterclaim of the First and Second Defendants be dismissed;
- [4] Costs are reserved.

CATCHWORDS: TORTS – NEGLIGENCE – GENERAL MATTERS – where the first and second defendant entered agreement for the provision of mortgage broking services by the fourth defendant by counterclaim– where the fourth defendant by counterclaim, through the actions of the third defendant by counterclaim, applied on behalf of the first and second defendant for a loan from the plaintiff – whether the third defendant by counterclaim deliberately submitted false information in that application; completed the application without proper instructions; failed to advise the first and second defendants of their inability to service the proposed loan; or, failed to inform the first and second defendant that they were to be committed to a loan with a fixed term of three years and of the penalties for early payment under that loan – whether any duty owed to the first and second defendant was breached

TORTS - NEGLIGENCE - GENERAL MATTERS - where the fourth defendant by counterclaim, through the actions of the third defendant by counterclaim, applied on behalf of the first and second defendant for a loan from the plaintiff – where a stated income figure for the second defendant of \$115,000 was declared on the application form – where this figure was untruthful – where the plaintiff approved the loan application and advanced \$670,000 to the first and second defendant subject to a mortgage over the property of the first and second defendants – whether the plaintiff owed a duty to the first and second defendants to confirm their ability to repay the loan

CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – CREATION OF RELATIONSHIP OF AGENCY – FORMATION AND PROOF OF AGENCY – IN GENERAL – where the fourth defendant by counterclaim, through the actions of the third defendant by counterclaim, applied on behalf of the first and second defendant for a loan from the plaintiff – where the first and second defendants understood the fourth defendant by counterclaim would be making applications to various lenders on their behalf – where there is no document suggesting a relationship of agency between the third or fourth defendant by counterclaim and the plaintiff – whether the third or fourth defendant by counterclaim acted as agent for the plaintiff

Consumer Credit (Qld) Code, s 80

Property Law Act 1974, s 84

Micarone v Perpetual Trustees Australia Ltd (1999) 75

SASR 1, considered

Perpetual Trustees Australia Ltd v Schmidt [2010] VSC 67,
considered

- COUNSEL: N M Cooke for the plaintiff and first and second defendants by counter claim
The first defendant and second plaintiff by counter claim appeared in person
The second defendant and first plaintiff by counter claim appeared in person
The third and fourth defendant by counterclaim appeared in person
- SOLICITORS: Norton Rose Australia for the plaintiff and first and second defendants by counter claim
The first defendant and second plaintiff by counter claim appeared in person
The second defendant and first plaintiff by counter claim appeared in person
The third and fourth defendant by counterclaim appeared in person

- [5] In 2007, the plaintiff (*Secure Funding*), who is also the first defendant to the counterclaim, advanced \$670,000 to Mr and Mrs Moon. It seeks recovery from them of the current balance of the loan, together with the enforcement of the mortgage which they provided for it.
- [6] Mr and Mrs Moon allege that the fourth defendant by counterclaim (*Concate*), who acted through the third defendant by counterclaim (*Mr Stevenson*), was agent for Secure Funding and the second defendant by counterclaim (*Assured Credit Management*), and that it breached duties owed to Mr and Mrs Moon. Mr and Mrs Moon have claimed damages from Concate and Mr Stevenson; and also that the loan and mortgage should be set aside.

Background

- [7] In 2007, Secure Funding carried on a money lending business. Documents issued by it suggest that it did so in association with Liberty Financial Pty Ltd, which appears to account for the appearance of the name, Liberty Financial Pty Ltd, on some of the documents.
- [8] I was informed that Assured Credit Management undertakes the task of enforcing loans owed to Secure Funding. It played no role in the events which need to be considered to determine these proceedings, and will not be referred to further.
- [9] Mr Stevenson has for more than 31 years worked in the banking and finance industry, and has worked for a number of the major banking institutions in Australia. In mid 2006, he decided to go into the business of mortgage broking. To that end, he arranged for the incorporation of Concate, which traded as Tribute Mortgage Corporation.

- [10] Mr Stevenson was a member of the Mortgage Finance Association of Australia. He (or perhaps more correctly, Concate) was a member of PLAN (Professional Lenders Association of Australia). Membership of PLAN provided access to lenders including Secure Funding, as well as other professional support.
- [11] Mr Moon is a carpenter by trade. For a time, he represented furniture manufacturers and importers in their dealings with retailers. He was the director and secretary of a company, Alchemy Interior Products Pty Ltd. Until January 2001, he was a director of Renaissance International Pty Ltd. He was the proprietor of a business with a business name registered in New South Wales, being Rodeo Design, together with Mrs Moon. The trading name La Luna Marketing was registered in June 2001, with Mr Moon the sole trader trading under this name. Mr Moon gave evidence that he traded under this name when he worked as an agent for furniture importers and manufacturers, which he ceased to do in 2003.
- [12] Mr John Saffiote had also been a director of Renaissance International Pty Ltd. Mr Moon gave evidence to the effect that he experienced financial misfortune as a result of his dealings with Mr Saffiote. That resulted in Mr and Mrs Moon being indebted to Bank of Western Australia Ltd (*BankWest*). This debt (*BankWest loan*) was secured by a first mortgage over their home at 731 Tomewin Mountain Road, Currumbin Valley. By July 2007, the amount of the BankWest debt was approximately \$465,000.
- [13] On 8 December 2006 Mr and Mrs Moon entered into a loan agreement with Telpot Pty Ltd (*Telpot Loan*). The amount of the loan was \$125,000. Interest was 36 per cent per annum, reducing to 30 per cent if paid in advance. The Telpot loan was repayable on 1 July 2007. Mr Moon gave evidence that the lender was prepared to extend the time for repayment to 1 December 2007, although there were no documents recording this agreement. It emerged that the Telpot loan was used to meet repayment obligations for the BankWest loan.
- [14] Over the 12 months prior to July 2007, Mr and Mrs Moon approached a number of mortgage brokers for the purpose of obtaining finance to payout the BankWest loan and the Telpot loan. One of those was a Mr Edward Lunney, who worked with an entity referred to as RAMS Home Loans. Mr Lunney gave unchallenged evidence that Mr and Mrs Moon completed an application for what is called a “Low Doc Loan” with RAMS Home Loans on about 23 July 2007; and that in the course of making the application Mr Moon stated he was self-employed as a furniture manufacturer. The application was refused, it being the policy of RAMS Home Loans not to make a loan which included an amount to repay an existing loan from an entity which was not a commercially recognised lender. Mr Lunney then referred Mr Moon to Mr Stevenson.
- [15] There is some controversy about some of the events which occurred thereafter. However, the principal facts are not really in dispute.
- [16] Mr Moon dealt with Mr Stevenson so that Mr Stevenson could find an entity who would lend Mr and Mrs Moon the money they were seeking. In addition to paying out the existing loans, they sought some additional funds, said to be for the purpose of making some improvements to their home. Mr Stevenson sent to Mr and Mrs Moon by facsimile a blank application form bearing the name, Tribute Mortgage Corporation. Mr Moon completed the form, which he and his wife signed on 16

August 2007, and subsequently sent it back by facsimile to Mr Stevenson (*Tribute application*). In the Tribute application, Mr Moon identified his employer as Bali Beach Huts, and his gross income as \$115,000. He identified his liabilities as the BankWest loan and the Telpot loan.

- [17] At some point, Mr Stevenson recommended to Mr and Mrs Moon that an application be made to Secure Funding. Secure Funding had a standard form to be used for such applications. Mr Stevenson entered much of the information required on the form. The sources of that information were Mr and Mrs Moon. It included a statement that Mr Moon was self-employed, being a sole trader, using the business name Bali Beach Huts, and was a furniture manufacturer. The commencement date of the business was said to be 1996. Mr Moon's annual income was said to be \$115,000. The letter X was used to mark locations where further information or signatures were to be inserted. Since some changes were later made to the document, I shall refer to the document as originally prepared by Mr Stevenson as *application version 1*.
- [18] On 19 August 2007 Mr Stevenson sent application version 1 to Mr and Mrs Moon, with a covering message and other documents. That message stated that the available loan was "a 3 Years Fixed Rate of 7.69%, HOWEVER if you decide that you would prefer to run on a variable rate basis this is available and is entirely up to you". The message also recorded the need for signatures in the locations indicated. The accompanying documents included a "Comparisons Rate Schedule". The schedule compared repayments to be made under fixed interest rate loans and variable interest rate loans. Mr and Mrs Moon both signed the schedule, and it was sent back to Mr Stevenson in the latter part of August 2007. On 21 August 2007, Mr and Mrs Moon sent back to Mr Stevenson parts of the application, including that part which stated Mr Moon's annual income to be \$115,000, and one page bearing their signatures, dated 21 August 2007 (*application version 2*).
- [19] Mr Stevenson was at this time in contact with Ms Jaci Smith, a business development manager with Secure Funding. On 21 August 2007, Mr Stevenson sent application version 1 and application version 2 to Ms Smith for comment. On the following day, Ms Smith responded favourably, but requested some further information, including an explanation of the roles of La Luna Marketing and Bali Beach Huts, and the intended purpose for the cash which was not required to pay out the existing loans. Mr Stevenson then sought further information from Mr and Mrs Moon. Mr Moon informed Mr Stevenson that the ABN number for La Luna Marketing was 802 287 093 053. He also gave Mr Stevenson bank statements which showed transfers of money which evidenced payments from La Luna Marketing to Mr Moon.
- [20] By late August 2007, Ms Lorraine Taylor, who holds the position of underwriter with Secure Funding, was dealing with Mr and Mrs Moon's application. On 29 August 2007, she sent by email a letter advising that the loan had been conditionally approved. One of the conditions was that the declaration of income which appeared on page 10 of the application form had to be completed with the stated income figure, and signed by Mr Moon. The covering email from Ms Taylor advised Mr Stevenson that a previous application from Mr and Mrs Moon had been refused, because their mortgage account was at a default stage. Ms Taylor sought an explanation for the past arrears, so that she could determine whether there had been a change in the ability of Mr and Mrs Moon to make repayments.

- [21] In early September 2007, Secure Funding obtained a valuation of the mortgage property. That resulted in the issue by Ms Taylor of a revised conditional approval on 6 September 2007, the relevant conditions remaining unchanged.
- [22] On 3 September 2007, Mr and Mrs Moon again signed the application form. It appears to be another copy of application version 1. However, on page 10 of the form, an income declaration statement had been completed. This involved the insertion of the stated income for Mr Moon (as well as Mrs Moon), and their signatures, beneath a declaration confirming the truth of those statements, and a statement that they had fully and honestly disclosed their income and liabilities. I shall refer to this document as *application version 3*. Application version 3, as executed, was submitted by Mr Stevenson to Ms Taylor on 10 September 2007.
- [23] On 8 September 2007, Mr Moon wrote to Mr Stevenson, explaining the arrears on the BankWest loan. He attributed these to the conduct of Mr Saffiote who, according to Mr Moon, was to assume responsibility for repayment of this loan, but failed to meet that responsibility. Mr Moon also made reference to a caveat over the property at Tomewin Road in favour of Stacks Solicitors, said to secure fees relating to litigation against Mr Saffiote. Mr Moon said that he was having the conduct of Mr Saffiote investigated in relation to fraud and forgery, alleging a loss of more than \$500,000.
- [24] In the latter part of August and in September of 2007, Ms Taylor gave consideration to the loan application made by Mr and Mrs Moon, which included the making of some inquiries. The steps which she took are identified in her evidence, including in a loan application checklist which she completed. It is not necessary to consider in detail the steps which she then took. By 19 September 2007, she approved the application. Shortly thereafter, Mr and Mrs Moon signed the security documents required by Secure Funding. The funds were advanced on 30 October 2007. Mr and Mrs Moon ceased making repayments at the end of April 2009. Their house has since February 2009 been rented to someone else for \$1,900.00 per month.
- [25] Mr Moon gave evidence that in 2005 his income was \$19,979; in 2006 he had no income; and in 2007, his income was \$9,962.

Issues

- [26] Save that they do not admit the sending of notices under s 84 of the *Property Law Act 1974 (Qld)* and s 80 of the *Consumer Credit (Qld) Code*, Mr and Mrs Moon in their defence do not take issue with the allegations in Secure Funding's statement of claim. In particular, they admit default under the mortgage. In their defence they allege that at a meeting with Mr Stevenson on about 3 September 2007, they signed the loan application in blank, Mr Stevenson stating that he would enter the details.
- [27] Mr and Mrs Moon have bought a counterclaim against Secure Funding, Assured Credit Management, Mr Stevenson and Concate. In it they allege that Secure Funding carried on the business of financier in conjunction with Mr Stevenson and Concate. They allege that Mr Stevenson and Concate carried on the business of mortgage broking, and did so in conjunction with Secure Funding by making initial enquiries, submitting loan applications, liaising with staff, agreeing to remuneration, and accepting commissions.

- [28] In their counterclaim, Mr and Mrs Moon allege they met Mr Stevenson on 3 September 2007 “to discuss obtaining a loan from one of the many providers he represented”; and that at this meeting Mr Moon stated that he was unemployed and had no income. The allegations about the provision by Mr Stevenson of a blank copy of the loan application, and that he would complete it, are repeated.
- [29] The counterclaim alleges that Mr Stevenson and Concate owed Mr and Mrs Moon a duty either by an implied term of their agreement or under the common law to exercise due care, diligence and competence; to advise them of all matters relevant to the application; and to protect their interests. They allege that Mr Stevenson and Concate deliberately submitted false information relating to their income, in an effort to secure the loan; which otherwise would not have been made. They allege that Mr Stevenson and Concate completed the loan application without proper instruction. They also allege that Mr Stevenson and Concate failed to advise them of their inability to service the proposed loan.
- [30] Mr and Mrs Moon also allege that the duties owed to them by Mr Stevenson and Concate were breached by committing them to a loan with a fixed term of three years; failing to inform them “of the penalties for early payment”; and “providing false particulars on the loan application in terms of employment status, and income”. They allege that had the loan application been correct in relation to the income and capacity of Mr and Mrs Moon to service the loan, the application would not have been granted.
- [31] Mr and Mrs Moon also allege that had Secure Funding exercised diligence “and/or its common law duty in confirming Mr and Mrs Moon’s ability to service a loan of this size”, it would not have approved the loan. They allege that the loan and mortgage transaction are liable in equity to be set aside, relief which Mr Moon orally confirmed they sought in the proceedings.
- [32] The counter-claim also alleges that Mr and Mrs Moon suffered loss and damage. However, at the beginning of the hearing, Mr Moon acknowledged that they had not suffered any loss.

Consideration

- [33] The critical allegations made by Mr and Mrs Moon relate to the alleged meeting with Mr Stevenson at a coffee shop at Mudgeeraba on about 3 September 2007. The most significant are that Mr Moon then told Mr Stevenson that he was unemployed, that he had no income, and that he had had no income for a period of time. The allegation that Mr Stevenson then told Mr and Mrs Moon to sign a blank copy of the loan application, and that he would “provide all the information...needed to ensure a successful application” is also important.
- [34] In respect of these allegations, I accept Mr Stevenson’s evidence that at no time prior to the advance to Mr and Mrs Moon was he told that Mr Moon was unemployed, that he had no income, and that he had had no income for a period of time.
- [35] Mr Stevenson presented as an honest and straightforward witness. His version of events is supported by contemporary documents. In particular the evidence clearly demonstrates that on 16 August 2007, Mr Moon filled out the Tribute application, in

which he stated that his employer was Bali Beach Huts, and he had been so employed for two years; and that his gross income was \$115,000 per annum. Further, the fact that application version 1 had been prepared by 19 August 2007 makes it highly unlikely that on 3 September 2007, Mr Stevenson presented to Mr and Mrs Moon a blank application form for signing. The execution by Mr and Mrs Moon of application version 2 on 21 August 2007, also makes it unlikely that on 3 September 2007, Mr Stevenson presented them with a blank application form for signing.

- [36] Perhaps of greater significance in determining this issue is the fact that Mr Moon admitted he was “happy for Mr Stevenson to misstate (Mr Moon’s) income” to get refinancing. That is confirmed by the Tribute application; and the signing of application version 2 and application version 3, including in particular the stated income declaration, pursuant to the condition notified by Ms Taylor. Mr Moon’s evidence demonstrates that he was prepared to be dishonest to obtain the loan. Indeed, he admitted telling Mr Lunney in about mid-2007 that he had an annual income of \$115,000. It is plain from Mr Moon’s own evidence that he was prepared to be dishonest to obtain finance. Indeed, he had strong motive to do so: he described his financial position at that time as “very desperate”. No reason was identified by Mr Moon for being frank with Mr Stevenson at this time. Frankness would have been inconsistent with his dealings with Mr Stevenson over the previous weeks. Moreover, it may well have placed at risk his prospects of obtaining the finance he so desperately sought.
- [37] In my view, Mr Moon’s version of a meeting with Mr Stevenson on about 3 September 2007 is no more than a convenient invention. I find that at no time prior to the advance by Secure Funding did Mr Moon tell Mr Stevenson the truth about his income position. I also find that Mr Stevenson did not ask Mr and Mrs Moon to sign a blank loan application form on about 3 September 2007 (or at all); nor did Mr Stevenson indicate that he would provide all of the information required to ensure that the application was successful (at least in the sense that he would do that, otherwise than on the basis of information provided by Mr and Mrs Moon, and without regard to its truth).
- [38] Mr Moon relied on his letter of 8 September 2007 as at least raising some concern about the truth of his statements about his income. The letter is silent on that question. Nor does it suggest that the financial position of Mr and Mrs Moon was materially different to what was indicated in the Tribute application, or any of the versions of the loan application to Secure Funding.
- [39] Finally, it is clear that Mr Stevenson communicated to Mr and Mrs Moon that the application was for a loan with the interest rate fixed for three years. Mr Moon did not suggest that he did not appreciate the consequences of earlier payment of such a loan.
- [40] These findings have the consequence that the allegations that Mr Stevenson and Concate acted without proper instructions, and that they deliberately submitted an application containing false information, fail. So does the allegation that they breached any duty they owed to Mr and Mrs Moon by failing to advise them that they would not be able to service the loan because they did not have sufficient income, and should not enter into it.

- [41] The allegation that Mr Stevenson breached any duty which he owed to Mr and Mrs Moon by committing them to a loan for a fixed term also fails. Mr and Mrs Moon were plainly advised that the loan had a fixed rate of interest for three years; and that a loan with a variable rate of interest could be sought; but they accepted that Mr Stevenson should apply for a loan with a fixed rate of interest. Mr Moon appeared to understand that this would mean that a repayment of the loan within the three year period might make the Moons liable to pay additionally moneys to Secure Funding.
- [42] In general, a finance broker, even if paid commission by a lender, is the agent of the borrower, and not the lender¹. The documents placed in evidence do not demonstrate that the relationship of principal and agent existed between Secure Funding, Concate and Mr Stevenson. That is a matter on which Mr and Mrs Moon bear the onus. There was a document demonstrating the relationship between persons and entities associated with PLAN Australia, and Liberty Financial Pty Ltd. Under the provisions of that document, a person or entity associated with PLAN was not an agent for Liberty Financial.
- [43] There is nothing in the present case to suggest a departure from the general position. Indeed, Mr Moon understood, when he approached Mr Stevenson, that Mr Stevenson might make an application for finance to one of a number of potential lenders. I find that neither Mr Stevenson nor Concate acted as the agent for Secure Funding in relation to the loan application made by Mr and Mrs Moon.
- [44] In general, a lender does not owe a borrower a duty to give commercial advice, or to investigate the ability of the borrower to make repayments of the loan, or verify information provided by the borrower.² There has been nothing in the present case to suggest any departure from the general position. The allegation that Secure Funding owed a duty to investigate the capacity of Mr and Mrs Moon to service the loan has not been made out. It would be remarkable if a lender owed a duty to a borrower to investigate an untrue statement about the borrower's income, for which statement the borrower was dishonestly responsible. The counter-claim against Secure Funding should be dismissed.
- [45] No allegations are made against Assured Credit Management, nor is any relief sought against it. Yet it is one of the parties against whom the counter-claim has been brought. The counter-claim against it should be dismissed.

Conclusion

- [46] There should be judgment in favour of Secure Funding against Mr and Mrs Moon for the current balance of the debt. The counter-claim should be dismissed. At the hearing, Mr and Mrs Moon only relied on the matters raised in the counter-claim to defeat the order sought by Secure Funding for possession. Such an order should be made. I shall hear further submissions from the parties as to the form of orders to be made, and as to costs.

¹ Dal Pont, *Law of Agency*, (2nd ed) at [1.32]

² *Perpetual Trustees Australia Ltd v Schmidt* [2010] VSC 67 at [173]; *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1 at [625].