

SUPREME COURT OF QUEENSLAND

CITATION: *Westpac Banking Corporation v Helicopters Brisbane Pty Ltd & Ors* [2012] QSC 263

PARTIES: **WESTPAC BANKING CORPORATION**
(ABN 33 007 457 141)
(plaintiff)
v
HELICOPTERS BRISBANE PTY LTD
(ABN 51 010 485 417)
(first defendant)
ALEXANDER JOHN SCHUTTLOFFEL
(second defendant)
EDMUND STUART GROVES
(third defendant)

FILE NO/S: BS 2107 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 19 April 2012

JUDGE: Martin J

ORDER: **Application dismissed.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where applicant lender seeks summary judgment against guarantor for debt arising out of commercial loan agreement – where applicant bound by s 85 of the *Property Law Act 1974* – where respondent claims remedies under *Trade Practices Act 1974* – where agreement contained a “no set off clause” – whether summary judgment should be granted

Property Law Act 1974, s 85
Trade Practices Act 1974, s 82, s 87
Uniform Civil Procedure Rules 1999, r 292

Bank of Western Australia Ltd v O'Brien [2012] NSWSC 456
Henjo Investments Pty Ltd v Collins Marrickville Pty Limited

(No 1) (1988) 39 FCR 546
Higton Enterprises Pty Ltd v BFC Finance Limited [1997] 1
 Qd R 168
Higton Enterprises Pty Ltd v BFC Finance Limited
 (unreported) [1994] QSC 133, 27 May 1994

COUNSEL: E Goodwin for the plaintiff/applicant
 D B O'Sullivan for the third defendant/respondent

SOLICITORS: Allens Arthur Robinson for the plaintiff/applicant
 Holding Redlich for the third defendant/respondent

- [1] This is an application by the plaintiff ('Westpac') pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 ('the Rules') for summary judgment against the third defendant ('Groves') for a debt in the amount of \$338,975.16. The debt is said to arise out of a commercial loan agreement executed on 4 March 2004 ('CLA') between Westpac as lender, the first defendant ('Helicopters Brisbane') as borrower and the second defendant and third defendant ("Mr Groves") as guarantors.
- [2] In about March 2004 Westpac advanced \$808,992.83 to Helicopters Brisbane, pursuant to the CLA, for Helicopters Brisbane to buy a thermal imaging helicopter camera ('the camera').
- [3] Helicopters Brisbane was obliged by the CLA to repay the loan in 60 monthly instalments together with a residual payment of \$323,600. Pursuant to the CLA, Westpac was granted a bill of sale over the camera.
- [4] Mr Groves was a shareholder of Helicopters Brisbane at the date of the execution of the CLA.
- [5] By November 2007, Helicopters Brisbane had failed to make all the monthly payments required under the CLA and was in default of that agreement.
- [6] A notice of demand was sent to Helicopters Brisbane in December 2007 requiring payment of the amount of \$506,146.23. That demand was not complied with, either in whole or in part.
- [7] Westpac subsequently took possession of the camera and sold it at auction in November 2008 for \$112,875.
- [8] In September 2009 Westpac sent a demand to Helicopters Brisbane seeking payment of the residual debt. No payment was made.
- [9] Each of the second and third defendants was sent separate demands in October 2009 for payment of the debt. Neither defendant satisfied the demands.
- [10] Clause 4 of the Standard Conditions of the CLA contained what is sometimes called a "no set off clause" in the following terms:

"4.2 The Guarantor acknowledges:

...

- (d) that the Guarantor’s liability hereunder shall not be affected by any claim or right to set off or crossaction which the Borrower or any other Guarantor may have or claim to have against the Lender on any account whatsoever nor shall the Guarantor be entitled to any set off against the Lender.”

- [11] A number of matters are raised in the defence filed by Mr Groves, including that:
- (a) Westpac acted unconscionably in inducing him to execute the guarantee;
 - (b) the guarantee is unenforceable because Westpac breached its duty to advise him as to the effect of the guarantee;
 - (c) the guarantee is unenforceable because Westpac, by failing to explain the guarantee to him, engaged in misleading and deceptive conduct under section 18 of the *Australian Consumer Law* (at the relevant time the *Trade Practices Act 1974* was in force but, for the purposes of this application, the principles are the same);
 - (d) Westpac is not entitled to the debt because it sold the camera at a “significant undervalue”;
 - (e) he did not pay the arrears and agreed to Westpac selling the camera because he was advised by Westpac that if it sold the camera it would probably come close to covering the debt.
- [12] The argument on the application was concerned mainly with the following areas:
- (a) the duties of Westpac under s 85 of the *Property Law Act 1974*;
 - (b) the availability of remedies under the *Trade Practices Act 1974* (‘TPA’) or the *Competition and Consumer Act 2010*; and
 - (c) the effect of the “no set off” clause.

Section 85 Property Law Act

- [13] Section 85 of the *Property Law Act 1974* (‘PLA’) provides:

“85 Duty of mortgagee or receiver as to sale price

- (1) It is the duty of a mortgagee, including as attorney for the mortgagor, or a receiver acting under a power delegated to the receiver by a mortgagee, in the exercise of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.
- (1A) Also, if the mortgage is a prescribed mortgage, the duty imposed by subsection (1) includes that a mortgagee or receiver must, unless the mortgagee or receiver has a reasonable excuse—
 - (a) adequately advertise the sale; and
 - (b) obtain reliable evidence of the property’s value; and
 - (c) maintain the property, including by undertaking any reasonable repairs; and
 - (d) sell the property by auction, unless it is appropriate to sell it in another way; and
 - (e) do anything else prescribed under a regulation.

- (2) Within 28 days from completion of the sale, the mortgagee shall give to the mortgagor notice in the approved form.
- (3) The title of the purchaser is not impeachable on the ground that the mortgagee or receiver has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.
- (4) A mortgagee who, without reasonable excuse, fails to comply with subsection (2) commits an offence.
- (5) An agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee or receiver from the duty imposed by this section.
- (6) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee to account to the mortgagor.
- (7) Nothing in sections 83(1)(a), 89(3) and 92(2) affects the duty imposed by this section.
- (8) Nothing in this section affects the operation of a law of the Commonwealth, including, for example, the *Corporations Act*, section 420A.
- (9) This section applies to mortgages whether made before or after the commencement of this Act but only to a sale in the exercise of a power arising upon or in consequence of a default occurring after the commencement of this Act.
- (10) In this section—
prescribed mortgage means a mortgage of a kind prescribed under a regulation.”

[14] Section 85 applies in these circumstances because:

- (a) the provision applies equally to mortgages of land and of chattels;
- (b) the bill of sale evidenced a “mortgage” within the meaning of s 77A(1)(c) of the PLA, and was an “instrument of mortgage” within the meaning of s 85; and
- (c) the power that was granted to the bank to sell the camera was conferred by the bill of sale, and this was done for the bank as a mortgagee within the meaning of s 85(1).

[15] Westpac accepted it was bound by s 85 and that Mr Groves was entitled to the benefit of that section. A guarantor such as Mr Groves who suffers a loss through a breach of s 85 has a remedy in damages: *Higton Enterprises Pty Ltd v BFC Finance Limited* [1997] 1 Qd R 168.

[16] Mr Groves claims that he has suffered such a loss through a breach by Westpac of its duty under s 85. Westpac denies that it has acted unreasonably or improperly and says that it is not liable for any losses. The evidence which has been provided by Westpac with respect to the sale of the camera consists of an invoice from an auction house recording that the camera, and some other related equipment, was sold in November 2008 for \$105,000. Westpac relies upon the terms of the bill of sale exculpating it for loss caused to the first defendant when exercising its power of sale. On behalf of Mr Groves it was argued that in light of a pleaded assertion of a

breach of the bank's duty, the absence of evidence from the bank with respect to, for example:

- (a) any details of advertising of the camera;
- (b) any valuations of the camera obtained by the bank;
- (c) details of any reserve set by the bank in auctioning the camera;
- (d) inquiries made by the bank as to how to market and sell a specialised item of equipment such as the camera,

was most unusual and weighed against the bank's case.

[17] Ordinarily the existence of a dispute such as outlined above would result in the dismissal of an application of this nature. But Westpac relies on the "no set off" clause and argues that, if Mr Groves is entitled to damages then he may seek to recover them, but not until he has paid Westpac the sum owing. In other words, Westpac argues that the clause does not purport to extinguish Mr Groves' claim but to postpone it.

[18] In response to that, Mr Groves argues that the "no set off" clause is impeached by the operation of s 85(5) and relies on the remarks of Dowsett J at first instance in *Higton Enterprises Pty Ltd v BFC Finance Limited* (unreported),¹ where his Honour said:²

"Thirdly, the defendants submitted that the plaintiffs had, by the terms of their guarantees, agreed not to enforce any claim pursuant to s 85 until such time as they had discharged the principal debt. In my view, such an agreement would, or might relieve the mortgagee from the duty imposed by s 85 and is therefore void pursuant to subs (5)."³

[19] Section 85(5) is obviously intended to ensure that parties cannot contract out of the duties which the section imposes on a mortgagee or receiver. But, apart from dealing with provisions which purport to relieve a mortgagee it also covers provisions which "might have the effect of relieving" a mortgagee etc from the duties otherwise imposed. The "no set off" clause could be argued to relieve, at least in a temporal sense, a mortgagee of the consequences of the duties imposed by this section for a limited time, such time to be that which the mortgagor takes to pay the outstanding sum. In the circumstances of this application and because of the opinion I have formed with respect to the next argument it is unnecessary to decide this point.

Representations by Westpac

[20] A separate argument is mounted by Mr Groves about the effect of the representation said by him to have been made to him by a Westpac employee. In his Defence and in the particulars of that pleading, and in an affidavit filed on the eve of the hearing, Mr Groves asserts that certain representations were made. He gives these details in his affidavit:

"[41] On 18 July 2008, I received a further notice of arrears on the Facility advising that the Facility was in arrears to the value of \$12,622.07.

¹ [1994] QSC 133, 27 May 1994.

² p 22.

³ The statement was referred to by Fitzgerald P in the decision of the Court of Appeal (see [15] above) but no view was expressed as to its correctness.

[42] When I received the notice, I telephoned Celeste Neander, who was my contact at Westpac at that time. At this point, Celeste knew that the share price for ABC Learning Centres Pty Ltd had fallen dramatically six months ago (February 2008), that I had sold all of my shares in ABC Learning Centres Pty Ltd and that I had a lot on my plate.

[43] When I spoke with Celeste on the phone, we had a discussion to the following effect:

- (a) I asked whether I should pay the amount of the arrears which were outstanding.
- (b) Celeste said to me words to the effect that I should not pay. Celeste said to me that Alex should hand the Camera back and let Westpac take control of the Camera to arrange for it to be sold as there wasn't long to go on the Commercial Loan Agreement.
- (c) Celeste told me that her research into the Camera's value was that the sale price should cover the residual or come close.
- (d) She also told me that she had made enquiries with LifeSaving Australia to see whether it was interested in purchasing the Camera (given that Westpac sponsored the lifesaving helicopters), but it was not.
- (e) She told me that she had not been able to get in contact with Alex."

[21] No evidence was called by Westpac on this point and no application was made to cross-examine Mr Groves. For the purposes of this application, then, I am content to proceed on the basis that a conversation of that type did take place.

[22] On the basis of that conversation, Mr Groves argues that he is entitled to an award of compensation under s 82 of the TPA or, alternatively, orders made under s 87 varying or partially rescinding the guarantee so that it instead secures the amount due less the sums equal to the losses caused by the bank's contravening conduct.

[23] It is open to Mr Groves to argue that to the extent that the "no set off" clause works to prevent him from setting off his claim against any liability to the bank, it cannot work to prevent him from seeking certain types of relief under the TPA . See *Henjo Investments Pty Ltd v Collins Marrickville Pty Limited (No 1)* (1988) 39 FCR 546.

[24] This argument is one in which Mr Groves seeks to impeach the validity of the guarantee or at least its continuing operation. A review of cases which considered this argument was undertaken by McDougall J in *Bank of Western Australia Ltd v O'Brien* [2012] NSWSC 456, where he said the following:

"[25] In general terms, it is both clear and uncontroversial that a creditor and a debtor may agree that the creditor is entitled to be paid in full before the debtor may exercise any rights (including by way of set off or cross claim) against the creditor. Clauses having that effect are commonly referred to as 'suspension' or 'suspension of rights' clauses.

[26] Bryson J stated the principles, in my respectful opinion correctly, in *Capital Finance Australia Limited v Davies* [2002] NSWSC 1146. After a detailed examination of the

cases, his Honour concluded at [93] that suspension clauses do not in principle oust the jurisdiction of the courts. At most, they suspend, but do not otherwise impair, the rights of, the relevant party. The party whose rights are suspended is, and remains able, to enforce those rights provided it conforms with its primary obligation of payment.

[27] At [95], Bryson J appeared to recognise that there might be a limiting case where a ‘colourable condition’ produces a ‘practically insurmountable obstacle to resort to the courts’. However, his Honour concluded, a clause which did no more than postpone the right of resort to the courts until the primary obligation was satisfied could not be so characterised.

[28] His Honour's views were, I think, summarised at [97]. His Honour said:

‘[97] The jurisdiction of courts and the rights of parties to make claims before courts are not conferred by contract and cannot be ousted by contract. However there is in my opinion no infringement of this principle where parties agree that in stated circumstances a particular sum of money will change hands without the opportunity at the same time to obtain judicial disposition of any other claim between them. In the contract of guarantee there is no infringement of the principle where parties agree to ensure that the guaranteed sum will be paid, and make this the more certain by postponing litigation raising any cross-claim or set-off.’

[29] In *St George Bank Limited v Field* [2007] NSWSC 902, I concluded that a lender's contractual entitlement to be paid in full and without deduction prevented the guarantor from raising defences as to the conduct of the lender in (allegedly) impairing the value of the security, and acting (again, allegedly) in a way that was effectively equivalent to equitable waste. However, I said, there was a distinction between a defence that impeached the guarantee itself on the one hand, and a defence that impeached only the exercise of rights under the guarantee on the other.

[30] I remain of the view that I expressed in *Field*.

[31] White J expressed a similar view in *Daewoo Australia Pty Limited v Porter Crane Imports Pty Limited* [2000] QSC 950. In the circumstances where the defendant did not seek to impeach the contract, but sought damages under the *Trade Practices Act* for allegedly misleading or deceptive conduct in connection with the formation of that contract (on which the defendant relied as a source of its rights), her Honour held that the plaintiff was entitled to judgment, and that the defendant should be left to pursue its claims by way of cross claim.

- [32] Holmes J expressed a similar view in *Capital Finance Australia Limited v Air Star Aviation Pty Limited* (2004) 1 Qd R 122. In that case, her Honour considered a clause in a guarantee which provided for the guarantor to pay in full without exercising any right of set off, counter claim etc. Her Honour concluded that **such a clause would not preclude the guarantor from relying on matters which went to the invalidity or complete discharge of the guarantee.**
- [33] If I may say so with respect, my decision in *Field* would have been made very much easier had I had the benefit of being referred to, and considering, her Honour's reasons before I gave judgment in that case.” (emphasis added)

Principles for the granting of summary judgment

- [25] It is clear that issues raised in these types of proceedings will be determined summarily “only in the clearest of cases”,⁴ and that the power to exercise this jurisdiction is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.⁵
- [26] The matters raised by Mr Groves with respect to the operation of the no set off clause, the undisputed contents of the conversation and the capacity of that conversation to result in relief under the TPA are matters which I am satisfied, lead to the conclusion that it cannot be said that this is a clear case or one in which there is no real question to be tried.
- [27] The application is dismissed.

⁴ *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232.

⁵ *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87.