SUPREME COURT OF QUEENSLAND

CITATION:	*Barker v GE Mortgage Solutions Limited* [2013] QCA 137
PARTIES:	**CAROL ELLENA BARKER** (appellant) **v** **GE MORTGAGE SOLUTIONS LIMITED** ACN 070 797 894 (respondent)
FILE NO/S:	Appeal No 11663 of 2012 DC No 525 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	31 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2013
JUDGES:	White JA and Philippides and Ann Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Dismiss the appeal.** **2. The appellant pay the respondent's costs of the appeal.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES – SUMMARY JUDGMENT – where appellant in default under loan agreement – where respondent was granted summary judgment – where appellant alleges mortgage broker misrepresented appellant's income to respondent – whether appellant has a real prospect of successfully defending respondent's claim pursuant to UCPR – whether trial judge applied relevant consumer credit legislation – whether trial judge gave due and proper regard to the provisions of the consumer credit legislation – whether mortgage broker was respondent's agent – whether trial judge erred in failing to grant an adjournment so that the mortgage broker could be joined as a party *Consumer Credit Code* (Qld), s 70, s 74(2), s 117 *Consumer Credit (Queensland) Act* 1994 (Qld) *National Credit Code* (Cth), s 76 *National Consumer Credit Protection Act* 2009 (Cth) *Australian Society Group Financial Services (NSW) Ltd v Bogan* [1989] ASC 55-938, cited

Custom Credit Corporation Ltd v Lynch [1993] 2 VR 469; [1993] VicRp 86, cited
Hilton v Gray [2008] ASC 155-094; [2007] QSC 401, cited
Kowalczuk v Accom Finance Pty Ltd (2008) 77 NSWLR 205; [2008] NSWCA 343, cited
Morlend Finance Corporation (Vic) Pty Ltd v Westendorp [1993] 2 VR 284; [1993] VicRp 72, cited
RHG Mortgage Corporation Ltd v Sava [2011] QSC 372, cited
West v AGC (Advances) Ltd (1986) 5 NSWLR 610, cited

COUNSEL: The appellant appeared on her own behalf
J P Morris for the respondent

SOLICITORS: The appellant appeared on her own behalf
Gadens Lawyers for the respondent

[1] **WHITE JA:** I have read the reasons for judgment of Philippides J in which she comprehensively canvasses the arguments advanced by the appellant. I agree with her Honour for those reasons that the appeal should be dismissed with costs.

PHILIPPIDES J:

The applications at first instance

[2] The appellant, Carol Ellena Barker, was the defendant in proceedings in the District Court brought by the respondent, GE Mortgage Solutions Limited, as plaintiff in respect of a claim for money due and owing under a loan agreement and for recovery of possession of certain property, provided as security for the loan. The property in question concerns land situated at 9 Tortuga Street, Deception Bay in the State of Queensland, being Lot 151 on RP 226901 in the county of Stanley, parish of Redcliffe, Title Reference 17373107 ("the property") which the appellant holds as registered owner and over which the respondent holds a first registered mortgage.

[3] On 16 October 2012 the appellant filed an application for summary judgment pursuant to r 292 of the UCPR, with the respondent filing a cross application on 5 November 2012 seeking, *inter alia*, summary judgment pursuant to r 292 in respect of its claim and r 293 UCPR in respect of the appellant's counterclaim.

[4] Rule 292(2) of the UCPR allows for summary judgment to be given in favour of a plaintiff and against a defendant for all or part of the plaintiff's claim if the court is satisfied that the defendant has no real prospect of successfully defending the plaintiff's claim and there is no need for a trial of the claim. Rule 293(2) likewise allows for summary judgment to be given against a plaintiff where the court is satisfied that the plaintiff has no real prospect of succeeding on all or a part of the claim and there is no need for a trial of it.

[5] The competing applications were heard on 6 November 2012. The learned primary judge gave an *ex tempore* judgment in favour of the respondent and made orders that the appellant's application be dismissed, her counterclaim be struck out and that the respondent recover, as against the appellant, possession of the property and the sum of $377,280.24 together with interest. Costs were awarded in the respondent's favour on the indemnity basis.

[6] A subsequent application for a stay of the enforcement of the judgment was refused. The appellant now appeals the judgment given and orders made on 6 November 2012.

The respondent's claim as pleaded

[7] The following facts (pleaded in the statement of claim and asserted in the respondent's affidavit material) relied upon at first instance by the respondent were not disputed:

(a) On 10 May 2007, a loan agreement[1] was entered into between the respondent, as lender, and the appellant, as borrower, whereby the respondent agreed to lend to the appellant the amount of $259,250.[2] The loan agreement documentation consisted of a GE Money Home Loan Contract Schedule and Home Loan Contract Terms and Conditions (Regulated) executed by the appellant on 10 May 2007.[3]

(b) The loan agreement required that the appellant provide as security for the loan a "first registered mortgage" over the property[4] which was executed in favour of the respondent on 10 May 2007 and registered on 30 May 2007.[5]

(c) Pursuant to the loan agreement, on or about 28 May 2007 the amount of $259,250 was provided to the appellant by the respondent.[6]

[8] The respondent alleged that the appellant ceased to make the payments required under the loan agreement as at 5 December 2011 and consequently was in default of the obligations under the loan agreement.[7] The appellant did not dispute that she ceased making payments.[8]

[9] The respondent deposed to service on 7 December 2011 on the appellant of a default notice,[9] in compliance with the statutory requirements, which required rectification of the appellant's default no later than 16 January 2012. It was not contested that the appellant failed to pay the amount detailed in the default notice by 16 January 2012 or at all and that she has failed to make any payments under the loan agreement since 3 June 2010.[10] The respondent's affidavit material deposed that as at 6 November 2012 the amount due and owing pursuant to the loan agreement was $413,296.06.[11] No issue was taken with that quantification.

The appellant's assertions at first instance

[10] The appellant prepared the court documents filed on her behalf and appeared on her own behalf both at first instance and before this Court. A document entitled "amended defence of Carol Ellena Barker defendant" was filed by the appellant. It was not responsive to the statement of claim and recorded in a narrative form the appellant's assertions as to her dealings with the broker and the respondent in a manner reflective of the fact that the appellant was not legally assisted.

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1 The loan agreement appears in the Appeal Record at pp 110 to 132.
2 AR 106, 110, 171.
3 AR 110.
4 AR 113.
5 AR 106, 133.
6 AR 107, 172.
7 AR 107, 172.
8 AR 29, 184.
9 AR 97, 99 – 104.
10 AR 106 – 107, 172.
11 AR 153.

[11] The amended defence document contained annexures A, B, B1, C, D, E, F and G. Annexure A was a copy of a "Form 12" entitled "Information about debtor's rights after default", which referred to paras 88(3)(f) and (g) of the *National Credit Code* and Regulation 86 of the *Regulations*. Annexure B was a letter dated 17 April 2012 signed by a Rob Wraight, addressing the matter of the appellant not having vacated the property. Annexure B1 was an invoice dated 17 April 2012 from a locksmith for the change of locks. Annexure C was an extract from a text on the law relating to mortgages. Annexure D was a copy of an article from a newspaper dated 14-15 April 2012. Annexures E, F and G set out a "counterclaim" which as a pleading suffered the same deficiencies as the amended defence, in that it set out a narrative of the appellant's version of events, complaints and claims.

[12] The appellant's affidavit, filed in support of her application for summary judgment, included as an exhibit the Home Loan Application Form signed by the appellant on 21 March 2007.

[13] The following may be gleaned from the appellant's amended defence and counterclaim document and her supporting affidavit:

(a) The appellant applied for a home loan with the respondent with the assistance of Mr Mike Buchecker of Aussie Home Loans, who had previously obtained loans for her.[12]

(b) The loan was sought for the purpose of refinancing an existing loan with the ANZ Bank and in order to overcome credit rating difficulties arising from debts of $3,000.[13]

(c) When the appellant signed the home loan application, she left the financial details part blank to be completed by the broker and provided him with her financial records, including Centrelink statements and income returns.[14]

(d) At the time the appellant was a single mother on full Centrelink payments and running a business at a loss.[15]

(d) The broker, without her knowledge, completed the financial details part of the loan application by inserting her income as $120,000 per annum which was incorrect and contrary to the financial documents concerning her income given by her to the broker to be provided to the respondent.[16]

(e) The appellant was required by the broker to sign the "business purposes declaration" part of the application stating that the loan was primarily for business or investment purposes, which was not the true position.[17]

(f) The broker, Mike Buchecker of Aussie Home Loans, acted on behalf of the respondent.[18]

(g) The appellant took issue as to having vacated the property and contended that the respondent had entered the premises and changed the locks unlawfully.[19]

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12 AR 28 – 29, 176.
13 AR 29, 184.
14 AR 176, 184.
15 AR 28, 184.
16 AR 28, 184.
17 AR 28 – 29, 176.
18 AR 176 – 177.
19 AR 175 – 176.

(h) Some 18 months after the loan agreement was entered into the appellant sought hardship relief which was refused.[20]

[14] The appellant denied that she owed any money to the respondent, summarising (at annexure G) the basis for that position as follows:

(a) The respondent had "not been responsible with their lending". (This seems to centre on allegations that the respondent failed to take steps to investigate and ascertain whether the appellant was capable of satisfying the loan.)[21]

(b) The respondent failed to provide the appellant "with the service [she] was entitled to for the duration of the loan which includes extending the term of the loan", as GE Mortgage Solutions was no longer "licensed to do home loan's (sic) and are unable to make changes to [the] contract."[22] (This was primarily a reference to the alleged failure to provide the appellant with an option to alter the terms of the loan contract on the grounds of hardship.) These allegations included:

(i) The respondent sold the home loan to Pepper Home Loans and so was unable to alter the contract on the grounds of hardship in breach of its legal obligations.[23]

(ii) The respondent failed "to comply with [her] legal rights as a consumer" and no option was offered to try and reach an amicable arrangement. (This appeared to be directed to allegations that the respondent did not offer her any options in accordance with the Form 12, which was annexure A to the defence, and that they only did so subsequently through Gadens, but she declined to fill in the hardship form because she had done so earlier and been denied relief.)[24]

[15] In annexure G the appellant sought relief by way of counterclaim as follows:

(a) "the loan be set aside by GE Mortgage Solutions or the loan be reduced back to the amount owed to the ANZ bank less any amount paid with no overdue or arrears and that it be at the same rate of fixed interest for the life of the loan at the rate of the ANZ bank loan I previously had."

(b) Compensation on behalf of the appellant and her family "of no less than $50,000.00 for emotional upheaval and trauma" endured as a result of the loan obtained and process undergone.

(c) The sum of "$50,000.00 from Aussie Home Loans for the conduct of their mortgage broker" in falsifying the appellant's income and making her sign documents she should not have signed, and the stress and trauma the loan had caused.

The GE Home Loan Application Form

[16] The GE Home Loan Application Form[25] recorded in "Section B: Your job and income" that the nature of the appellant's business was "amusement machines" and

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20 AR 184.
21 AR 175.
22 AR 175.
23 AR 175.
24 AR 175.
25 The GE Home Loan Application Form appears in the Appeal Record at pp 47 to 57.

that gross profit before tax was $120,000. (This was alleged to have been fraudulently inserted by the broker and contrary to the financial statements provided to him.)

[17] The assets owned by the appellant and their approximate market value were recorded in "Section C: Your financial situation" as $670,000 as follows:

9 Tortuga Street, Deception Bay	$350,000
Toyota Hi-ace 99	20,000
Various	30,000
Business valuation	120,000
Amusement machines	150,000

[18] Total liabilities of $248,000 and monthly payments of $2,451 were recorded as follows:

ANZ ($224,000)	$1,680 monthly payments
Liberty ($20,000)	$521 monthly payments
GE personal loan ($2,100)	$150 monthly payments
ANZ credit card ($2,000)	$100 monthly payments

[19] Under "Section D: Loan amount, purpose and security" the security was stated to be the Deception Bay property, which was noted to be an "owner/occupied investment". The details of the loan were noted as $248,000 for refinancing and $32,000 for "other", with a notation "extra funds to pay rates & new kitchen & other home improvements". This section included a "Business Purpose Declaration" to be signed where the loan was wholly or partially for business or investment purposes (which was signed by the appellant).

[20] Section F set out various consents, acknowledgements and declarations, including that:

> "The Applicant(s):
>
> …
>
> (c) have fully disclosed all details of their income and expenditure;
>
> (d) are satisfied that their obligations to the Credit Provider will not adversely impact on their ability to meet all their other financial obligations (including living expenses) as when they fall due;
>
> (e) confirm that they can comfortably afford all repayments resulting from this loan without incurring substantial financial hardship;
>
> (f) acknowledge that the Credit Provider is relying on the statements in this application in considering whether or not to approve the application;
>
> (g) acknowledge that the Introducer is not an agent of Credit Provider and acts independently of Credit Provider;
>
> …"

[21] Under "Section H: Lo Doc Declaration of Financial Position" the appellant's business was noted as "amusement machines", with the registered address of the business being the appellant's home address at Deception Bay. In respect of the

appellant's "personal annual pre-tax income derived from the business", the figure of $120,000 was inserted. The section included a "Declaration of Financial Position" which was signed by the appellant and relevantly stated:

> "I/We (*being Individual, Individual Trust, Company, or Company Trust*) certify warrant and represent to the Credit Provider ('you') that:
>
> (a) I am/we are aware of our financial obligations under my/our proposed loan with you;
>
> (b) I/we have declared all details of my/our income in the table below, which is a true and accurate representation of my/our financial position;
>
> (c) I am/we are satisfied, and for Company and/or Company Trustee applicants have resolved at a duly held board meeting, that our obligations to you will not adversely impact on our ability to meet all my/our other financial obligations (including living expenses) as and when they fall due;
>
> (d) I/we confirm that I/we can comfortably afford all repayments resulting from this loan, without incurring substantial financial hardship;
>
> (e) I/we are not relying on you to verify or review my/our financial position;
>
> ...
>
> I/We acknowledge that you are relying on this statement in considering whether or not to approve my/our loan application."

The Home Loan Contract Schedule

[22] The Home Loan Contract Schedule referred to the "Loan type" as a "GE Money Home Loan Principal and Interest Variable Rate Regulated". The annual percentage rate was specified as the variable annual percentage rate being the GE Money variable reference rate plus a margin of 2.49 per cent per annum. The "current GE variable reference rate" was stated to be 8 per cent with the "current variable annual percentage rate" being 10.49 per cent per annum. Repayments of 360 monthly principal and interest repayments of $2,372 payable over the loan term were specified. The "loan-to-security" percentage was recorded as 85 per cent.

[23] The special terms and conditions contained in the schedule included:

> "… This approval is subject to GE Money normal terms and conditions as set out in the Loan Contract and Loan Terms and Conditions booklet.
>
> Pursuant to 1.3(m) of the Home Loan Contract Terms and Conditions you must before, or on, the settlement date, terminate the credit contracts listed below and repay any outstanding amounts and you acknowledge that the loan is provided to you for this purpose (as well as any other to which you and we have agreed):
> ANZ $224,000.
> Liberty $20,000.
> ANZ C/C $2,000.

GE Personal loan $2,100.
All unpaid defaults must be paid at settlement:
GE Capital Finance $2,487 23/05/06 unpaid,
AAPT $204 28/12/06 unpaid.
Rates notice arrears to be brought up to date at settlement.
Evidence that 2 court actions have been paid for settled – McCloys Dental $565 05/07/06, Caboolture Shire council $1,545 23/08/06."

Other loan application related documents

[24] The appellant tendered at the hearing at first instance documents[26] comprising an "Application Pack Cover Sheet", an Aussie Mortgage Manager "Serviceability Worksheet", a document headed "FILE NOTES Aussie Mortgage Adviser: Mike Buchecker" and a GE Money Application checklist. At the top of the Application Pack Cover Sheet was the notation "FROM Aussie" and "TO GE Money". It recorded in a table under the heading, "Home Loan Application Form", the "Mortgage Adviser Name" as Mike Buchecker, and referred to a "Lender's Mortgage Adviser Code" number and an "Aussie Adviser Code" number. It required the "mortgage adviser" to complete certain application fee details. It also required the "adviser" to sign and confirm that "all applicable requirements have been satisfied, including but not limited to the sighting of original documentation for all savings, income & FTRA identification evidence".

[25] The "Serviceability Worksheet" noted a gross annual income of $120,000, with the loan being for "owner occupied / personal use" for $280,000 and security of $350,000.[27] The "File Notes" document recorded the purpose of the loan to be "refinance owner occupied" and "pay out car loan, credit cards", "pay rates" and "extra for kitchen and home improvements". The appellant's employment was stated to be "self employed 3 yrs". Assets were referred to as "ok considering relationship split". Repayment history was stated to be: "Recent credit issues due to – had recent death in family. Was caring for dying parent which was drawing cash resources as not working in business." Savings/equity was noted as "82% LVR". At the bottom of the page the words "Recommend Loan Approval" appeared.

[26] The GE Money "Application Checklist" document, which recorded the introducer's name as "Mike Buchecker", referred to "separate file notes attached" with respect to employment history. It also stated in response to the question "Any other supporting information? (eg explanation of any missed loan payments, key strengths that should be highlighted, etc)" the following: "spent time away from business last few years caring for dying parent. Rebuilding business again but needs to clear / consolidate loans / debts". Under the heading "income evidence provided (tick all that apply below)" a number of options were provided. The box next to the entry "Lo Doc declaration attached" was ticked.

Submissions of the respondent at first instance

[27] In written submissions made at first instance,[28] counsel for the respondent contended that the defence was deficient and did not on any reading provide any prospect of defending the matter or succeeding on any counterclaim. At best it was said that the appellant sought to allege that the respondent:

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26 AR 200 – 204.
27 AR 201.
28 AR 194 – 199.

(a) had engaged in some form of predatory lending;

(b) had required the appellant to execute an application on the basis of a loan for business purposes; and/or

(c) had breached an obligation to provide some form of relief.

The respondent's conduct

[28] At first instance, the respondent contended that, insofar as the appellant's allegations were directed to asserting that the respondent failed to ascertain the appellant's ability to satisfy the loan and ought not to have provided the loan in the circumstances, they misconceived the obligations of a lender. It was submitted, relying on *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205; [2008] NSWCA 343 at [99] per Campbell JA (with whom Hodgson and McColl JJA agreed), that there was no general duty to carry out a detailed investigation of the practicality of an intending borrower actually being able to repay the relevant loan. Nor was there any overriding statutory obligation in effect at the time the loan agreement was entered into.

[29] The respondent also submitted that there was no allegation by the appellant that any of the terms of the loan agreement or mortgage were unfair or that she failed to understand those documents or was at any material disadvantage when entering into the agreement. Nor was it alleged that she did not receive the benefits of the moneys advanced.

[30] The respondent referred to the "Declaration as to Financial Position" in Section H of the loan application signed by the appellant, and in particular the statements that the applicant's income was true and accurate, that she could comfortably afford all repayments without incurring substantial financial hardship, that she was not relying on the respondent to verify or review her financial position and the acknowledgment that the respondent was relying upon the accuracy of that information.[29]

[31] Further, it was noted that the specified purpose of the loan was the refinancing of an existing home loan facility (and other facilities) with those monthly repayments totalling $2,451, which was more than the monthly repayments required under the loan agreement with the respondent of $2,372 specified in the Loan Contract Schedule. It was also pointed out that the appellant did in fact make the repayments for a significant period before defaulting.

Execution of a document that the loan was for business purposes

[32] As for the appellant's allegations and complaint that she was required to state the loan was for business purposes and the suggestion that the motivation for this was an attempt to subvert the consumer protection legislation, the respondent accepted that although the appellant had executed the business purpose declaration of the application, that declaration was not required to be signed, since the loan application was clearly not for a loan for business purposes. It was also accepted that the loan was sought and provided as a home loan for the majority purpose of refinancing an existing home loan, and that position was not altered by the appellant inadvertently signing the declaration. The respondent thus conceded that the loan was at all times subject to the relevantly applicable consumer credit legislation.

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29 AR 52, 57, 60.

The respondent's alleged failure to provide a service

[33] As to the appellant's allegation that the respondent failed to provide "a service that she was entitled to under the loan", as stated, that was primarily directed to a contention that the respondent did not amend the terms of the loan contract/mortgage on the grounds of hardship. However, the respondent contended that, on the appellant's own material, she twice received hardship application forms from the respondent which she did not complete or submit, in addition to seeking assistance from the Financial Services Ombudsman, who did not see fit to intervene.[30] The respondent's submission was that it had complied with its obligations and had provided a Form 12, which outlined the appellant's rights.

[34] Furthermore, the respondent submitted that the appellant's complaint seemed to be based on the misguided understanding that the respondent was required to grant assistance under the hardship provisions. Reference was made to *RHG Mortgage Corporation Ltd v Sava* [2011] QSC 372, where the court considered the provisions of s 72 of the *National Consumer Credit Protection Act* 2009 (Cth) in respect of an allegation by a borrower that there should have been a change to the borrower's obligations under the mortgage on the grounds of hardship. The court observed there that, in addition to there being no evidence of a complying application, there was no evidence that, if such an application were made and granted, there was any reasonable expectation that the borrower would have been able to discharge his obligations under a contract altered pursuant to s 72(3). Relying on that authority, the respondent argued that the appellant at no stage completed an application for relief under the hardship provisions despite being supplied with the requisite form on two occasions. There was no obligation to grant any such relief, nor was there any information before the court to demonstrate that any decision was unreasonable. And even if that were able to be shown to be the case, the appellant was provided with all the relevant material with respect to appealing any decision and opted not to avail herself of that course.

Counterclaim

[35] With respect to the appellant's counterclaim, the respondent argued that it failed to comply with the requirements of the UCPR; failed to disclose or plead any cause of action which could give rise to any successful claim, and did not seek any relief available to the appellant and, as such, ought be struck out in its entirety.

Agency

[36] The matter of whether the mortgage broker was the agent of the respondent was not addressed in written submissions, but in oral submissions it was contended that there was no evidence that the broker was employed by, or an agent of, the respondent. Rather, the appellant's amended defence made it clear that Mr Buchecker had been approached by the appellant, as a broker she had previously used to secure other credit facilities. Reliance was placed on the declaration and acknowledgments part of the loan application which specified that the applicant for a loan acknowledged that the introducer was not an agent of the credit provider and acted independently of the credit provider.[31]

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30 AR 175, 184.

31 AR 54.

The reasons of the primary judge

[37] The primary judge gave the following *ex tempore* reasons:

> "These are competing applications for summary judgment in circumstances where the plaintiff seeks arrears of a loan agreement entered into with the defendant, and recovery of possession of a property listed as security for the loan.
>
> The defendant contends in her application that the plaintiff engaged in unlawful conduct in entering into the loan with her in circumstances where she alleges the broker engaged by her misrepresented her earnings. The allegations of the defendant were investigated by me in the course of the hearing at some length and the defendant has been unable to demonstrate to me that there is a proper legal basis for her allegations.
>
> The plaintiff submits that there was no legal obligation upon it at the relevant time to do more than act on the face of the application which was signed by the applicant and prepared by the broker engaged by her.
>
> I have been taken to no statutory provisions or common law authority which suggest that the plaintiff acted unlawfully in respect of the loan. In the circumstances, I grant the plaintiff's application and dismiss the defendant's application and otherwise make orders in terms of the draft which I initial and place with the file."

Grounds of appeal

[38] The appellant's notice of appeal specifies four grounds of appeal as follows, namely that the learned primary judge:

1. did not give due and proper regard to s 70 of the *Consumer Credit Code*;
2. "failed to give appropriate weight to the actions of the [respondent's] agent";
3. ought to have adjourned the matter so that "the agent Aussie Home Loans" was able to be joined as a party to the proceeding;
4. erred in failing to consider to apply the relevant consumer credit legislation.

Failure to give appropriate weight to actions of the agent

[39] It is convenient to deal immediately with the second ground of appeal. The appellant submitted that the primary judge "did not give appropriate weight to the actions of the [respondent's] broker", that is the mortgage broker, Mike Buchecker of Aussie Home Loans, who assisted the appellant with her documentation and who she contended was the respondent's agent.[32]

[40] It must be said that the crux of the appellant's complaint stems from her assertion that the broker incorrectly and indeed fraudulently inserted the sum of $120,000 as her income in the signed application from. She maintained that she was assured by the broker that he would complete the financial details required on the basis of the financial documents provided by her to him to pass on to the respondent. She claimed only to have found out about the matter when she sought hardship relief from the respondent.

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[32] AR 176 – 177.

[41] In her written submissions before this Court, the appellant contended that the broker was affiliated with the respondent as he was a representative paid 1 per cent commission on the life of the loan by the respondent; that is he was contracted by the respondent, through Aussie Home Loans, "to acquire credit for customers and as a result was paid a commission". The appellant submitted that by offering an incentive, in the form of a commission, to the broker to introduce customers to the respondent, the parties (the appellant and the broker) were "joint and liable for [her] consumer protection and for any legal action".

[42] Additionally, it was contended that the broker and/or Aussie Home Loans was "a linked credit provider" pursuant to s 117 of the *Consumer Credit Code* (Qld) and ought to have been joined to the proceeding by the primary judge, given the provisions of s 74(2) of the *Consumer Credit Code*. This did not occur, as the judge "did not order the third party to be joined and when asked whether the matter should be adjourned to join the third party, [the respondent] said there was no need as they were not affiliated with the broker".

[43] The issues of the capacity in which Mr Buchecker acted and whether he was an agent of the respondent were canvassed at first instance, and although the primary judge did not address the matter in his *ex tempore* reasons, he implicitly accepted the respondent's submissions that Mr Buchecker was an employee of Aussie Home Loans retained by the appellant to provide a service, and was her agent and not the respondent's agent.

[44] Before this Court, the respondent maintained that there was nothing in the material put forward by the appellant to establish an arguable case that the broker acted as agent for the respondent. It submitted that Aussie Home Loans and/or its employees, servants or agents were not and could not be employees or agents of the respondent. They were retained by the appellant to provide a service which had previously been provided by Aussie Home Loans, specifically Mr Buchecker. Aussie Home Loans was an unrelated business to the respondent, providing brokerage services and advice to parties seeking finance. It accessed lenders and did not provide any services exclusively for the respondent. While Aussie Home Loans received an introducer fee (commission) when it introduced a client, the application form executed and submitted by the appellant provided that the introducer was not an agent of GE Mortgage Solutions and the commission was disclosed in the contract schedule provided to the appellant.[33] The respondent argued that the authorities indicated that, of itself, did not result in an agency.

[45] It is the case that the authorities referred to by the respondent establish that generally, but subject to the terms of the relevant contract, brokers have been held to be the agent of the borrowers: see *Morlend Finance Corporation (Vic) Pty Ltd v Westendorp* [1993] 2 VR 284, 308, and *Custom Credit Corporation Ltd v Lynch* [1993] 2 VR 469 at 486 where Marks J (with whom the other members of the court agreed) stated in respect of the submission that the broker was the agent of the lender:

> "Mr North QC, for the respondent, did not seek to support it beyond submitting that Mr Cheap was the agent of the applicant 'for the purpose of introducing the respondent'. This submission was inspired by the admitted payment of commission by the appellant to Mr Cheap. This did not make Mr Cheap the agent of the appellant

[33] AR 54, 113.

> for the loan transaction itself. If a person receives money for introducing a client to a financier, he is not thereby, without more, the agent of the financier in respect of what the financier thereafter concludes by way of contract with the client. The commission is merely for directing business in the way of the lender. At that point no relationship of principal and agent arises.
>
> It is necessary to say a little more about agency in the present context. It is true to say, as Mr North submitted, that agency depends on the facts of a particular case: *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552, at pp 573, 587. The position of Mr Cheap might be considered to have been analogous to that of a finance or insurance broker. In *Con-stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, at p 234, the High Court unanimously said: '… under the general principles of the law of agency, a broker is the agent of the assured, not the insurer … There will be rare circumstances in which a broker may also be an agent of the insurer, but the courts will not readily infer such a relationship because a broker so placed faces a clear conflict of interest between his duty to the assured on the one hand and to the insurer on the other.'
>
> Such a conflict would clearly have existed if Mr Cheap was the agent of the appellant. But everything done by Mr Cheap purported to be done for the respondent. The mere possession of the appellant's forms is not enough to constitute agency (*Branwhite's Case,* per Lord Morris, at p 575), nor is the fact that commission was payable for the introduction: (*Con-stan's Case,* at p 234; *Octapon Pty Ltd v Esanda Finance Corporation Ltd* (unreported, NSW Supreme Court, 3 February 1989), at pp 27-8), nor is the filling in of the charges on the forms: *Branwhite's Case*, at p 577."[34]

[46] In the same vein, Douglas J observed in *Hilton v Gray* [2008] ASC 155-094; [2007] QSC 401 at [40]:[35]

> "Were it necessary, I would conclude that Mr Sultan was not the plaintiffs' agent; see also *Micarone v Perpetual Trustee* (1999) 75 SASR 1, 123 at [632] where Debelle and Wicks JJ said:
>
> > 'A finance broker in a transaction of this kind is prima facie the agent of the borrower: *Morlend Finance Corp (Vic) Pty Ltd v Westendorp* [1993] 2 VR 284 at 308 and that is so notwithstanding that the broker may receive a commission from the lender: *Custom Credit Corp Ltd v Lynch* [1993] 2 VR 469 at 486 to 487; *Octapon Pty Ltd v Esanda Finance Corp* (unreported, Supreme Court NSW, 3/02/89). The position may, of course, differ according to the individual circumstances of each case.'"

[47] It is also relevant to observe that, in the present case, as the respondent submitted below, the GE Home Loan Application Form, which the broker assisted the appellant to fill out, specified in the "declarations and acknowledgments" part that

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34 Adopted in *Mytton-Watson v Commonwealth Bank of Australia* [2012] WASCA 232 at [45].

35 See also *NMFM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270 at [544] – [562].

the applicant(s) for a loan "(g) acknowledge that the Introducer is not an agent of the Credit Provider and acts independently of the Credit Provider". That is inconsistent with an agency based on actual authority or the implication of an agency based on ostensible or apparent authority. I note that the appellant sought to make something of the reference to the words "Lender's Mortgage Adviser Code AU811234" in the table in the Application Pack Cover Sheet. But that appears to be no more than an identification number given by the respondent lender to the introducer, as is apparent from the "Introducer Details" part of the GE Money Application Checklist which ascribes "AU811234" to Mr Buchecker as his "introducer code".

[48] As stated, even though the primary judge's reasoning is not set out in his *ex tempore* judgment, it is implicit that he accepted the respondent's submissions on the agency issue and concluded that there was no triable issue that the broker was the respondent's agent. In my view, on the material before the court that conclusion was correct.

[49] As to the appellant's reference to, and reliance on, s 117 of the *Consumer Credit Code*, as the respondent correctly submitted, it was misguided. This is because, pursuant to ss 115 and 116, Part 7 specifically applied to sale contracts (being sale of goods or services). It did not apply to a credit contract and therefore was also of no relevance.

[50] Nor does the *National Consumer Credit Protection Act* 2009 assist the appellant's case. The respondent accepted that Aussie Home Loans was a corporation which, pursuant to that Act, engaged in "a credit activity" by providing "a credit service by way of credit assistance".[36] But even so, it was submitted that the formation of the contract and the services provided by Mr Buchecker pre-dated the enactment of the National legislation and that there were no provisions in the *Consumer Credit (Queensland) Act* 1994 or *Queensland Credit Code* at the material time similar to those present in the *National Consumer Credit Protection Act* 2009 which imposed obligations on the mortgage broker[37] and no legislative provision relevant to issues of agency as at the time that the loan was entered into. I accept those submissions.

[51] There was no error in not finding a serious issue to be tried in respect of the question of agency, nor in failing to find that the respondent was responsible for the conduct of Mr Buchecker on the basis that he was their agent.

Failure to consider the loan contract under the relevant consumer credit legislation

[52] I now turn to deal with the fourth matter raised in the Notice of Appeal. This ground is expressed in the Notice of Appeal as follows:

> "The trial judge failed to consider the contract which is covered under the current credit laws, of which the trial judge did not consider as the other party claimed that it wasn't as the loan was taken out in 2007. The Mortgage Common Provisions of this loan

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36 As those terms are defined in ss 6, 7 and 8 of the Act.

37 Part 3-1 of the *National Consumer Credit Protection Act* 2009 imposes obligations upon licensees that provide credit assistance in relation to credit contracts. These include an obligation to make a preliminary assessment as to whether the contract will be unsuitable for the consumer after making reasonable inquiries about the consumer: ss 115-117. Further, s 123 prohibits licensees from providing credit assistance to a consumer to enter unsuitable credit contracts.

> clearly states that the loan is covered by all laws included amended laws. Under these circumstances the trial judge was not fair and just."

[53] In her written outline, the appellant referred to cl 8.30 of the Memorandum of Mortgage Common Provisions, which specified that "the mortgagor is governed by the law of the state or territory where the property is situated" and cl 9 which set out the meaning of the word "law". The appellant submitted that "the facts have still not been clarified and as such it is hard to determine whether I am in fact covered by the amended consumer credit laws which were brought into action in 2010".

[54] This ground of appeal appears to be directed to a contention that the primary judge failed to consider the applicability of current consumer credit legislation (the *National Consumer Credit Protection Act* and *National Credit Code*) to the loan agreement and mortgage. It should be noted that the respondent's position before this Court, as below, was that it did not dispute that at all times the loan was a regulated loan for the major purpose of re-financing a domestic residence. However, the respondent contended that the matter agitated by the appellant under this ground was based on a misunderstanding of the operation of the relevant legislation and arguments put forward by the respondent at first instance.

[55] The respondent submitted that the relevant legislative scheme was addressed at first instance with the respondent submitting before the primary judge that the Queensland *Consumer Credit Code* in force under Queensland consumer credit legislation applied to the loan contract at the time of its formation in May 2007. Thereafter, in 2010 the *National Credit Code* was adopted on the enactment of National consumer credit legislation and did not have any retrospective application.[38] The primary judge, it was submitted, correctly proceeded on that basis.

[56] In respect of the legislative schemes concerning consumer credit, the following may be noted. The *Consumer Credit Code* (set out in the appendix to the *Consumer Credit (Queensland) Act* 1994) regulated the provision of consumer credit until the *National Credit Code* was adopted pursuant to the *Credit (Commonwealth Powers) Act* 2010 (Qld)[39] which repealed the *Consumer Credit (Queensland) Act* 1994 and *Consumer Credit Code*.[40] Thus, at the time of the formation of the loan contract in May 2007, the relevant governing legislation was the Queensland legislation, the *National Consumer Credit Protection Act* 2009 not being enacted until 1 April 2010 and not being retrospective. However, from the enactment of the National legislation, the respondent was required to comply with the provisions of that legislation and the *National Credit Code* in respect of all future conduct, including enforcement procedures.[41]

[57] The appellant contended that in failing to ensure that she had a capacity to meet her obligations under the loan contract, the respondent breached its statutory

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38 AR 13 – 14.

39 *Credit (Commonwealth Powers) Act* 2010 (Qld) s 4.

40 *Credit (Commonwealth Powers) Act* 2010 (Qld) s 11.

41 Schedule 1 s 3(2) of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act* 2009 (Cth) provides that the *National Consumer Credit Protection Act* 2009 (Cth) and the *National Credit Code* apply to "carried over instruments". A "carried over instrument" is a contract that was made before commencement, in force immediately before commencement, and under the application of the *Consumer Credit Code* immediately before commencement: *National Consumer Credit Protection (Transitional and Consequential Provisions) Act* 2009 (Cth) s 4.

obligations. Although no statutory provision was identified by the appellant, the appellant's submissions appear to be a reference to the responsible lending conduct obligations imposed on credit providers by Ch 3 of the *National Consumer Credit Protection Act* 2009. In particular, division 3 of Ch 3 Pt 3-2 of that Act provides, *inter alia*, that, before a credit contract is entered into, a credit provider is obliged to make an assessment as to the unsuitability of the credit contract (see ss 128 and 129). However, the provisions of Ch 3 alluded to by the appellant were not in force at the time the loan contract was entered into and therefore do not apply. Nor do they have any counterpart in the Queensland legislation which did apply at the time the contract was entered into.

[58] The primary judge was correct in implicitly accepting the respondent's submissions as to the legislative scheme in force at the time the loan contract was entered into in finding that there "was no legal obligation upon [the respondent] at the relevant time to do more than act on the face of the application which was signed by the applicant and prepared by the broker engaged by her". In that respect there was no error in failing to correctly apply provisions of the National legislation.

[59] A further matter raised by the appellant in her written submissions concerned the allegation that the respondent failed to offer a hardship option in accordance with its statutory obligation. It was alleged that the respondent sold its home loan portfolio to Pepper Home Loans. The appellant contacted Pepper in January 2012 and was told that they could not extend her home loan as they did not have a contract with her. The respondent was unable to extend the loan as they no longer were home loan lenders. The appellant submitted that the respondent breached the contract by making a decision to exit the home loan lending market and no longer offering fully functional borrowing services. She further contended that the respondent should not be permitted to maintain a collection process and in those circumstances she no longer owed the respondent any money under the contract.

[60] The matter reflects arguments ventilated below, in addition to the submissions made by the respondent below that were repeated before this Court, as to the appellant's failure to pursue hardship relief. It was also apparent from the appellant's oral submissions that she had not availed herself of the opportunity to complete a hardship application received after she complained to the solicitors, Gadens, that she had been deprived of pursuing that option. The appellant explained that she did not wish to do so, because according to her she had previously been declined hardship relief and because, even if relief were to have been granted in the form of some extension of the loan, such relief was insufficient as she would have been unable to meet the amended loan obligations in any event. In those circumstances, it is difficult to see how a triable issue arises on this ground of complaint. There is nothing of substance in this ground of complaint.

Failure to give due and proper regard to s 70 of the Consumer Credit Code

[61] The appellant submitted in her written outline that the primary judge did not give due and proper regard to s 70(2) of the *Consumer Credit Code*, which sets out considerations for determining whether a term of a particular credit contract, mortgage or guarantee is unjust.

[62] Although the appellant referred to s 70 of the *Consumer Credit Code* in her outline and at first instance, at the time of the hearing of the applications that provision had

been replaced by s 76 of the *National Credit Code*, which was the provision that applied in respect of an application to reopen an unjust transaction. Nothing turns on that error, however, as s 76 of the *National Credit Code* is relevantly in the same terms as s 70 of the *Consumer Credit Code*.

[63] Section 76 provides:

> "**76(1) Power to reopen unjust transactions** The court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into or changed (whether or not by agreement), the contract, mortgage or guarantee or change was unjust, reopen the transaction that gave rise to the contract, mortgage or guarantee or change.
>
> **76(2) Matters to be considered by court** In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, the court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following:
>
> (a) the consequences of compliance, or noncompliance, with all or any of the provisions of the contract, mortgage or guarantee;
>
> (b) the relative bargaining power of the parties;
>
> (c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation;
>
> (d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or guarantee or the change;
>
> (e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee;
>
> (f) whether or not the debtor, mortgagor or guarantor, or a person who represented the debtor, mortgagor or guarantor, was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition;
>
> (g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed;
>
> (h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;
>
> (i) the extent to which the provisions of the contract, mortgage or guarantee or change and their legal and practical effect were accurately explained to the debtor, mortgagor or

guarantor and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect;

(j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;

(k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures;

(l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;

(m) whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;

(n) for a mortgage – any relevant purported provision of the mortgage that is void under section 50;

(o) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases;

(p) any other relevant factor.

76(3) Representing debtor, mortgagor or guarantor For the purposes of paragraph (2)(f), a person is taken to have represented a debtor, mortgagor or guarantor if the person represented the debtor, mortgagor or guarantor, or assisted the debtor, mortgagor or guarantor to a significant degree, in the negotiations process prior to, or at, the time the credit contract, mortgage or guarantee was entered into or changed.

76(4) Unforeseen circumstances In determining whether a credit contract, mortgage or guarantee is unjust, the court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed.

76(5) Conduct In determining whether to grant relief in respect of a credit contract, mortgage or guarantee that it finds to be unjust, the court may have regard to the conduct of the parties to the proceedings in relation to the contract, mortgage or guarantee since it was entered into or changed.

76(6) Application This section does not apply:

(a) to a matter or thing in relation to which an application may be made under subsection 78(1); or

(b) to a change to a contract under this Division.

> **76(7)** This section does apply in relation to a mortgage, and a mortgagor may make an application under this section, even though all or part of the mortgage is void under subsection 50(3).
>
> **76(8) Meaning of *unjust*** In this section:
> **unjust** includes unconscionable, harsh or oppressive."

[64] There is ample authority to the effect that a credit contract will not be unjust merely because one of the criteria in s 76(2) applies, since the criteria are to be considered in the light of all the circumstances of the case. But by the same token, a contract may be unjust even though none of the s 76(2) criteria are present (see authorities such as *Custom Credit Corporation Ltd v Lynch*, which dealt with comparable legislation).

[65] In her outline, the appellant referred to subsections (2)(b), (d), (e), (f), (l), (m) and (o) in respect of the matters to be considered in determining whether to reopen a contract, but without further elaboration thereon, other than pointing to the following terms of the loan agreement which she contended were "not negotiable, oppressive and clearly protect the interests of [the respondent] without regard to [her] consumer protection":

- cl 8.17: "Subject to 8.25 and 8.26, any present or future law that would otherwise vary *your* obligations under this mortgage is excluded (to the extent allowed by law) if it affects *our* rights or remedies adversely."
- cl 8.20: "*You* appoint *us*, each of *our* directors, each of *our* company secretaries, each of *our* employees and each receiver under this mortgage, separately as *your* attorney. If *we* ask, *you* must formally approve anything they do under 8.21. *You* may not revoke these appointments."
- cl 8.21: "If *we* have served a notice stating that *you* are in default, each attorney may:
  (a) do anything which *you* can do as *owner* of the property (*including* executing deeds, selling or leasing or otherwise dealing with the *property*, lodging or withdrawing caveats and starting, conducting and defending legal proceedings); and
  (b) delegate their powers (*including* this power) and evoke a delegation; and
  (c) exercise their powers even if this involves a conflict of duty or they have a personal interest in doing so."
- cl 8.24: "8.25 applies to the extent that legislation relating to consumer credit or otherwise applies to this mortgage."
- cl 8.29: "To the extent this mortgage is not regulated by consumer credit legislation, *you* indemnify *us* for any liability, loss or costs (*including* consequential or economic loss) *we* suffer or incur."
- cl 8.16: "*Our* rights and remedies under this mortgage may be exercised by any of *our* employees or any person *we* authorise."

[66] The appellant also submitted that the trial judge did not give due and proper regard to s 70(3), which concerns "representing a mortgagor". She argued that this section applied as her broker "was a responsible party that filled in her financial details knowing that trust was given to him fully". The appellant submitted that the broker had her sign paperwork that was not completed and filled false figures into the application for credit. The appellant submitted that this occurred in circumstances where the respondent failed to take any inquiry to ascertain whether the appellant was able to afford the finance, even though, the appellant maintained, it was aware

that the appellant had several dependent children and was on social security payments. The appellant submitted that, although the application was for a low-documentation loan and the respondent's internal procedures did not require it to clarify her earnings, the law required that they show her a "duty of care".

[67] The respondent submitted that the power to reopen an unjust transaction requires an application to be made and no such application was in fact made. Further, it was argued that neither the appellant's defence and counterclaim document, nor the material submitted at first instance made any reference to s 70 of the *Consumer Credit Code*, although it was accepted that the appellant was able to identify the section during oral argument.[42] The respondent argued that the relevance and practical impact of the provision was explored by the judge in the course of oral argument and that the primary judge indicated a view that there was no basis to conclude that the credit contract was an "unjust transaction" that ought be reopened under the *Consumer Credit Code*. The respondent therefore submitted that the primary judge gave due and proper regard to s 70, but exercised his discretion not to reopen the transaction. Accordingly, there was no basis to disturb that discretion.

[68] In any event, the respondent contended that there was no substance in the submissions made by the appellant concerning the "unjust transaction" ground. It argued that the Mortgage Common Provisions, which the appellant submitted were not negotiable, oppressive and protective of the interests "without regard to [the appellant's] consumer protection", were terms common to transactions of the type in question. Furthermore, the appellant was free to apply to any lender for finance and seek terms and the appellant's consumer protection was provided by legislation which at all times governed the contract. The respondent also submitted that the alleged actions of the broker could not be attributed in any way to the respondent, since the broker could not be said to have been the agent of the respondent. In those circumstances, there was nothing in the respondent's conduct which resulted in the loan agreement being entered into which could be said to result in an unjust transaction. In addition, the respondent repeated submissions made below that the monthly repayments under the loan contract of $2,372 were in fact less than the appellant's monthly outgoings that were recorded in the loan application. In those circumstances, it was submitted that the suggestion that the respondent knew or had reason to believe that the appellant could not pay in accordance with the terms of the loan agreement, or at least not without substantial hardship, were unfounded. This was said to be borne out by the fact that the payments were met for a substantial period after the loan contract was entered into.

[69] The appellant's submissions as to the reopening provisions were only ventilated orally and in a broad-brush fashion. She did not seek an adjournment to better present her case, but nor did the respondent object to the matter being canvassed in the way it was without a written articulation of the appellant's case in respect of s 70 of the *Consumer Credit Code*. It is true that the appellant did not specially refer to that provision in her pleading or affidavit material, nevertheless she did ultimately refer to the section in oral argument as mentioned, placing particular reliance on s 70(2)(l), and was permitted by the primary judge to do so, with no objection to that course being taken by the respondent.

[70] In those circumstances, and although no application for a reopening had formally been filed, the matter was one which the primary judge was required to consider.

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42 AR 13.

For present purposes, the question for the primary judge was whether there was a real prospect of defending the respondent's claim on the basis of an application to reopen the loan contract and mortgage under s 76 of the *National Credit Code* as an unjust transaction and that a trial of that issue was required. The primary judge made no reference in his *ex tempore* reasons to that question. His failure to address the matter, after having permitted it to be ventilated, means that what regard he had to the matter of whether a triable issue had been raised, and his reasoning in respect of it, is not evident. Indeed, it is not apparent whether he appreciated that, while there was no statutory obligation to make inquiry pursuant to s 128 of the *National Consumer Credit Protection Act* 2009 (because it was not in force when the loan agreement was entered into), a lender's failure to make an inquiry as referred to in s 76(2)(l) is a circumstance that might be taken into account in making a determination as to whether a term of a loan contract or mortgage was unjust.[43] In the circumstances, I am unable to accept the respondent's submission that the primary judge gave due and proper regard to s 76 of the *National Credit Code* or that the primary judge indicated a view on the matter. The failure to do so in his reasons has the result that the discretion has miscarried and this Court is required to exercise the discretion afresh.

[71] The definition of "unjust" in s 76 is not an exclusive one. In considering whether a term of a credit contract or mortgage is unjust in the circumstances relating to it at the time it was entered into the court may consider the matters listed in s 76(2)(a) to (p) and is to have regard to the public interest and all the circumstances of the case. Circumstances not reasonably foreseeable when the contract was entered into are not to be taken onto account.

[72] The appellant asserted that she was unable to afford the loan provided by the respondent. But the fact that a party cannot afford a loan has been held to be insufficient on its own to result in a finding that the loan contract is unjust under comparable legislation: see *Australian Society Group Financial Services (NSW) Ltd v Bogan* [1989] ASC 55-938 in respect of similar legislation. The appellant also contended that there was an inequality in bargaining power between the parties (relying on the equivalent of s 76(2)(b) and (d)). However, mere procedural factors such as inequality of bargaining power without more, such as the lender abusing or taking unfair advantage of that power, is unlikely to be a sufficient basis for a finding that a contract is unjust: see *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610. As to the provisions referred to by the appellant of the Mortgage Common Provisions, which the appellant submitted were not negotiable, oppressive and protective of the interests "without regard to [her] consumer protection", there is nothing to suggest that these were other than common and standard type provisions.

[73] Nor is this a case where the contract or one of its terms was the product of unfair conduct on the part of the respondent in respect of the means it employed to conclude the contract (*West* at 622). I accept the respondent's argument that any contention that there is a triable case for a reopening of the loan transaction as unjust on the ground that any misrepresentation or misconduct by the broker as to the annual income of the appellant could be attributed to the respondent is doomed.

[74] As to the appellant's reliance on s 70(3) (now s 76(3)), as the respondent correctly submitted, it applies only in consideration of s 70(2)(f) which applies only where a debtor (or debtor's representative) is unable to protect their interests because of his

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43 AR 21.

or her age or physical or mental condition. There is no evidence that the appellant's age or physical or mental condition attracted the operation of subsection 2(f). The appellant's reliance on s 70(3) is thus misguided.

[75] A critical part of the case raised by the appellant centred on subsection (2)(l): that the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.

[76] Although the loan was a "lo doc" loan, the respondent did seek various financial details in the application form which were provided. These included details of the appellant's income, which she claims was incorrectly stated as $120,000 by the broker. However, as the respondent emphasised, various declarations were made by the appellant in the loan application, including that her income was true and accurate, that she could comfortably afford all repayments without incurring substantial financial hardship, that she was not relying on the respondent to verify or review her financial position and the acknowledgment that the respondent was relying upon the accuracy of that information. And the respondent also placed some store on the fact that the refinancing resulted in the appellant paying slightly less in total monthly payments than that documented on the loan application as her then current outgoings.

[77] There was nothing in the material before the court to indicate that the respondent *knew* at the relevant time that the appellant could not pay in accordance with the terms of the loan contract or not without substantial hardship. And although the appellant contended that the respondent was aware that she was on Centrelink payments, that is not apparent from the loan application or other documents tendered at first instance as part of exhibit 2 or any other evidence put before the court. (It may be that her contention was based on her allegation that she provided those documents to the broker to provide to the respondent. However, the respondent was not responsible for any misconduct of the broker in that regard.)

[78] As to the appellant's contention that the respondent was aware that she had sought refinance in part because she had debts of $3,000 which she was concerned would affect her credit rating, that is borne out by the documentation submitted to the respondent by the broker in respect of the loan application.[44] The documentation reveals that the respondent was advised that the appellant needed the loan to "clear/consolidate loans/debts" and that there were "recent credit issues". The loan application form referred to needing to "pay rates" and the loan contract schedule in fact specified that "all unpaid defaults must be paid at settlement" and in that regard listed $2,487 as unpaid to GE Capital Finance as at "23/05/06", $204 to AAPT unpaid as at "28/12/06" and "rates notice arrears to be brought up to date" in addition to reference to two court actions, namely "McCloys Dental $565" dating from 5 July 2006 and "Caboolture Shire Council $1,545" dating from 23 August 2006.

[79] While these documents revealed some outstanding debts at the time the loan contract and mortgage were entered into, an explanation was offered in documentation provided by the broker for the appellant's credit issues, namely that she had "spent time away from the business" over the past few years caring for a dying parent which was "draining cash resources as [she] was not working in [the]

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44 See AR 50 – 51.

business". That was not put in issue by the appellant. There was nothing to cause the respondent to doubt that explanation and the debts referred to did not alone demonstrate an inability to meet the loan payments.

[80] As to the matter of reasonable inquiry, although the appellant asserted that she was on Centrelink benefits contrary to what she declared to be the case in the signed application form, the appellant did not depose to what her actual income was at the time that she entered into the loan contract and thus what further inquiries by the respondent would have revealed as to her financial situation. She was in fact able to meet the obligations under the loan contract for some 18 months, on her own evidence, before she sought hardship relief.

[81] In the circumstances, the material did not disclose a real prospect of successfully defending the respondent's claim on the basis of an unjust transaction and there was a need for a trial of the claim.

Failure to grant an adjournment

[82] Similarly, the appellant's reliance on s 74(2) (now s 81(2)) is misguided; the requirement to join a third party occurs only where the court has determined that a credit contract is unjust. By s 74(2) no order may be made in respect of a third party unless the third party is joined as a party to the proceedings and has had an opportunity to be heard. The transcript of the hearing at first instance reveals that the appellant did not at any stage of the hearing raise the issue of an adjournment and the primary judge could not have erred by not granting that which was not requested.

[83] **Order**

I would dismiss the appeal and order that the appellant pay the respondent's costs of the appeal.

[84] **ANN LYONS J:** I agree with the reasons of Philippides J and with the orders proposed.