

SUPREME COURT OF QUEENSLAND

CITATION: *Ruabon Pty Ltd v Kopp & Anor* [2013] QSC 229

PARTIES: **RUABON PTY LTD**
ABN 010100811
(plaintiff)
v
BRIAN KOPP & CAROLYN ANNE KOPP
(defendants)

FILE NO: 331 of 2012

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 29 August 2013

DELIVERED AT: Brisbane

HEARING DATE: 23 April 2013

JUDGE: Atkinson J

ORDERS: **1. Application dismissed;**
2. Costs in the cause.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where plaintiff sought payment said to be owing under the loan agreement and vacant possession of the property – where it could not be said that the defendants had no real prospect of defending all or part of the plaintiff’s claim and there was a need for no trial of the facts of the claim and proposed defence and counter-claim – where plaintiff’s application for summary judgment for the whole of plaintiff’s claim was dismissed with costs in the cause

Australian Consumer Law 2010 (Cth)

Australian Securities and Investment Commission Act 2001 (Cth)

Consumer Credit (Queensland) Act 1994 (Qld) (Consumer Credit Code), s 80

National Consumer Credit Protection Act 2009 (Cth) (National Credit Code), s 76

Uniform Civil Procedure Rules 1999 (Qld), r 292, 377, 378

Clark v Japan Machines (Aust) Pty Ltd [1984] 1 Qd R 404, cited

Maguire v Racing Queensland Limited [\[2012\] QSC 219](#),
cited
St George Bank Ltd v Perpetual Nominees Limited [\[2010\]
QSC 57](#), cited

COUNSEL: N J Morgan (*sol*) for the plaintiff
B Blond for the defendant
SOLICITORS: Rostron Carlyle Solicitors for the plaintiff
Buchanan Legal for the defendants

- [1] On 23 April 2013, I ordered that the plaintiff's application for summary judgment against the defendant for the whole of the plaintiff's claim be dismissed with costs in the cause. The application had been filed on 7 February 2013. I also made certain directions in the proceeding for the filing of a defence, reply, disclosure and the date by which a request for trial date should be filed or the matter deemed resolved. Accordingly the matter is proceeding to trial.
- [2] The plaintiff has asked for reasons for the dismissal of its application for summary judgment and so I publish these brief reasons.
- [3] The plaintiff claimed as first registered mortgagee for recovery of possession of property located at 95 Yundah Street, Shorncliffe more particularly described as Lot 3 on Registered Plan 4541, County of Stanley, Parish of Nundah ("the property"), payment of the sum of \$477,000 said to be owing under a loan agreement entered into on 13 November 2009 ("the loan agreement") and interest at a rate of 16 per cent per annum, compounding monthly pursuant to the agreement or interest pursuant to the *Supreme Court Act* 1995. The defendants initially filed a defence as self-represented litigants and subsequently filed a notice for address for service showing they were represented by a firm of solicitors although they have continued to be self-represented from time to time. Both parties were represented by solicitors and counsel when the application for summary judgment was heard and dismissed.
- [4] On 10 December 2012 the plaintiff filed an amended statement of claim with amendments to the claim said to be pursuant to r 378 of the *Uniform Civil Procedure Rules* 1999 ("UCPR"). Rule 378 of the UCPR provides that a party may make an amendment for which leave is not required under the UCPR. However r 377 makes it clear that leave is required to amend an originating process, such as a claim. No such leave has been sought, or granted, in this proceeding. Nevertheless on 7 February 2013, the plaintiff filed a further amended statement of claim with further amendments to the claim. Again no leave was sought or granted. It is this pleading on which the plaintiff sought summary judgment.
- [5] The defendants, acting in person, filed an amended defence on 1 March 2013 and a further amended defence on 11 April 2013 after case flow orders were made on 27 February 2013.
- [6] The plaintiff's application for summary judgment was made pursuant to r 292(2) of the UCPR. Judgment was sought for \$871,476.29 said to be owing under the loan agreement on 23 April 2013 and for vacant possession of the property. The questions to be determined were whether or not I was satisfied that the defendants had no real prospect of defending all or part of the plaintiff's claim and that there was no need for a trial of all or part of the claim. If I had been satisfied that the

answer to those questions was in the affirmative then I had a discretion to give judgment for the plaintiff against the defendant for all or part of the plaintiff's claim and make any other order I considered appropriate. In spite of extensive judicial writings on the topic,¹ the words of the rule require no further exegesis.

- [7] The defendants in this proceeding were self-represented when they filed their defence, amended defence and further amended defence but represented once the summary judgment application came on for hearing. Counsel submitted that he wished to have an opportunity to plead the defendants' case properly given that the defendants drafted the defences themselves and that they had not understood how to plead their case. The directions I gave upon dismissing the claim for summary judgment consequently required an amended defence to be filed by 13 June 2013. Had that amended defence not been adequate to answer all or part of the plaintiff's claim a further summary judgment application could have been filed.
- [8] The plaintiff submitted that the defendants had paid \$83,000 as against their liability under the loan agreement whereas they were required to repay all moneys owing under the loan agreement by 13 November 2010. As at 23 April 2013, the defendants owed \$871,476.29 under the loan agreement. The plaintiff alleged it had served a notice of exercise of power of sale on 9 August 2011 which enabled the defendants to understand with reasonable certainty what they were required to do.²
- [9] A further notice of exercise of power of sale was served on 14 February 2013. The plaintiff submitted that although the defendants' accountant had filed an affidavit disputing the amount owed, the plaintiff's method of calculation should be preferred. In the alternative to giving judgment for all of the amount which the plaintiff said the defendants owed under the loan agreement, the court, it submitted, should give judgment for the amount calculated by the defendants' accountant.
- [10] The defendants submitted that although the purpose of the loan was not set out in the loan agreement and clause 17 of the loan agreement attempted to expressly exclude the provisions of the Consumer Credit Code, the purpose of the loan was to refinance the defendants' principal place of residence and was arguably subject to the Consumer Credit Code. The lending may, it was submitted, amount to predatory lending; default notices required to be issued under s 80 of the Consumer Credit Code were not issued and the plaintiff committed breaches of the loan agreement; and the amounts calculated by the plaintiff in its notices of exercise of power of sale (issued without first issuing the required notices of default) were in any event disputed by the defendants.
- [11] The defendants relied on an affidavit by the male defendant which exhibited the loan agreement and the notices they had received, which did not include any default notices. He also explained the purpose of the loan agreement which was to refinance a borrowing for him and his wife secured over their principal place of residence. The defendants also filed an affidavit by a chartered accountant who calculated the interest owing on the loan agreement (on the assumption it was enforceable) which showed a different interest calculation from that relied upon by the plaintiff.

¹ See for example *Maguire v Racing Queensland Limited* [2012] QSC 219 and the cases therein referred to at [16]-[34].

² See *Clarke v Japan Machines (Aust) Pty Ltd* [1984] 1 Qd R 404 at 413; *St George Bank Ltd v Perpetual Nominees Limited* [2010] QSC 57.

- [12] The facts and law submitted by the defendants showed that they had a defence and counter-claim that the loan agreement and mortgage were subject to consumer credit law and that the plaintiff might be liable to them for damages or that all or part of the loan agreement might be void. The defendants' defence and counter-claim would be able to be made pursuant to *Australian Consumer Law 2010* (Cth) for loss or damage caused by what is alleged to be the plaintiff's misleading and deceptive conduct, unconscionable conduct and breach of a guarantee that the plaintiff's services would be rendered with due care and skill and, in respect of terms of the standard form contract, that they were unfair and therefore void; and under the *Australian Securities and Investment Commission Act 2001* (Cth) which renders certain terms of a consumer contract void if they are unfair and allows the recovery of loss or damage for prohibited unconscionable conduct in connection with the provision of financial services. The court may also order that the whole or any part of such a contract is void. Under s 76 of the National Credit Code, the court has the power to reopen unjust transactions. These provisions mean that the defendants may succeed in showing that they either had no liability at all to the plaintiff or that if they did have any liability, the amount of that liability was presently uncertain. The defence subsequently filed on 19 June 2013 amply demonstrated that the submissions made by the defendants were capable of being pleaded in such a way as to preclude a successful application for summary judgment.

Conclusion

- [13] It could not be said that the defendants had no real prospect of defending all or part of the plaintiff's claim and there was no need for a trial of the facts of the claim and proposed defence and counter-claim. In these circumstances it was not an appropriate case in which to grant summary judgment and the application was refused.