SUPREME COURT OF QUEENSLAND

CITATION:	*Westpac Banking Corporation v Lomas* [2014] QSC 117
PARTIES:	**WESTPAC BANKING CORPORATION** **(ACN 33 007 457 141)** **(plaintiff)** **v** **DOUGLAS JOHN LOMAS** **(defendant)**
FILE NO:	BS5895 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application for summary judgment
DELIVERED ON:	4 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2014
JUDGE:	Mullins J
ORDER:	**Judgment for the plaintiff**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the bank advanced money to the defendant under a facility agreement – where defendant defaulted – where defendant alleges the clause providing for default interest to be paid on overdue amounts is illusory and void – whether summary judgment should be ordered *Uniform Civil Procedure Rules* 1999, r 292 *Cross v National Australia Bank Ltd* (unreported, Federal Court of Australia, 29 April 1994, Drummond J), considered *Godecke v Kirwan* (1973) 129 CLR 629, considered *Kabwand Pty Ltd v National Australia Bank Ltd* (1989) ATPR 40-950, considered *Perpetual Nominees Ltd v Parist Holdings Pty Ltd* [2005] NSWSC 1345, considered
COUNSEL:	B D O'Donnell QC for the plaintiff L A Jurth for the defendant
SOLICITORS:	Gadens Lawyers for the plaintiff Worcester & Co for the defendant

[1] The plaintiff bank applies for summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 against the defendant borrower.

The facts

[2] Pursuant to a facility agreement made on or about 22 August 2010 for a Bank Bill Business Loan, the bank advanced $14,303,000 to the defendant Mr Lomas as the trustee of the Centre Management Trust (the trust). The facility agreement incorporated the bank's General Conditions Booklet version 3, dated 03/2003 (the general conditions). The parties agreed by a variation agreement dated 30 December 2010 (and accepted by the defendant on or about 5 January 2011) to vary the terms of the facility, including extending the expiry of the facility to 31 January 2011. The variation incorporated the general conditions.

[3] The facility expired on 31 January 2011 and Mr Lomas failed to repay the money due on that date. Mr Lomas did not comply with the demand dated 31 October 2011 from the bank in respect of the money then outstanding of $13,663,026. After realising the securities it held in respect of the facility agreement, the bank commenced this proceeding on 27 June 2013 claiming $5,707,129.11. Interest has continued to accrue on the outstanding balance under the terms of the facility agreement. As of the date of hearing this application, the bank claimed the balance outstanding was $5,869,932.68.

[4] Mr Lomas admits in his defence most of the factual matters pleaded by the bank. The substantive defence relies on an event in May 2012 where Mr Lomas sent to the bank (or receivers appointed by the bank) a refinance offer Mr Lomas received from Sterling Capital Pty Ltd (Sterling). Sterling had approved a facility to the amount of $8.5m that was subject to it reaching agreement with the bank on assignment of the bank's existing facility and rights held from the defendant to Sterling, subject to the bank's documents being acceptable to Sterling's lawyers, and with a proposed settlement of the transaction by 15 June 2012.

[5] The bank rejected the refinance offer on 8 May 2012.

[6] Mr Lomas alleges the bank owed him duties to take all reasonable care not to cause any loss or damage to him and the beneficiaries of the trust, to exercise its rights under the facility in good faith, and not to prevent or interfere with his discharging his duties as trustee of the trust. Mr Lomas also alleges the bank was under a duty to take all reasonable steps to mitigate its own loss or damage. Mr Lomas therefore alleges that the bank breached these duties by rejecting the finance offer and, if it had been accepted, there would be no debt owing by him to the bank under the facility agreement.

[7] The bank denies the allegations based on the alleged duties. Relevantly for the summary judgment application, the bank alleges in its reply that, as at 8 May 2012, the debt owing to the bank under its facility by Mr Lomas was $9,236,530.50 (inclusive of accrued interest and charges) and the proposed refinance by Sterling was not sufficient to clear the amount owing. It appears from the second affidavit of Mr Curtis, an authorised officer on behalf of the bank, filed on 30 April 2014, that (apart from that amount owed under the facility) Mr Lomas also owed to the bank, as at 8 May 2012, the sum of $158,753.47 in respect of the overdraft he held with the bank.

Issue

[8] Mr Lomas challenges the bank's calculation of the amount owing at the time of the refinance offer on the basis that certain clauses in the facility agreement (as varied) providing for the payment of interest are illusory and void. It is submitted that there was a "real chance" that the amount offered under the refinancing was sufficient to discharge the debt.

[9] Another matter raised on behalf of Mr Lomas was that prior to the filing of the application for summary judgment, his solicitors had made numerous requests commencing on 1 May 2013 and repeatedly during July 2013 for details of the calculation of the amount claimed by the bank from Mr Lomas, including the interest rates applicable from time to time. When the summary judgment application was filed on 28 March 2014, it was supported by an affidavit of Mr Curtis filed on the same date that exhibited the duplicate statements of account for the facility from 21 May 2010 until 23 May 2012 and the duplicate statements of account for the overdraft from 30 July 2010 until 31 May 2012. Mr Curtis explained in paragraphs 51 to 52 of his affidavit that statements of account were provided by the bank to Mr Lomas on a monthly basis, but that from 31 March 2012 the bank ceased to record formally on the statements of account the debiting of unpaid interest, fees and charges in respect of the facility and the overdraft. Mr Curtis had therefore prepared a spreadsheet which showed the manual calculation of the debt claimed by the bank from Mr Lomas under the facility from the period of 31 March 2012 to 24 March 2014. Paragraph 55 of Mr Curtis' affidavit sets out the Bank Bill Business Rate that applied during that period and was used in the calculations, the margin rate that applied and the Unarranged Lending Rate that was the default interest rate applied during that period. The spreadsheet created by Mr Curtis is exhibit PAC28 to his affidavit.

[10] The summary judgment application was originally returnable on 15 April 2014. The affidavit of the defendant's solicitor filed on that date to support an application for an adjournment of the hearing explained that the defence filed on behalf of Mr Lomas was a holding defence and that when the particulars of the claimed sum were provided, it was likely that the defence would be amended and that counsel who had been briefed for Mr Lomas were unavailable for four weeks. The application was adjourned on 15 April 2014 by consent of the parties to 13 May 2014. No amended defence was filed in the meantime, even though the particulars of the calculation of the plaintiff's claim were provided in Mr Curtis' affidavit filed and served on 28 March 2014. Apart from the legal argument that the interest rate provided for in the variation agreement was illusory and void, there was no challenge on the summary judgment application to the calculations undertaken by Mr Curtis. Mr Jurth of counsel on behalf of Mr Lomas did suggest that the defence may be improved after disclosure by the bank which might give rise to obligations under the *Code of Banking Practice*, but in the context of the allegations made in the defence.

[11] Ultimately, the only issue that was relied on by Mr Lomas to oppose the summary judgment application was the defence that depended on the calculation of the debt (including the interest) under the facility agreement when the Sterling offer was made.

Relevant provisions of the variation agreement to the facility agreement

[12] At the commencement of the document entitled "Details of Variation", a table was set out showing the variation to the facility details. Under interest details, the base rate was shown as 5.57 per cent per annum and the base rate name was described as "Bank Bill Business Rate". The margin rate was shown as 0.90 per cent per annum making a resultant rate that was shown as 6.47 per cent per annum. The interest period was specified as 90 days and the interest charge frequency was shown as monthly.

[13] There was a heading in the variation to the facility agreement "What should I know about interest rates and margins?" That part of the agreement then provided:

> "Where an interest rate applies to a Facility:
>
> - interest will be calculated on the daily balance owing in the loan account from the first day of drawing to the date of repayment
> - if no period is specified in the Finance Details, interest is payable on the last business day of each calendar month
> - quarterly interest (where applicable) will be payable on the last business day of March, June, September and December
> - half yearly interest (where applicable) will be payable on the last business day of March and September
> - interest may be debited to the loan account without notice to you.
>
> You agree to pay:
>
> - interest on each Facility at the interest rate and margin stated in the Finance Details
> - interest on overdue amounts including excesses above Facility Limits at the *Unarranged Lending Rate*, which will be determined by the Bank from time to time.
>
> We can vary the margin at any review and we will notify you of any change to the margin. The *Unarranged Lending Rate* will be published in a tombstone with our other Business Finance lending rates.
>
> Advertisements of our current variable base rates (other than the Bank Bill Business Loan base rate) and the *Unarranged Lending Rate* will appear in the *Australian Financial Review* and *The Australian* every second Monday. If Monday is a public holiday, the advertisement will appear on the next business day. We will also give you information on current interest rates, including the Bank Bill Business Rate, on request."

[14] On the hearing of the summary judgment application, leave was given to the bank to read and file an affidavit of its solicitor Mr Pennicott sworn on 13 May 2014 that deposed to the information he was provided by Mr Curtis in respect of the term "Unarranged Lending Rate". Mr Pennicott stated "the Unarranged Lending Rate is a benchmark rate of the Bank's which is generally applicable to the Bank's business customers". Mr Pennicott was informed that the Unarranged Lending Rate is published in the Australian Financial Review newspaper every second Monday and produced a copy of the relevant publication published on 12 May 2014 that

appeared in a box with the symbol for the bank underneath which was a heading "Important Notice to Customers". In the table below that heading there was a description of products and interest rates. Under the heading "Short-Term Finance Products" there was an entry for "Unarranged Lending Rate" for which 16.72 per cent per annum was designated.

Submissions

[15] Mr O'Donnell of Queen's Counsel on behalf of the bank submitted that the Unarranged Lending Rate was a benchmark rate determined by objective criteria that was published in the newspaper and applicable to all customers whose agreements with the bank provided for them to pay interest at the Unarranged Lending Rate.

[16] Mr Jurth submitted that the Unarranged Lending Rate is not described in the facility agreement (as varied) as a benchmark rate and, in terms of the variation to the facility agreement, it was merely a rate that could be determined by the bank from time to time without any constraint on the bank's determination.

[17] Both parties made reference to *Cross v National Australia Bank Ltd* (unreported, Federal Court of Australia, 29 April 1994, Drummond J) and *Perpetual Nominees Ltd v Parist Holdings Pty Ltd* [2005] NSWSC 1345.

[18] In *Cross*, the applicants guaranteed their company's debts to the respondent bank under an equipment lease agreement where, if there were default by the lessee in paying the rent or other moneys under the agreement to the respondent, the lease provided for the lessee to pay to the respondent "interest on the portion of the rental remaining unpaid and any other moneys payable under the provisions of this Agreement from the date the moneys become payable until the date of payment at such rate as is determined by the Bank from time to time". Drummond J found this provision was illusory:

> "It was not suggested that this expression could be read as a reference even to the bank's own benchmark rates. This is a clear example of a provision which reserves the fixing of a substantial obligation entirely to the discretion of the bank as one of the two contracting parties. It is therefore illusory: see Placer Development Ltd v The Commonwealth of Australia (1969) 121 CLR 353 at 356 and 359-361; Godecke v Kirwan (1973) 129 CLR 629 at 646-647."

[19] This was an application of the principle of contract law that there can be no concluded bargain, if a vital term has been left to the determination of one of the parties: *Godecke v Kirwan* (1973) 129 CLR 629, 647 and *Kabwand Pty Ltd v National Australia Bank Ltd* (1989) ATPR 40-950 at 50,380-50,381.

[20] *Cross* was followed by Brereton J in *Parist* at [35]. The relevant interest rate in *Parist* was calculated by reference to the lender's "Benchmark Rate" that was defined to mean:

> "the rate as determined by the lender on 1 December 2004 and then as redetermined by the lender quarterly on or about the first business days of January, April, July and October in each year. The lender will (but without having any obligations to do so) when determining and redetermining the Bench Mark Rate refer to the level at which 90

> day bank bill products have been trading by the major Australian trading banks rounded up to the nearest five basis points."

[21] Brereton J construed the definition of Benchmark Rate as leaving it to be determined by the lender without any constraint or reference criteria and that distinguished the case from *Kabwand* and brought it within the judgment of Drummond J in *Cross*.

Was the interest provision illusory?

[22] The interest rate that was the subject of submissions was not the interest rate that was payable when there was no default under the facility agreement. It was the interest rate that was applicable only where there was default.

[23] The letter of variation dated 30 December 2010 varied the general conditions in this respect.

[24] The expression "Unarranged Lending Rate" is not otherwise defined in the letter of variation or the general conditions or designated in those documents as a particular benchmark rate used by the bank, but it is an expression that is used in the advertisements of the bank's relevant interest rates to which Mr Lomas' attention was expressly drawn by the letter of variation.

[25] In context, although the letter of variation describes the Unarranged Lending Rate as a rate "which will be determined by the Bank from time to time", it was not a rate that was intended to be selected by the bank without constraint to apply to Mr Lomas' facility, but a rate that applied to all customers of the bank who were subject to the Unarranged Lending Rate and was ascertainable in an accessible way from the nominated newspaper advertisements.

[26] Although Drummond J suggested in *Cross* that an interest clause which gave one party discretion to fix the interest rate would not be illusory if it were able to be read as referring to a benchmark rate (rather than a rate determined in the exercise of an unfettered discretion), that authority does not limit the constraints that parties may agree upon as applying to the fixing of an interest rate by one of the parties.

[27] The effect of the agreement of the parties embodied in the letter of variation was that the default interest rate that applied to the facility, when there was default, was that rate that was applied by the bank to all customers who were subject to the Unarranged Lending Rate, as published in the manner described in the letter of variation. This was not a case where the bank could select any interest rate that it pleased, but confined itself to the rate that was identified for the purpose of the letter of variation. The interest provision was not illusory.

Orders

[28] As Mr Lomas has failed on the argument he relied on to oppose summary judgment, and there is otherwise no need for a trial of the bank's claim, it is appropriate that judgment be given for the plaintiff on its claim including interest to the date of judgment and the costs of the proceeding.

[29] On the publication of these reasons, I will give the plaintiff an opportunity to update the calculation of the amount outstanding under its claim to the date of judgment.