

SUPREME COURT OF QUEENSLAND

CITATION: *McGlone v Suncorp-Metway Ltd* [2015] QSC 352

PARTIES: **JOHN ANDREW MCGLONE**
(plaintiff)
v
SUNCORP-METWAY LTD
ABN 66 010 831 722
(defendant)

FILE NO: SC No 7824 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 3 December 2015

JUDGE: Flanagan J

ORDERS:

- 1. Paragraphs [1] and [3] of the amended claim filed 27 February 2015 seeking damages for unconscionable conduct and exemplary damages be permanently stayed.**
- 2. The amended statement of claim filed 27 February 2015 be struck out.**
- 3. Order 7 of the order of Justice Mullins made 5 February 2015 be vacated.**
- 4. In relation to the proceedings, including the defendant's application filed 19 November 2015, there be no order as to costs.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where the defendant provided a line of credit to a company for the purchase of a business, to be operated by the plaintiff's then wife, that was guaranteed and indemnified by the plaintiff and secured by an existing mortgage over the then marital home – where the plaintiff alleges that he signed the guarantee as a consequence of his then wife's undue influence and that the defendant engaged in unconscionable conduct by providing the line of credit and subsequently increasing it – where the plaintiff's marriage broke down and was the subject of proceedings in the Federal

Magistrates Court and then an appeal to the Full Court of the Family Court – where the defendant seeks the claim be set aside as an abuse of process as it is an attempt to re-litigate an issue determined by the Federal Magistrates Court and creates the prospect of a result inconsistent with the Federal Magistrates Court – whether the claim should be stayed as an abuse of process or the pleading struck out as disclosing no reasonable cause of action and having a tendency to prejudice or delay the fair trial of the proceeding

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS – where the defendant provided a line of credit to a company for the purchase of a business, to be operated by the plaintiff's then wife, that was guaranteed and indemnified by the plaintiff and secured by an existing mortgage over the then marital home – where the plaintiff alleges that he signed the guarantee as a consequence of his then wife's undue influence and that the defendant engaged in unconscionable conduct by providing the line of credit and subsequently increasing it – where the plaintiff's marriage broke down and was the subject of proceedings in the Federal Magistrates Court and then an appeal to the Full Court of the Family Court – where the defendant seeks the claim be set aside as an abuse of process as it is an attempt to re-litigate an issue determined by the Federal Magistrates Court and creates the prospect of a result inconsistent with the Federal Magistrates Court – whether the claim should be stayed as an abuse of process or the pleading struck out as disclosing no reasonable cause of action and having a tendency to prejudice or delay the fair trial of the proceeding

REAL PROPERTY – TORRENS TITLE – MORTGAGES, CHARGES AND ENCUMBRANCES – POWERS AND REMEDIES OF MORTGAGEE – SALE – MODE OF SALE AND DUTY OF MORTGAGEE – where the defendant provided a line of credit to a company for the purchase of a business, to be operated by the plaintiff's then wife, that was guaranteed and indemnified by the plaintiff and secured by an existing mortgage over the then marital home – where the plaintiff's marriage broke down and was the subject of proceedings in the Federal Magistrates Court and then an appeal to the Full Court of the Family Court – where, following the Federal Magistrates Court's proceedings, the defendant exercised its power of sale over the then marital home – where the plaintiff alleges that the defendant breached s 85 of the *Property Law Act 1974* (Qld) by allegedly selling the then marital home at an undervalue – where the defendant advertised the property by public auction, obtained valuation reports, set an original reserve, and then lowered the reserve

on the day of the auction – whether the defendant failed in its duty to take reasonable care to ensure the property was sold at market value – whether the claim pursuant to s 85 of the *Property Law Act 1974* (Qld) should be struck out

Property Law Act 1974 (Qld), s 85

Uniform Civil Procedure Rules 1999 (Qld), r 16, r 171(1)

Edington v Board of Trustees of the State Public Sector Superannuation Scheme [2012] QSC 211, considered

Habib v Radio 2UE Sydney Pty Ltd [2009] NSWCA 231, cited

Investec Bank (Australia) Ltd v Glodale Pty Ltd (2009) 24 VR 617; [2009] VSCA 97, cited

O’Shane v Harbour Radio Pty Ltd (2013) 85 NSWLR 698, 724; [2013] NSWCA 315, cited

Rippon v Chilcotin Pty Ltd (2001) 53 NSWLR 198; [2001] NSWCA 142, cited

Robertson v Vlahos [2011] QCA 243, cited

Spencer v Commonwealth of Australia (2010) 241 CLR 118; [2010] HCA 28, cited

State Bank of New South Wales Ltd v Stenhouse Ltd (1997) Aust Torts Reports ¶81-423, considered

Tomlinson v Ramsey Food Processing Pty Ltd (2015) 323 ALR 1; [2015] HCA 28, cited

Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34, 529, cited

COUNSEL: The plaintiff appeared on his own behalf
G Beacham QC for the defendant

SOLICITORS: The plaintiff appeared on his own behalf
King & Wood Mallesons for the defendant

- [1] The defendant, Suncorp-Metway Ltd, seeks summary relief in respect of the plaintiff’s amended claim and amended statement of claim. The primary relief sought is that the amended claim be set aside pursuant to r 16 of the *Uniform Civil Procedure Rules 1999* (Qld) as an abuse of process.

Background

- [2] On or about 21 August 2008 the defendant entered into an agreement with Homegate Pty Ltd (“**Homegate**”) for a small business line of credit in the sum of \$100,000. These funds were used to purchase a café/homewares retail business in Mooloolaba Queensland to be conducted by the plaintiff’s then wife.
- [3] On 22 August 2008 the plaintiff signed a deed of guarantee and indemnity with the defendant guaranteeing the obligations of Homegate under the line of credit.

- [4] As part of the guarantee the plaintiff allowed an existing mortgage over the marital home at Castaways Beach to be taken as security to support the line of credit.
- [5] In his amended statement of claim the plaintiff pleads that he signed the guarantee not of his own freewill but because of undue influence from his wife. He also pleads that the defendant engaged in unconscionable conduct in providing the line of credit and subsequently increasing it from \$100,000 to \$150,000. The plaintiff further alleges that in exercising its power of sale in respect of the marital home the defendant breached s 85 of the *Property Law Act 1974* (Qld).
- [6] From an examination of the amended claim and the amended statement of claim the plaintiff does not appear to claim any relief in respect of the undue influence allegations. These allegations were not pleaded in the plaintiff's original statement of claim. The claims in relation to damages for unconscionable conduct and damages for alleged breaches of s 85 of the *Property Law Act* were previously pleaded in the plaintiff's original statement of claim. By orders made 5 February 2015, Mullins J struck out the original statement of claim and granted the plaintiff leave to re-plead. Pursuant to this grant of leave the plaintiff has sought to add allegations of undue influence and to re-plead, with some immaterial changes, the same claims in respect of unconscionable conduct and breaches of s 85 of the *Property Law Act*.

Abuse of process

- [7] By this application the defendant seeks to shut the plaintiff out from continuing his proceeding. The defendant carries the onus of satisfying the Court that there is an abuse of process. This onus has been described as "a heavy one".¹ In *Spencer v Commonwealth* the High Court stated:²

"The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so where such disposition is sought on the basis that the pleadings fail to disclose a reasonable course of action or on the basis that the action is frivolous or vexatious or an abuse of process." (citations omitted)

- [8] In *Edington v Board of Trustees of the State Public Sector Superannuation Scheme*³ Mullins J dismissed an application under r 16 of the *Uniform Civil Procedure Rules 1999* (Qld) seeking orders to strike-out, set aside or permanently stay the proceeding. As to the principles to be applied on such applications, her Honour said, in summary:⁴
- (a) "the approach to determining whether the proceeding should be brought to an end summarily should be no less stringent than that provided under r 293";
 - (b) "authoritative statements about exercising caution in terminating a proceeding summarily remain applicable"; and

¹ *Williams v Spautz* (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ); *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698, 724 [111].

² *Spencer v Commonwealth of Australia* (2010) 241 CLR 118, 131 [24] (French CJ and Gummow J).

³ *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2012] QSC 211.

⁴ *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2012] QSC 211, [53]-[54].

(c) “the comments in the judgments in *Spencer* about the exercise of caution in dismissing an action summarily were intended to apply generally in respect of the procedure of summary judgment.”

- [9] The defendant seeks to, in effect, stay the plaintiff’s claims in relation to undue influence and unconscionable conduct relying on the abuse of process ground. Whether the present proceeding constitutes an abuse of process requires a consideration of the previous proceedings in the Federal Magistrates Court and the Full Court of the Family Court.
- [10] The Reasons of the Federal Magistrates Court reveal that most of the trial was taken up with determining whether an amount of \$128,228.75 for unpaid rent for Homegate’s shop lease to a company called Kalgold Pty Ltd and the sum of \$189,448.07 being the unpaid mortgage taken out as a line of credit against the marital home from the defendant, should be characterised as marital debt.⁵ The plaintiff submitted that those debts were not marital debts but personal debts of his former wife. The plaintiff based his case on a lack of capacity to make decisions which resulted in the debts to Suncorp and Kalgold.⁶ The defendant Suncorp appeared as a respondent to an application filed by the plaintiff in the Federal Magistrates Court seeking an order pursuant to s 90AF of the *Family Court Act 1975 (Cth)* restraining Suncorp from exercising its power of sale over the marital property.⁷ Suncorp intervened in the proceedings agreeing not to exercise its power of sale until the Federal Magistrates Court’s decision had been made.⁸
- [11] Coates FM noted that there was no objection from the parties that Suncorp had acted or was acting outside its powers, so the debt or Suncorp’s position did not have to be proved.⁹ Before the Federal Magistrates Court Suncorp presented evidence that as at 30 April 2011, no payments had been received and the outstanding mortgage debt was \$189,448.07. Suncorp sought an order which would allow it to exercise its power of sale.¹⁰ The plaintiff alleged that he suffered depression and, at the same time, his wife threatened to end the marriage if he did not enter into the Homegate business. He stated that the depression deprived him of the capacity to make the final decisions and understand the quality of his acts in signing financial documents.¹¹ He alleged that he had a mental breakdown in mid-2009 and was unaware that he had personally guaranteed the lease for the shop and he would not have done so otherwise. Coates FM found however, that there was no admissible medical evidence as to how this mental condition affected the plaintiff.¹² Further, the Court found that there was no evidence to support the plaintiff’s assertions that he lacked capacity whereby he did not understand the quality of his acts in signing “far reaching financial documents”.¹³ The plaintiff did not run any case against Suncorp that the loans or how the amount owed was “in breach of a statement or principle of law”. As noted by Coates FM:¹⁴

⁵ *McGlone v McGlone* [2011] FMCAfam 540, [3].

⁶ *McGlone v McGlone* [2011] FMCAfam 540, [9].

⁷ *McGlone v McGlone* [2011] FMCAfam 540, [11].

⁸ *McGlone v McGlone* [2011] FMCAfam 540, [13].

⁹ *McGlone v McGlone* [2011] FMCAfam 540, [14].

¹⁰ *McGlone v McGlone* [2011] FMCAfam 540, [18].

¹¹ *McGlone v McGlone* [2011] FMCAfam 540, [64].

¹² *McGlone v McGlone* [2011] FMCAfam 540, [95].

¹³ *McGlone v McGlone* [2011] FMCAfam 540, [102].

¹⁴ *McGlone v McGlone* [2011] FMCAfam 540, [136].

“There was no case that the husband had been denied natural justice in relation to the bank’s position. He did not run his case, that he lacked capacity against the bank, he ran it against the wife in the form that she unduly influenced him, taking advantage of his depressed state.”

Coates FM therefore concluded that there was no evidence to show that it would be proper for an injunction to be granted (restraining the sale of the marital property).¹⁵

[12] Order 4 of the orders made by the Federal Magistrates Court required the plaintiff and his wife to do all acts and things necessary to procure that, upon the sale of the home by the defendant, the proceeds of sale be paid in a certain manner and priority:¹⁶

- (i) first, pursuant to the *Property Law Act 1974* (Qld) (in other words, by paying the costs and expenses of sale and the mortgage over the property, including the mortgage which secured the debt owed to the defendant under the guarantee);
- (ii) in discharge of all debts due and payable by Homegate which included the debts to the defendant and to Kalgold.

In addition the Court ordered that costs and expenses incurred by the defendant intervening in the proceedings and arrears of outgoings, rates and water charges on the marital property from 1 January 2009 be paid out the plaintiff’s share of the proceeds.

[13] The plaintiff appealed to the Full Court of the Family Court. The appeal was dismissed, and the Court’s Reasons show:¹⁷

- (a) the guarantee, and the increase in the amount of the line of credit, were, once again, in issue;
- (b) the plaintiff again contended that his wife alone should bear responsibility for these liabilities to the defendant; and
- (c) that contention was rejected on the basis that the Federal Magistrate had correctly decided against that argument because of a lack of evidence in support of it.

[14] The defendant submits that the plaintiff’s claim for undue influence in this proceeding is an abuse of process in that:¹⁸

- (a) it involves an attempt to re-litigate an issue that has already been determined against the plaintiff, namely the claim that he “lacked capacity” to execute the guarantee (and the extension of the line of credit). That issue was determined after a trial, in

¹⁵ *McGlone v McGlone* [2011] FMCAfam 540, [183].

¹⁶ Exhibit PJZ-1 to the affidavit of Paul James Zande sworn 24 November 2015, pp.

¹⁷ Exhibit PJZ-2 to the affidavit Paul James Zande sworn 27 November 2015, [3], [11], [27], [32], [33], [37], [38], [43].

¹⁸ Defendant’s outline of submissions dated 1 December 2015, [15].

a proceeding for final relief, in which the issue was (on the Reasons of the Federal Magistrates Court) at least one of the primary issues in contest; and

- (b) it creates the prospect of a result in this proceeding that is inconsistent with the Federal Magistrates Court order (and subsequent appeal). If the plaintiff were to succeed on the undue influence claim, it would naturally lead to the conclusion that the debt owing under the line of credit was not recoverable under the guarantee. That would be inconsistent with the basis upon which the Federal Magistrates Court's order was made – namely a rejection of the plaintiff's contention that he lacked capacity for (inter alia) a guarantee, and that the debt under the line of credit should be solely the responsibility of his former wife.

- [15] As to the unconscionable conduct claim, the defendant submits that in the Federal Magistrates Court the plaintiff's case was that he lacked capacity to agree to the extension of the line of credit from \$100,000 to \$150,000. The defendant further submits that the Federal Magistrates Court orders proceed on the basis that the entire line of credit debt is owing and is a marital debt of the plaintiff and his wife secured against the property: "[t]he logical outcome of the unconscionable claim is that a part (or all) of the line of credit debt is not recoverable, at least as against the plaintiff. That is completely inconsistent with the basis of the Federal Magistrates Court's order."¹⁹
- [16] The plaintiff, in the course of oral submissions, accepted that the material facts pleaded concerning his undue influence claim were matters that were before the Federal Magistrates Court. He submitted, however, that his unconscionable conduct claim was not raised in the Federal Magistrates Court. This claim is said to be in relation to both of the initial granting of the line of credit of \$100,000 and the subsequent extension of the line of credit to \$150,000.
- [17] The plaintiff's case is that the defendant acted unconscionably because it engaged in asset lending in circumstances where it should have been aware that the plaintiff did not have the necessary income to meet repayments. The difficulty with this submission is that in the Federal Magistrates Court the plaintiff sought to restrain the defendant from exercising its power of sale. In support of that application the plaintiff alleged that he lacked capacity or was subject to undue influence in executing the guarantee. He did not challenge the validity of the underlying financial transactions by seeking to impugn the conduct of the defendant. The orders of the Federal Magistrates Court (which included the sale of the property and distribution of those proceeds) were based on the unquestioned validity of the amounts owed by Homegate to the defendant, secured on the marital home and guaranteed by the plaintiff. Any subsequent finding by this Court impugning the validity of the line of credit extended by the defendant to Homegate would be inconsistent with the orders made by the Federal Magistrates Court and upheld by the Full Court of the Family Court.
- [18] Abuse of process has been recently considered by the High Court in *Tomlinson v Ramsey Food Processing Pty Ltd*. French CJ, Bell, Gageler and Keane JJ stated:²⁰

¹⁹ Defendant's outline of submissions dated 1 December 2015, [16].

²⁰ *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 323 ALR 1, 8 [25].

“Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although unsusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court’s procedure would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.” (citations omitted)

- [19] In *Habib v Radio 2UE Sydney Pty Ltd*, McColl JA (with Giles and Campbell JJA agreed) stated:²¹

“There can be an abuse of process where, even though a plea of res judicata, cause of action or issue estoppel is not available ‘if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again ...’ ... It may be a form of *Anshun* estoppel, the underlying premise being that success on the reformulated case would contradict the outcome, or determination of an issue, in earlier proceedings.” (citations omitted)

- [20] In *Rippon v Chilcotin Pty Ltd*,²² the New South Wales Court of Appeal quoted with approval the following passage in the judgment of Giles CJ in *State Bank of New South Wales Ltd v Stenhouse Ltd*.²³ This was a case involving an abuse of process in seeking to re-litigate an issue:

“... The guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the system of administration of justice, and amongst the matters to which regard may be had are —

- (a) the importance of the issue in and to the earlier proceedings, including whether it is an evidentiary issue or ultimate issue;
- (b) the opportunity available and taken to fully litigate the issue;
- (c) the terms and finality of the finding as to the issue;
- (d) the identify between the relevant issues in the two proceedings;
- (e) any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceedings;
...
- (f) the extent of the oppression and unfairness to the other party if the issue is relitigated and the impact of the relitigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and

²¹ *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231, [89].

²² *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198, 204 [32].

²³ *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Reports ¶81-423, 64,089.

- (g) an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process.”

[21] Similarly, in *Robertson v Vlahos*,²⁴ Boddice J (with whom McMurdo P and Muir JA agreed) said:

“To allow a party to relitigate an issue decided between the party and a third party may constitute an abuse of process where it would be oppressive and unfair to the other party to the litigation, and would put in question the integrity of the system of administration of justice. Such an abuse can arise in the case of subsequent proceedings where they are initiated to mount a collateral attack on a final decision against the party made by another court of competent jurisdiction in which the party had a full opportunity of contesting the decision. Whether there is an abuse of process depends on the circumstances.” (His Honour then referred to *State Bank of New South Wales Ltd v Stenhouse Ltd*)

[22] The present amended claim and amended statement of claim constitute, in my view, an impermissible attempt by the plaintiff to re-litigate an issue that has already been determined against the plaintiff. The defendant was an intervener in the Federal Magistrates Court proceedings in circumstances where the plaintiff was seeking to restrain the defendant from exercising its power of sale. It is common ground that the power of sale was sought to be exercised in relation to the failure on the part of Homegate to make repayments in respect of the line of credit. This line of credit was secured both by a mortgage over the marital home and by guarantees. The mortgaged property constituted part of the marital property for the purposes of the adjustment that was undertaken by the Federal Magistrates Court. The order for the sale and distribution of proceeds in relation to the property recognised the validity of the debts owed to the defendant by both the plaintiff and Homegate. Significantly, the Court ordered that Homegate’s liability to the defendant was to be paid by the sale proceeds of the property before any distribution to the plaintiff. The Federal Magistrates Court proceeded on the basis that the plaintiff did not challenge the validity of the Suncorp debt.²⁵ It would constitute an abuse of process for the plaintiff to now seek to agitate the underlying validity of these loans in the present proceedings. The originating process, namely the amended claim, should, pursuant to r 16(e) of the *Uniform Civil Procedure Rules 1999* (Qld), be set aside. However, as the amended claim seeks not only damages for unconscionable conduct but also damages for breaches of section 85 of the *Property Law Act* the more appropriate order is that the plaintiff’s proceeding in terms of paragraph 1 of the amended claim which seeks damages for unconscionable conduct be permanently stayed.

Pleading deficiencies – undue influence and unconscionable conduct claims

[23] The pleading in the amended statement of claim in respect of both undue influence and unconscionable conduct is so deficient that it should in any event be struck out pursuant to r 171(1) of the *Uniform Civil Procedure Rules 1999* (Qld) on the basis that it discloses no reasonable cause of action and has a tendency to prejudice or delay the fair trial of the

²⁴ *Robertson v Vlahos* [2011] QCA 243, [19].

²⁵ *McGlone v McGlone* [2011] FMCAfam 540, [136].

proceeding. The Court's discretion to strike out pleadings should only be exercised in clear cases.

- [24] As I have already observed, the plaintiff does not identify any actual relief arising from the allegations of undue influence. Even if one was to assume that what is sought is the setting aside of the guarantee executed by the plaintiff, the plea should otherwise be struck out. The undue influence pleaded is that exerted by the plaintiff's wife not the defendant. There is no pleaded basis upon which the wife's undue influence can be brought home to the defendant.
- [25] As to the unconscionable conduct claim, the real difficulty is that the agreements in respect of the line of credit are pleaded as having been entered into between the defendant and Homegate as trustee for the McGlone Family Trust. The defendant therefore submits that the extension of the line of credit cannot be unconscionable as regards the plaintiff as guarantor. Either the guarantee secured the line of credit or it did not.²⁶
- [26] The real difficulty that I have with the plaintiff's claim in respect of unconscionable conduct, however, is the practical effect of the order of the Federal Magistrates Court. Even if the plaintiff succeeded in setting aside the guarantee such that the Homegate debt could no longer be secured at least partially against his interests in the marital home, the order of the Federal Magistrates Court nevertheless provided that all debts due and payable by Homegate be paid out of the proceeds of the sale of the property. As submitted by the defendant, "... if the debt owed to the defendant was not secured by the mortgage, and therefore not caught by paragraph 4(a) of the Federal Magistrates Court's order, then it was another debt due and payable by the company Homegate and therefore caught by paragraph 4(b)(ii) of the Federal Magistrates Court's order."²⁷

The sale at undervalue claim

- [27] This claim is pleaded in paragraphs 40 to 51 of the amended statement of claim together with a claim for further losses and exemplary damages.²⁸ The plaintiff pleads that on 8 July 2011 the defendant took possession of the property. The defendant set a reserve of \$425,000 for this auction but reduced the reserve to \$390,000. The property ultimately sold at auction for \$400,000. The plaintiff then pleads valuations for the property which were obtained in 2008, 2009 and 2010 which are all greater than the sale price. The plaintiff alleges that the defendant failed in its duty to ensure that the property was sold at market value. The duty under s 85 of the *Property Law Act* 1974 (Qld) is, of course, to take reasonable care to ensure that the property is sold at the market value.
- [28] The defendant seeks to strike-out this pleading pursuant to r 171 on two bases. First, that a mere contention that the property was sold at less than its market value is not sufficient to make out a claim under s 85 of the *Property Law Act*. The relevant question is whether the sale process was undertaken with reasonable care.²⁹ The defendant submits that there is evidence that the defendant sold by auction after marketing and advertising the property

²⁶ Defendant's outline of submissions dated 1 December 2015, [24].

²⁷ Defendant's outline of submissions dated 1 December 2015, [27].

²⁸ Amended statement of claim filed 27 February 2015, [53]-[56].

²⁹ *Investec Bank (Australia) Ltd v Glodale Pty Ltd* (2009) 24 VR 617, 626 [46].

for sale and obtaining a valuation of the property from certified practising valuers.³⁰ The plaintiff does not identify any deficiencies in the process by which the property was auctioned. The plaintiff, however, submits that the defendant's conduct in reducing the reserve from \$425,000 to \$390,000 in itself constitutes a breach of s 85 of the *Property Law Act*. This allegation is made in the context of an advertised public auction where the original reserve had been set by the defendant and was subsequently lowered by the defendant.

- [29] From a comparison of the original statement of claim which was struck out by Mullins J and the amended statement of claim, this allegation concerning the lowering of the reserve would appear to constitute the pleading of a new fact. Given that the question that needs to be answered is whether the process utilised to effect the sale of the property was undertaken with reasonable care, it is difficult to see how a mortgagee in the defendant's position lowering the reserve price on the day of auction constitutes such a breach. I note that the valuation received by the defendant from the certified practising valuers on 28 July 2011 considered that the market value range was between \$380,000 to \$440,000. The valuers recommended a current market value of \$420,000 for realisation purposes but considered that a market value of \$370,000 would realise a sale within a shorter than average selling period of 60 to 90 days.
- [30] The plea in paragraphs [43] and [44] of the amended statement of claim concerning the reduction of the reserve on the day of auction from \$425,000 to \$390,000 does not by itself disclose a reasonable cause of action for a breach of s 85 of the *Property Law Act*. As I have observed, this drop in the reserve price appears to be the only new fact pleaded by the plaintiff pursuant to the grant of leave to re-plead by Mullins J. There is, however, a more fundamental difficulty with the plaintiff's s 85 case. The plaintiff was a tenant in common with his former wife of the property. His right to damages arising from a breach of s 85 is therefore limited to the extent of his interest in the property. The effect of the orders of the Federal Magistrates Court is that there was a series of debts owed by Homegate that were to be paid out of the proceeds of the sale of the property prior to any distribution to the plaintiff and his former wife. The order identified total liabilities of \$490,983.62 as at 10 June 2011 to be paid out of the proceeds of the sale of the property. In addition, prior to the plaintiff receiving any distribution he was ordered to pay the costs and expenses incurred by the defendant intervening in the Federal Magistrates Court proceedings. What is pleaded in the amended statement of claim takes no account of the practical effect of the orders of the Federal Magistrates Court. The defendant therefore submits that the plaintiff has not demonstrated that he has suffered any loss as a result of the alleged failure to sell at market value. If the plaintiff's case is that the reserve should not have been dropped from \$425,000 to \$390,000 on the day of auction then the maximum damages arising from this is only \$35,000 plus interest. The effect of the order of the Federal Magistrates Court is that after the sale of the property at auction there remained outstanding debts to third parties including Kalgold and the defendant in excess of \$150,000.³¹ The result is that even if a sale at a higher price had been achieved this would simply have resulted in further funds being paid to discharge debts to third parties but no money would have been distributed to the plaintiff.

³⁰ Affidavit of Paul James Zande, sworn 24 November 2015, [14].

³¹ Defendant's outline of submissions dated 1 December 2014,5 [31].

- [31] The amended statement of claim does not articulate the basis upon which the plaintiff's loss is calculated by identifying the relevant market value and then the basis upon which a sale at that market value would have resulted in some distribution of proceeds to the plaintiff having regard to the order of the Federal Magistrates Court. Nor could any amendments assist in formulating such a case.
- [32] As to the plaintiff's claim for further losses and exemplary damages, these are all alleged to have been caused by the defendant's unconscionable conduct. As I have determined that this claim constitutes an abuse of process, it is also appropriate that the plaintiff's claim for exemplary damages in paragraph 3 of the amended claim be permanently stayed.

Disposition

- [33] I order that:
1. paragraphs [1] and [3] of the amended claim filed 27 February 2015 seeking damages for unconscionable conduct and exemplary damages be permanently stayed.
 2. the amended statement of claim filed 27 February 2015 be struck out.
 3. order 7 of the order of Justice Mullins made 5 February 2015 be vacated.
 4. in relation to the proceedings, including the defendant's application filed 19 November 2015, there be no order as to costs.