

SUPREME COURT OF QUEENSLAND

CITATION: *RHG Mortgage Corporation Limited v Bennetts* [2017] QSC 28

PARTIES: **RHG MORTGAGE CORPORATION LIMITED ACN 065 912 932 (FORMERLY RAMS MORTGAGE CORPORATION LIMITED)**
(plaintiff)
v
CHRISTIAN CHARLES BENNETTS
(defendant)

FILE NO/S: Brisbane No BS 599 of 2009

DIVISION: Trial Division

PROCEEDING: Application on the papers without oral hearing

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 7 February 2017

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Boddice J

ORDER: **1. I make orders in terms of the draft, which I initial and place with the papers.**

CATCHWORDS: PROCEDURE – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – EXECUTION AGAINST PROPERTY – WARRANTS OF SEIZURE AND SALE OR WRIT OF FIERI FACIAS – PRACTICE – TAKING POSSESSION – where the applicant was granted default judgment 30 September 2009 and subsequently issued an enforcement warrant – where the applicant and respondent entered into a payment agreement on which the respondent defaulted – where the applicant was issued a second enforcement warrant on 9 June 2015 – where the respondent again entered into a payment agreement on which the respondent again defaulted – where the applicant has served a copy of default judgment and made unsuccessful demand for possession of the relevant land – where the applicant applies for a further enforcement warrant ex parte – whether the applicant should be issued a further enforcement warrant

Uniform Civil Procedure Rules 1999 (Qld), 389(2), 915
Tyler v Custom Credit Corporation Ltd [2002] QCA 178,

applied

SOLICITORS: Dibbs Barker for the applicant
No appearance for the respondent

- [1] By application, filed 2 February 2017, the plaintiff sought orders, pursuant to Rule 389(2) of the *Uniform Civil Procedure Rules* 1999, that leave be granted to take a step in the proceedings and, pursuant to Rule 915, that an enforcement warrant be issued in respect of specified land. The plaintiff proposed the application be decided without an oral hearing.

Background

- [2] The application arises out of proceedings commenced by the plaintiff on 16 January 2009 claiming relief as a consequence of default by the defendant in compliance with the terms of loan agreements entered into between the plaintiff and the defendant on 13 April 2007 and on 18 April 2007. The defendant provided a mortgage over land at 33-37 Platypus Drive, Greenbank in the State of Queensland (“the land”) as security for his obligations under those loan agreements.
- [3] On 30 September 2009, the plaintiff was granted default judgment in the proceeding for possession of the land. On 24 November 2009, the plaintiff was granted an enforcement warrant for possession of the land.
- [4] As a consequence of a payment agreement being entered into between the plaintiff and the defendant, no steps were taken thereafter to enforce the rights pursuant to the judgment or the enforcement warrant. However, when the defendant defaulted under the payment arrangements the plaintiff, on 9 June 2015, successfully made application to take a step in the proceeding and for a further enforcement warrant to issue.
- [5] Subsequent to the granting of the second enforcement warrant on 30 July 2015, the defendant again entered into a payment arrangement with the plaintiff. As a consequence, the further enforcement warrant was not executed by the defendant.

- [6] In or about 2016, the defendant defaulted on the further payment arrangement. At or around that time, the defendant also lodged a complaint with the Credit and Investments Ombudsman. On 7 December 2016, the plaintiff was granted permission by the Ombudsman to proceed with further enforcement action.
- [7] On 13 December 2016, the plaintiff served a further copy of the judgment on the defendant demanding payment of the judgment debt or that the defendant deliver possession of the land to the plaintiff. The defendant has not complied with that request.

Oral hearing

- [8] Whilst the defendant has not been served with the application, the defendant has been served with the judgment and a demand for payment and possession of the land. He has not complied with that demand. I am satisfied the proceeding ought to be heard on the papers.

Leave to proceed

- [9] Leave to proceed is necessary as the plaintiff has not taken a step in the proceeding for over two years from the time the last step was taken. Whether leave ought to be given requires consideration of a number of factors in determining whether, on balance, good reason is given for making the order. The relevant factors were enunciated in *Tyler v Custom Credit Corporation Ltd* [2002] QCA 178.
- [10] Having considered the factors set out in *Tyler*, I am satisfied there is, on balance, good reason to grant the plaintiff leave to take a further step in the proceeding. The litigation had proceeded to completion. Compliance with the enforcement order was not sought due to an agreement by the defendant to meet his obligations. In those circumstances, it was reasonable for the plaintiff to take no further step in the proceeding. To do otherwise may have incurred unnecessary cost to the defendant.
- [11] The defendant has now failed to comply with the terms of that further agreement. There is no reason why the plaintiff should be denied the opportunity to pursue its legitimate right to recovery of the land.

- [12] Good reason has been shown for the delay in the prosecution of the proceeding. Further, no prejudice will be suffered by the defendant in the granting of leave.
- [13] I order, in the exercise of my discretion, that the plaintiff be granted leave pursuant to Rule 389(2) of the *UCPR*, to take a step in the proceedings.

Enforcement warrant

- [14] Whilst the defendant has not been served with this application, the defendant was served with a further copy of the judgment on 13 December 2016. The defendant has not complied with the terms of the further payment arrangements.
- [15] The plaintiff is entitled to enforce its judgment. Enforcement includes the granting of an enforcement warrant.
- [16] I order, pursuant to Rule 915 of the *UCPR*, that an enforcement warrant issue in respect of the land at 33-37 Platypus Drive, Greenbank in the State of Queensland.
- [17] I make orders in terms of the draft, which I initial and place with the papers.