[2013] QCA 330

COURT OF APPEAL

FRASER JA

Appeal No 7728 of 2013
DC No 2872 of 2011

BENJAMIN BERARU &
MAGDALENA BERARU **Applicants**

v

PERPETUAL LIMITED **Respondent**

BRISBANE

FRIDAY, 1 NOVEMBER 2013

FRASER JA: Mr and Mrs Beraru have applied for a stay of execution of the judgment given in the District Court on 23 July 2013 pending the determination of their appeal against that judgment. The respondent bank's claim was to recover possession of the applicants' house property pursuant to a mortgage granted by the applicants to the respondent to secure the payment of a loan and for recovery of the outstanding accelerated amount of a loan ($707,050.83 including interest as at 23 July 2013).

Affidavits filed by the respondent in the District Court proved the written loan agreement made in May 2006 for a loan of $496,000, execution of the mortgage securing repayment of the loan, the advance of the loan, the applicant's failure to comply with their repayment obligations, the issue in 2011 by the respondent to the applicants of the demand for repayment of the loan and the demand for possession of the mortgaged property in accordance with the loan agreement and the mortgage, and the applicants' failure to make any repayment after earlier payments in July of 2010.

The applicants did not appear when called at the hearing of the summary judgment application. That application had originally been returnable a week earlier. The judge adjourned the hearing for a week because, although the applicants failed to appear, one of the applicants sent a medical certificate to the court seeking an adjournment for a month. The primary judge observed that the medical certificate in relation to the male applicant stated that he was receiving medical treatment and between 15 July and 15 August 2013 would be unfit to continue his usual occupation "due to depressive mood disorder". Following that first hearing, the respondent's solicitor sent to the applicants at the address indicated in their defence and to an email address which the applicants had used to communicate with the respondent's solicitors and with the court, a letter conveying the view of the judge who heard the first application, that the applicants ought "to provide properly particularised evidence to the court in support of their request for a further adjournment".

On 22 July 2013, the primary judge's associate received an email seeking an adjournment of the hearing together with a medical certificate, undated, certifying that the doctor had, that day, examined the male applicant and, in the doctor's opinion, he would be unfit for normal work from 19 July to 19 August 2013; the male applicant had been diagnosed with "depression and has commenced medication today. Court appearance is not recommended at this time." The primary judge observed that there was nothing to show that the female applicant was disadvantaged, that it would be unsurprising that anybody facing eviction from his or her home would be in mental and emotional turmoil, and that "it seems idle to hope for recovery while court proceedings loom". The primary judge therefore refused the application for an adjournment.

The primary judge observed that there was nothing to suggest that the applicants had any prospects of success in defending the claim. His Honour referred to a paragraph of the defence which alleged that the Financial Ombudsman Service Limited was investigating the complaint, that the respondent had failed to provide the applicants with full disclosure and accounting and that that respondent had failed to perform "due diligence in relation to the defendant's ability to service the loans", and that the respondent had engaged in "predatory

lending". The primary judge noted that an affidavit filed by the respondent showed that the reference to the Financial Ombudsman Service Limited, which had the effect of staying the proceeding for a time, had been resolved so that the proceeding could go ahead. The primary judge observed of all the other assertions in the defence, which formed the basis of a counter claim, that there was no evidence to support them and no further particulars. On that footing, it was a clear case for granting summary judgment. Accordingly, the primary judge granted summary judgment to the respondent for recovery of possession of the mortgaged property and for repayment of the loan. The primary judge also ordered a stay of enforcement of the judgment until 20 August 2013 or 21 days after service of a copy of the order, whichever was the later, and granted the applicants liberty to apply to have the order changed. It appears that the applicants did not make any such application. The enforcement warrant was issued on 8 October 2013 and served on the applicants on 26 October 2013.

The authorities show that the applicants bear the onus of establishing that it is an appropriate case for a stay to be granted and that no stay should be granted where there is a readily apparent lack of merit in the appeal. See *Elphick v MMI General Insurance Ltd & Anor* [2002] QCA 347 at paragraph 8, which was approved in *Raschilla & Anor v Westpac Banking Corporation* [2010] QCA 255. See also *Kostopoulos v G E Commercial Finance Australia Pty Ltd* [2005] QCA 311 at paragraph 69, following *Croney v Nand* [1999] 2 Qd R 342 at 348 and 349.

The applicants contend before me that they have an arguable appeal on various bases. They contend that they were denied natural justice because they were not personally served with the respondent's District Court claim. But their own affidavit shows that the respondents were granted an order for substituted service and that the statement of claim was in fact received by the applicants long before the summary judgment hearing, and the applicants filed a defence and counter claim. Although the applicants contend in their application that one of the affidavits in support of the summary judgment application was not served upon them, the respondent filed an affidavit in the District Court that proved service by post and the applicants did not prove that they did not in fact receive that affidavit. The applicants refer to

the proceedings before the primary judge as "secretive" but the applicants were plainly given notice of the hearing. Indeed, they applied for an adjournment of it by sending an email to the primary judge's associate.

The applicants argue before me that the application should have been adjourned, but the primary judge was entitled to regard the medical certificate relating to the male applicant as a wholly insufficient basis upon which to justify a second adjournment of the application for summary judgment. There was no evidence supplied that the female applicant could not attend the hearing and there was, and is, no evidence that an adjournment would have served any useful purpose.

The applicants refer in their affidavit to the respondent as the "alleged" lender and to themselves as "alleged" borrowers. They challenge the validity of the loan agreement and mortgage, claiming that the respondents created credit "out of thin air" and that the respondent transferred the loan and mortgage or that there were novations of the contracts without the applicants' consent. These contentions are contrary to the evidence of the loan agreement and the mortgage signed by the applicants with the respondent. The applicants also contend that they do not have a copy of the completed loan application form but there is no pleaded or other explanation showing that this might be significant. The application contends, in general terms, that the primary judge did not take into account relevant considerations and took into account irrelevant considerations, but no such consideration is identified.

The applicants also argue before me that there is "evidence of predatory lending". The loan application form, as the applicants point out, shows assets which the applicants contend are non-existent and they are valued in a total amount of $130,000.

The applicants also contend that the loan application form includes an "over valuation" of the mortgage property at $650,000. That form bears purported signatures of the applicants. Those signatures appear, on their face, to be indistinguishable from the signatures of the applicants in their joint affidavit. In any event the applicants do not adduce evidence from

which it might be inferred that the respondent did not believe that the application form, which it accepted, had been duly signed by the applicants. They do not adduce evidence that they did not sign an application form for the loan which was made.

The applicants contend that they did not receive the loan in the amount stated on the application form of $520,000 but there is again nothing to suggest that this allegation is significant. The applicants complained also that the interest rate which has been charged for at least some of the period of the loan of 10.99 per cent different from original rates of 7.23 per cent and an original default rate of 9.23 per cent, but these are variable interest rate loans and there is nothing to show that the bank was not entitled to charge the interest rates which it has charged. It is true, as was submitted by the male applicant, that it is necessary to have certainty of interest rates, but again there is no pleading and no evidence that the provisions for the variable interest rate in this loan were not in the conventional form which has been found to be valid in previous decisions. The applicants also contend that the bank did not satisfy itself of the capacity of the applicants to repay the loan. Again, this is an allegation of which there is no evidence.

The applicants' affidavit suggests that their difficulties in repaying the loan have resulted from an unfortunate and very serious car accident in which the male applicant "lost his ability to cope with the bank loans and his responsibilities". It appears from the evidence before me that, perhaps as a result of this, the respondent extended some hardship assistance to the applicants but they have nevertheless been unable to repay the loan. It is impossible not to have sympathy for people in the position of these applicants who are to be ejected from their home as a result of their inability to repay the loan. However, the evidence upon which the applicants rely reveals no ground for thinking that there is any merit in their appeal. If arguable merit were shown in the appeal I would be very much inclined to grant a stay of execution. In the absence of any evidence which suggests that the appeal has any real prospect of succeeding, it would do no favour to the applicants merely to defer the inevitable. It would be wrong to grant a stay. I refuse the application for a stay.

…

FRASER JA: The applicants sought orders, in effect, for discovery against the bank, requiring the bank to make disclosure of documents in their possession relating to the loan. Discovery was not shown to be necessary or required in this case, in which it was not shown that there was any issue to be litigated, the bank having proved its claim and there being no arguable defence established at the summary judgment application. For that reason, this was not an appropriate case for the primary judge to order discovery, had it been applied for, and certainly not on an application for a stay.

Now, in relation to your request for some further time to get your affairs into order, although the applicants have been on notice for a very long time that the bank wished to take possession, and sought to enforce the warrant, and although I can see considerable substance in the bank's opposition to granting an extension of time, in view of what seemed to me to be the terribly unfortunate and extraordinary circumstances in which the applicants find themselves, I am prepared to grant a short stay of the execution of the warrant. I also bear in mind that the applicants have foreshadowed an appeal from my decision refusing a stay, so that this would give them an opportunity, if they can take any proceedings in that respect, to take them urgently in the meantime.

…

FRASER JA: So these are the orders I make. One, the application for a stay filed 21 October 2013 is dismissed. Two, I grant a stay of the execution of the warrant until 5 pm, 8 November 2013. Three, the applicants are to pay respondent's costs of the application to be assessed.