

DISTRICT COURT OF QUEENSLAND

CITATION: *Bendigo and Adelaide Bank Ltd v Scrap Hunter Australia Pty Ltd* [2020] QDC 227

PARTIES: **BENDIGO AND ADELAIDE BANK LIMITED**
ABN 11 068 049 178
(plaintiff)
v
SCRAP HUNTER AUSTRALIA PTY LTD
ACN 143 668 240
AS TRUSTEE FOR THE SJM TRUST
(defendant)

FILE NO/S: BD 3126 of 2019

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 11 September 2020

DELIVERED AT: Brisbane

HEARING DATE: 23 July 2020

JUDGE: Rinaudo DCJ

ORDER:

- 1. The defendant pay to the plaintiff the amount of \$378,581.34 (Judgment Amount).**
- 2. The defendant pay interest on the Judgment Amount from 22 July 2020 to the date of payment at the rate of 5.61% per annum.**
- 3. The plaintiff recover, as against the defendant, possession of the land described as Lot 12 on Registered Plan 837232, and being the whole of the land contained in title reference 18162062, and known as 90 Henderson Road (or Street), Logan Reserve QLD 4133.**
- 4. The defendant pay the plaintiff's costs of the proceeding on the indemnity basis, to be assessed if not agreed.**

CATCHWORDS: BANKING AND FINANCE – INSTRUMENTS – PROMISSORY NOTES – where the plaintiff loaned the defendant a sum of money secured by a mortgage over the defendant's property – where the defendant delivered a promissory note to the plaintiff – where the plaintiff did not

agree to accept the promissory note in satisfaction of the debts secured by the mortgage – where the defendant nonetheless claimed he discharged his liability to the plaintiff under the mortgage by delivering the promissory note – where the debt owed by the defendant was not extinguished as a result of the delivery of the promissory note

AMP Bank Limited v Eckhardt [2018] QDC 92

Bayly v Westpac Banking Corporation [2020] QCA 148

Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404

Walsh v Toyota Finance Australia Limited ABN 48002435181 Trading as Toyota Financial Services [2016] QDC 92

COUNSEL: B O'Brien for the plaintiff

SOLICITORS: Thomson Greer Lawyers for the plaintiff
S Munro (sole-director) and M Andrews (by leave) for the defendant

[1] This claim came on for trial before me on 23 July 2020.

[2] The following documents were made exhibits during the proceeding:

1. A loan agreement between Adelaide Bank and Scrap Hunter Australia Pty Ltd dated 10/02/2015;
2. Registered mortgage between mortgagor, Scrap Hunter Australia Pty Ltd and mortgagee, Bendigo and Adelaide Bank Limited;
3. A default notice sent by Bendigo and Adelaide Bank to Scrap Hunter Australia as trustee for the SJM Trust Pty Ltd dated 29 May 2018;
4. A sale contract for Lot 12 RP 837232 between Scraphunter Australia P/L atf the SJM Trust and Commonwealth Bank of Australia as mortgagee exercising power of sale under registered mortgage number 711898768;
5. A letter of arrears from Mortgage Help Centre to Scrap Hunter Australia Pty Ltd dated 29 April 2019;
6. A letter of arrears from Mortgage Help Centre to Scrap Hunter Australia Pty Ltd dated 17 May 2019;
7. A bundle of bank statements of Scrap Hunter Australia Pty Ltd;
8. A letter of arrears from Mortgage Help Resolutions to whom it may concern dated 22 July 2020 regarding loan account 41313743 YX01 (Scrap Hunter Australia Pty Ltd);
9. An affidavit of Sarah Griffin-Breen, solicitor at Thomson Greer Lawyers, sworn 16 July 2020;
10. Draft orders for the plaintiff;
11. The plaintiff's outline of closing submissions; and

12. A letter dated 23 July 2020 to Judge R Rinaudo from Stephen John Munro.

History

- [3] On or about 16 February 2015, the plaintiff, Bendigo and Adelaide Bank Limited ('the Bank') entered into a loan agreement with the defendant Scrap Hunter Australia Pty Ltd ACN 143 668 240 as trustee for the SJM Trust ('Scrap Hunter').
- [4] The loan agreement provided for a "*Fixed Rate to Variable Interest Only to Principal & Interest Loan*". The loan amount was \$319,200. The term of the loan was for 30 years with 12 interest only repayments at a fixed annual percentage rate (first year), then 108 interest only repayments at a variable rate (next 9 years), then 240 principal and interest payments of \$2,189.00 each for the remaining 20 years of the loan.
- [5] The full amount of the loan was advanced and was secured by registered mortgage over a property at 90 Henderson Road, Logan Reserve. Scrap Hunter is the registered owner of that property. The mortgage has not been released or discharged.
- [6] The Bank pleads that Scrap Hunter has defaulted in payment due under the loan agreement and remains in default. On or around 29 May 2019, the Bank served a notice of default on Scrap Hunter ('the Default Notice'). Scrap Hunter admits the default notice was served on it.
- [7] Scrap Hunter says it paid the "alleged debt" by delivering a document entitled "promissory note" to the Bank on 16 May 2019. The Bank denies that document constituted payment and that it has received payment of the outstanding debt. The Bank says the debt remains outstanding.
- [8] Proceedings were commenced on 30 August 2019 claiming \$329,869.55 as the debt outstanding plus interest at the rate provide for in the loan agreement and recovery of possession of the secured property.
- [9] A strike out/indefinite adjournment application filed by Scrap Hunter on the basis that the debt had been paid in full by delivery of the "promissory note" was dismissed on 15 October 2019.

- [10] The pleadings are constituted by the Statement of Claim filed on 30 August 2019, Amended Defence filed 31 October 2019, Amended Reply filed 14 November 2019 and defendant's "Answer" filed 31 October 2019.

Issues for determination

- [11] The Bank submits, based on the pleadings, the issues for determination are:
- a) Whether the Bank advanced the sum of \$319,200 to Scrap Hunter pursuant to the loan agreement; and
 - b) Whether Scrap Hunter has paid the debt (such that there has been no default or any default has been remedied) and whether the debt remains outstanding.

Loan documents

- [12] Clause 1.1 of the mortgage sets out the purpose for the mortgage:¹

For the purposes of securing to *us* the payment of the *amount owing*, *you* mortgage to *us* all *your* estate and interest in the land described in this mortgage, together with each fixture, structure or improvement on it or fixed to it.

- [13] Clause 1.2 states Scrap Hunter acknowledges the mortgage was given for valuable consideration from the Bank:

You acknowledge giving this mortgage and incurring obligations under it for valuable consideration received from *us*.

- [14] Clause 9.1 sets out the agreement covered by the mortgage and the amount owing:

Agreement covered by this mortgage means:

- An agreement, contract or other arrangement (*including* a deed) under which one or more of *you* incurs or owes obligations to *us* or under which *we* have right against *you*, *including* any such agreement, contract or arrangement which all of *you* acknowledge in writing to be an agreement covered by this mortgage; and
- Each variation of the agreement covered by this mortgage.

Without limiting this definition, it includes an agreement, contract or other arrangement (*including* a deed) which is assigned to *us* and any agreement, contract or arrangement which *you* acknowledged to another *person* to be an agreement covered by this mortgage before the agreement, contract or arrangement was assigned to *us*.

¹ Exhibit 2

- [15] Clause 8.9 states the certificate of indebtedness given by the Bank is sufficient evidence of the amount owing unless proved to be incorrect:²

We may give you a certificate about a matter or about an amount payable in connection with this mortgage. The certificate is sufficient evidence of the matter or amount, unless it is proved to be incorrect.

- [16] Clause 6.1 sets out what is an event of default. This includes a failure to pay on time:

You are in default if:

(a) *you do not pay the amount owing on time;*

...

- [17] Clauses 6.3 and 6.4 specify what happens in the event of default and the giving of a notice of default:

If you are in default and we decide to enforce this mortgage, we must give you a notice stating that you are in default. (You must have been in default for one day or more before we may do this).

If you do not correct the default within any period given in the notice then, at the end of that period and without further notice to you the amount owing becomes immediately due for payment (to the extent it is not already due for payment). In addition, we may do one or more of the following as well as anything else the law allows us to do as mortgagee:

(a) *sue you for the amount owing;*

(b) *take possession of the property;*

(c) *do anything an owner or receiver of the property could do, including improving, selling or leasing it;*

(d) *appoint a receiver to do any of these things and anything else the law allows a receiver to do, including under 6.5.*

- [18] Clause 6.6 provides the Bank is entitled to its reasonable enforcement expenses where there has been a default:

When we ask, you must pay us the reasonable expenses we reasonably incur in enforcing this mortgage after you are in default (including in preserving and maintaining the property – such as by paying insurance, rates and taxes for the property). This applies to expenses we incur before or after taking action under 6.4

- [19] Section A of the loan agreement states customer 'SCRAP HUNTER AUSTRALIA PTY LTD ACN 143 668 240 ATF THE SJM TRUST' with account number

² Exhibit 8.

0041313743YX01/FX01 has a credit amount of \$319,200.³ It further provides how repayments are to be made, with reference to a *payment period*, defined in the dictionary section to be monthly.⁴

[20] Section B of the loan agreement sets out the purpose of the loan as land purchase. A special term and condition of the loan agreement is a copy of the fully executed purchase contract for 90 Henderson Street, Logan Reserve, Qld, 4133 be provided to the Bank. This contract was tendered at the trial.⁵

[21] Section C of the loan agreement provides the customer accepts the offer as set out and has been given to keep and read a copy of the loan agreement before signing the acceptance. The former director of the defendant signed the loan agreement on 16 February 2015.⁶

[22] Section D sets out the terms of the loan agreement. Part 1.1 states the Bank agrees to lend the amount of credit referred to in Section A. Part 4 governs how repayments are to be made. Part 7 stipulates the fees and charge payable by the customer to the Bank. Relevantly, pt 7.1(c) states all reasonable enforcement expenses of the Bank. Part 9.1 governs default, being relevantly under pt 9.1(a) a failure to pay on time all amount due under the contract. Parts 9.3 and 9.4 provide the Bank a contractual right to make the total amount of the loan owing immediately due and payable on default after they have given the customer a default notice that hasn't been remedied:

If *you* are in default

- a) *we* may give *you* a default notice; and
- b) *you* must correct the default within the period allowed by the notice.

If *you* do not correct the default within that period *we* may:

- a) make the *total amount owing* immediately due and payable; and
- b) end this *contract* and apply any credit *offset balance* towards reducing the *total amount owing*; and
- c) sue *you* for that amount or enforce any *security* or do both.

³ Exhibit 1

⁴ Exhibit 1, p 18.

⁵ Exhibit 4.

⁶ Exhibit 1, p 8.

- [23] Part 9.7 states the customer must pay interest on an amount owing under the contract as a separate obligation which is not affected by a court order. Part 9.8 states a late charge fee may be charged when all or part of a payment is overdue.
- [24] Part 12.2 provides the Bank may give the customer a certificate about a matter or about an amount payable in connection with the loan agreement. The certificate is sufficient evidence of the matter or amount, unless it is proved to be incorrect.

Default

- [25] Scrap Hunter's loan account went into arrears from January 2019.
- [26] By letter dated 29 April 2019, the Bank notified Scrap Hunter its loan account was in arrears in the sum of \$4,569.34. By letter dated 17 May 2019, the Bank notified Scrap Hunter the arrears was now \$6,070.99. The Bank transferred \$1,000.09 to the loan account from another account.
- [27] A default notice was served on Scrap Hunter noting arrears of \$5,488.90 on 20 May 2019. The notice required Scrap Hunter to "*rectify the default by paying the Total Amount Owing [specified in the notice] ... no later than 31 days from the date of [the default notice].*" That did not occur. I note the default notice is dated 2018. I accept the Bank's submission that this does not invalidate the Default Notice because "the default amount owing in May 2019 was correctly identified and the Default Notice reasonably conveyed to Scrap Hunter that it was in default and the Bank required it to rectify that default (with the loan account statements at the end of May 2019 also identified the overdue payment)."
- [28] Scrap Hunter deny the arrears or default but rather allege it paid the outstanding debt by delivery of a 'promissory note' on 16 May 2019. In its Amended Defence, Scrap Hunter pleaded at paragraph 7:
- a. Payment for the full alleged outstanding balance of the alleged debt was delivered on 16th may 2019 to the office of the Plaintiff, and
 - b. The alleged debt was discharged in full, and
 - c. The form of the payment complied/complies with Federal Law, and
 - d. No further monthly payment were required.
- [29] At paragraph 9, titled particulars, it is pleaded:

- a. The Plaintiff and its legal representatives are cognisant payment was already made in full and final satisfaction of the alleged debt, and
- b. The form of payment complied with the highest Federal laws of the Commonwealth of Australia, and
- c. Promissory Notes are included within various Federal Acts as “money” and as “Australian currency”.⁷

The Promissory note

- [30] According to the text of the promissory note, the defendant offered to pay the Bank:

The Sum of Three Hundred and Fifty Thousand Dollars
Australian only redeemable at

917 Kingston Road, Waterford West

Queensland

At **9:05** hours without; let, delay, hindrance or ado, on

The **twenty seventh** day of **May AD 2019**

- [31] The promissory note was delivered to the Bank. Acknowledgement of delivery was obtained from Ms Julie Hayes, a bank employee. The note states it is for \$350,000.00 and is a “Promissory Note for settlement of ... Homelend Home loan Account 0041313743 YXOI”. The plaintiff submits there is no evidence of the Bank ever having accepted the note as payment of or in discharge of the debt. The mortgage specifically provides for payment by way of transfer of funds to an offset account, which has not occurred. It is further submitted there is no term of the loan permitting payment by way of a “promissory note” or requiring the Bank to accept such a document as payment.

- [32] In respect of the decision of *Bayly v Westpac Banking Corporation* [2020] QCA 148, the following exchange occurred:⁸

HIS HONOUR: But weren't you involved in this matter of Bayly?

MR ANDREWS: Of?

HIS HONOUR: Bayly.

MR ANDREWS: Bayly.

HIS HONOUR: Dallas Henry Bayly.

MR ANDREWS: Yes, that's right. Correct.

⁷ *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 413

⁸ Trial transcript at 1-35.

- HIS HONOUR: Weren't you given leave by the Court of Appeal to appear in that matter?
- MR ANDREWS: Yes, correct.
- HIS HONOUR: And you understand as – what was your relationship to Bayly?
- MR ANDREWS: Only as an agent for him.
- HIS HONOUR: I see. But you're an employee of this company?
- MR ANDREWS: He approached - - -
- MR MUNRO: Yes, your Honour.
- MR ANDREWS: Yes, with Scrap, aren't I?
- HIS HONOUR: So you're aware of the outcome of Bayly.
- MR ANDREWS: Well, there – the – there has been a decision, but that decision is underway for an appeal. There were some very gross errors in the judgment. In fact, when we saw the reasons for it, there are claims made there of what statements were made and they were not made. So they're points of appeal, and I guess there's an anticipation that maybe the judgment may be overturned on the basis – on several bases, but certainly some errors in law pertaining to - - -
- HIS HONOUR: But you're not a lawyer.
- MR ANDREWS: I've not claimed to be.
- HIS HONOUR: No.
- MR ANDREWS: But the – one of the issues - - -
- HIS HONOUR: So, I mean, on what basis do you say that? Have you got some legal advice about that or has Mr Bayly got some legal advice?
- MR ANDREWS: Well, I have what is some case law. I also have a number of legal dictionaries which give very precise definitions, and yet those definitions were ignored by the judge that prevailed over that proceeding, so - - -
- HIS HONOUR: But you're aware that there's reference there to other decisions of other courts and other judges

on exactly the same point, both federally and state.

[33] There are numerous decisions about the validity of Promissory notes in this context. I note in particular *Walsh v Toyota Finance Australia Limited* in which Smith DCJA discusses the point at paragraph [41] to [50],⁹ *AMP Bank Limited v Eckhardt* where Jarro DCJ discusses the issue in paragraphs [41] to [43],¹⁰ and most notably, *Bayly v Westpac Banking Corporation* where in the Court of Appeal Bradley J deals with the issue at paragraph [27] and following.¹¹

[34] It should be noted Mr Andrews was granted leave to appear in that appeal.

[35] After quoting Lord Denning MR in *Fielding & Platt Ltd v Najjar* 1969 1 WLR 357 at 361B as to the effect of promissory notes, his Honour noted at paragraph [33], “The import of the passage is that a person who draws a promissory note must honour it when it is due; so there was little scope to defend a claim for the amount of the note. Mr Andrews seemed to think it meant Mr Bayly could write out his own promissory note and it would be “as good as cash” to settle any debt. He was quite wrong.”

[36] In dealing with the issue of acceptance his Honour noted in [35] and [36] that as there was no agreement to accept a promissory note, the Bank did not have to accept Mr Bayly’s promissory note as payment for the outstanding debt. It followed Mr Bayly could not discharge his debt to the Bank by delivering the promissory note to the Bank’s Solicitors. He said, “Put simply, he could not affect his or Westpac’s existing legal rights by promising in writing he would pay Westpac at the local pub at 10.30 am on a Thursday.

[37] His Honour then went on to discuss a number of Commonwealth Acts at paragraph [43] and concluded at paragraph [44] and [45] that none of the provisions considered had any relevance to the matters in issue between the parties. “None makes a promissory note ‘money’ for any broader purpose. Mr Bayly had no real

⁹ *Walsh v Toyota Finance Australia Limited ABN 48002435181 Trading as Toyota Financial Services* [2016] QDC 92.

¹⁰ *AMP Bank Limited v Eckhardt* [2018] QDC 92.

¹¹ *Bayly v Westpac Banking Corporation* [2020] QCA 148.

prospect of succeeding in his defence based on the contention that his debt to Westpac had been extinguished as a result of the delivery of the promissory note.”¹²

Trial

[38] Counsel appeared for the Bank. Mr Munro, sole director and shareholder of Scrap Hunter appeared. When called upon he responded:

[y]es, your Honour. I answer to that name, sir, out of necessity. I reserve my rights at all times and waive all benefits and privileges. I’m only here under duress and threat of menace because my estate is under threat and siege by the plaintiff when it has no cause of action in these proceedings.

[39] The plaintiff tendered a copy of the loan contract (exhibit 1) and its terms are admitted by the defendant. A copy of the mortgage and its terms were tendered (exhibit 2), which was admitted in the Amended Defence. The default notice was tendered (exhibit 3), which the defendant admitted in its response to the notice to admit.

[40] The Bank submitted:¹³

[y]our Honour, the facts that are not in dispute on the basis of the pleadings and the response to that notice to admit are that Scrap Hunter is the registered owner of the property; the bank and Scrap Hunter entered into the loan agreement; that there’s a mortgage over the property that secures the amount owing under it, and that the bank served a default notice. The facts and issues that are in dispute are whether the bank advanced the sum of \$319,200. The bank will say this occurred and is evidenced in loan account statements. The second issue is whether Scrap Hunter has defaulted and whether it has paid the outstanding debt. The bank says there is an outstanding debt and it hasn’t been paid. The defendant’s position is that on the 16th of May 2019, it delivered a document to the bank called the promissory note and it says that that – delivery of that document discharged the debt. That is something that remains in dispute.

Ms Fletcher

[41] The plaintiff called Ms Chantelle Fletcher, team manager of mortgage health, a part of the Bank dealing with defaults. Ms Fletcher gave evidence by telephone. Through Ms Fletcher a copy of the contract to purchase the property, the subject of

¹² *Bayly v Westpac Banking Corporation* [2020] QCA 148 at [44]-[45].

¹³ Trial transcript at 1-8, ll 20-31.

the mortgage, was tendered (exhibit 4). Ms Fletcher confirmed a letter was sent to the defendant advising the “account holders account was in arrears” (exhibit 5). She was asked:¹⁴

Q: And why would this sort of document be sent?

A: If a – if a loan has a payment that hasn’t been made, we’re obliged to let a customer know that – that the account has accrued arrears and request payment of those and any potential consequences of non-payment.

[42] A further letter was tendered advising the defendant’s account was in arrears in the amount of \$6,070.99 and that \$1,000.09 had been transferred from the defendant’s offset account which was the total balance amount in that account at the time (Exhibit 6). Ms Fletcher produced a bundle of bank statements (exhibit 7) showing the initial advance of \$319,200.00 in March of 2015. Statement 47 shows an overdue amount of \$2,064.68 and statement 51 an overdue amount of \$5,070.90. Ms Fletcher confirmed a letter dated 22 July 2020 was sent showing the loan balance of \$378,581.34 and loan arrears of \$59,381.34 (exhibit 8).

[43] Mr Munro was invited to cross-examine the witness. He asked Mr Andrews be allowed to conduct the cross-examination. The following exchange occurred:¹⁵

HIS HONOUR: Mr Munro, when you’re ready.

MR MUNRO: Your Honour, I’m wondering if there’s any objection to Mr Mark Andrews continuing here. He is the – has my power of attorney for these proceedings and is also the proper officer, as designated by us in the addressing of Adelaide Bank and Bendigo Bank.

HIS HONOUR: Ms O’Brien, what do you say?

MS O'BRIEN: Your Honour, my understanding is Mr Andrews is not a legal representative, and that would be my only concern in him appearing for Mr Munro – sorry, Scrap Hunter, the defendant.

HIS HONOUR: Yes.

MS O'BRIEN: But if your Honour doesn’t object to the course, I can’t oppose it, I’m sorry.

¹⁴ Trial transcript at 1-12, ll 30-33.

¹⁵ Trial transcript at 1-17.

- HIS HONOUR: What is he, your power of attorney?
- MR MUNRO: Sorry?
- HIS HONOUR: He's got a power of attorney from you.
- MR MUNRO: Mr Andrews has a power of attorney for myself.
- HIS HONOUR: And what else did you say - - -
- MR MUNRO: And he's – sorry?
- HIS HONOUR: And what else did you say he's got?
- MR MUNRO: And he's the proper officer for Scrap Hunter Australia.
- HIS HONOUR: I see. What's "proper officer"?
- MR MUNRO: He's the person designated to operate for the company in these proceedings, and he's also the general administration manager for us.
- HIS HONOUR: He's employed by the defendant.
- MR MUNRO: Yes, your Honour.
- HIS HONOUR: Actually employed and paid.
- MR MUNRO: Yes, your Honour.
- HIS HONOUR: I see. Well, I suppose – yes. Okay. All right. I'll allow it.

[44] Mr Andrews asked if the witness had access to the "original, completed and signed loan agreement?" The witness replied "[t]he application or the contract?" Mr Andrews clarified he meant the application. Ms Fletcher advised she access to an electronic copy of the original documents. Mr Andrews stated that an electronic copy was not the original but a copy. Counsel for the plaintiff objected to the question on the basis the loan agreement was admitted on the pleadings. Mr Andrews said when asked what his point was:¹⁶

Point is that the plaintiff is making the claim that they have a valid cause of action, and for someone to be having a valid claim, they must be in possession of the thing or res, the property, that is the substance of the claim, being the original, completed, signed loan application. So Mr Munro has sought that document, amongst other particulars, for nearly two years now, and he has not had the

¹⁶ Trial transcript at 1-19, ll 17-22.

opportunity to examine it, and he seeks that evidence in order to proceed.

[45] The objection was allowed and Mr Andrews was asked to move on; however, Mr Andrews persisted in asking only questions about the loan application, which had already been ruled on. Eventually, the following exchange occurred:¹⁷

MR ANDREWS: Well, in that case, I'm instructed that the defendant can't proceed because the defendant cannot be part of a conspiracy to pervert justice. The defendant will not be part of a fraud. So - - -

HIS HONOUR: All right, Mr Andrews. Are you going to ask any questions of Ms Fletcher or not? This is your opportunity. The trial is proceeding. Your - I've ruled on your - on the objection that's been made to your asking the questions about the loan application. Move on. What else do you want to ask Ms Fletcher?

MR ANDREWS: I have no further questions to ask Ms Fletcher on the basis that we're not getting the answers necessary to identify whether the plaintiff, in fact, has standing and status to proceed with this claim.

HIS HONOUR: Well, I've made an order about - I've already made a ruling on that. The ruling is that the loan agreement and the mortgage give the bank standing.

[46] Mr Andrews continued to cross-examine Ms Fletcher. He asked if she was aware the director for the defendant delivered a promissory note in full and final satisfaction of the alleged debt to the plaintiff. She replied she was aware of a promissory note being submitted.

[47] In re-examination, Ms Fletcher was asked if she was aware of what the Bank had done with the promissory note. Ms Fletcher replied, "We have a copy of it, but it hasn't satisfied the debt".

Ms Hayes

¹⁷ Trial transcript at 1-24.

[48] The plaintiff called Ms Julie Marie Hayes who confirmed she had received a bundle of documents (being the promissory note documents). She said they were first given to “Tahni” a customer services officer and she had then received them at the counter. She was confused as to what they were or what to do with them but eventually signed the receipt she was requested to sign. When asked what she understood she was signing for, she said “That I had receipted these documents”.¹⁸

[49] Mr Andrews then sought leave to subpoena the Chief Financial Officer of the Bank. I ruled against this as the reason advanced by Mr Andrews for the request was to ask that representative about the promissory note. He asked Ms Hayes:¹⁹

Q: And, with respect, are you familiar with promissory notes?

A: No, I’ve never seen one before.

Q: Okay. Thank you. Are you familiar with the six federal Acts that disclose that promissory notes are a form of money and Australian currency?

A: No, I’m not.

Ms Griffin-Breen

[50] The plaintiff called Sarah Griffin-Breen, a solicitor employed by the legal firm acting for the plaintiff, who affirmed her affidavit sworn 16 July 2020 (exhibit 9). Ms Griffin-Breen was cross-examined about her “firsthand knowledge of the particulars or the matters in the proceeding”. She replied, “I was the solicitor with carriage of the matter at some stage in the past, but at the moment I don’t have personal firsthand knowledge, no.”

[51] I offered to allow the representatives of the defendant some time to review the affidavit to ensure they had an opportunity to ask all the questions they wished. They declined. The plaintiff closed its case.

[52] A lengthy conversation then took place about the Bank’s unwillingness to enter into negotiations with the defendant about the debt. This conversation came to an end as follows:²⁰

¹⁸ Trial transcript at 1-26, l 41.

¹⁹ Trial transcript at 1-28, ll 1-5.

²⁰ Trial transcript at 1-36.

HIS HONOUR: Anyway, I'm not going to debate that with you. The first point is this: is there any evidence which Mr Munro proposes to adduce on his own behalf in defence of these proceedings? So is he going to give evidence or is there anything that he wants to produce to the court or – as evidence or?

MR ANDREWS: Well, by reason of your earlier order, it's denied Mr Munro equitable remedy to actually proceed. The only issue he has left now is the promissory note issue, which – it certainly can be agitated, but if your Honour is predisposed to the decision a fortnight ago, then I think that it's mute until the appeal is heard. So - - -

HIS HONOUR: Well, it's not mute. I'm bound by that decision. It's a decision of the Court of Appeal of this state, so I'm bound by it, but – to the extent that it applies to the circumstances of this case. So is there anything else then that Mr Munro wants to rely on?

MR ANDREWS: Well, the discussion outside was that by reason that the plaintiff hasn't been directed to provide evidence of its status and standing or provide the source of its claim to have made a loan or an advance, the defendant, or the director on behalf of the defendant, makes it – states now that he elects to withdraw energy from the proceedings and he doesn't consent to these proceedings on those bases, and, therefore, denies the court commercial energy to proceed.

HIS HONOUR: I see. Okay.

[53] Some further discussion took place after which Mr Munro and Mr Andrews withdrew from the bar table to the public gallery of the court and took no further part in the trial. I note the following:²¹

HIS HONOUR: Yes. All right. Look, I mean, I can't stop you from going, if you want to go, but all I can say is this, that the matter will be determined by me based on the evidence that's been provided. You've chosen not to produce any other evidence. I note the promissory note that's been referred to in evidence, and I'll deal with that in due course. But in relation to withdrawing energy from the court, I don't know what that means. I'm here to hear and determine the matter and it must be a matter entirely for yourself - - -

²¹ Trial transcript at 1-38, ll 15-30.

MR MUNRO: Yep.

HIS HONOUR: - - - to withdraw, if that's what you propose to do.

MR MUNRO: We will, your Honour. The promissory note was provided. It wasn't returned. Well, nobody knows where it is, whether it was securitised, whether it wasn't. You know, we can't get any information from the bank, as Mr Andrews said.

[54] Ms O'Brien then proceeded to sum up the plaintiff's case.

Discussion and decision

[55] I am satisfied on the evidence the defendant applied for a loan of \$319,200.00 from the plaintiff in order to purchase a property at 90 Henderson Road, Logan Reserve.

[56] The Bank loaned the defendant the money on the terms set out in the loan agreement and the mortgage. The loan monies were used to purchase the property.

[57] The terms of the loan agreement and the mortgage are set out above and required the defendant to pay back the loan in the ways set out above.

[58] The defendant defaulted under the terms of the terms of the loan and has failed to pay either the arrears or the loan in full.

[59] The defendant purported to pay the debt by delivery of a promissory note referred to above. As noted this is not a lawful method of repaying the loan and the debt remains outstanding.

[60] The Bank has complied in every respect with its obligations under the loan agreement and the mortgage and the law in respect of the providing the defendant with notice of default and has had to resort to litigation to enforce its rights.

[61] In the circumstances I am satisfied that the Bank is entitled to judgement against the defendant in the sum of \$378,581.34 together with interest from 22 July 2020 to the date of payment at the rate of 5.61% per annum.²²

[62] Recovery as against the Defendant, possession of the land described as Lot 12 on Registered Plan 837232, and being the whole of the land contained in title reference

²² See exhibit 8 which details a Loan balance of \$378,581.34 and Loan arrears of \$59,381.34

18162062, and known as 90 Henderson Road (or Street), Logan Reserve QLD 4133.

[63] Having regard to the express terms of the mortgage as to costs, the Plaintiff is entitled to its costs of the proceeding on the indemnity basis.

Letter from defendant post-hearing

[64] For completeness, I note a letter dated 23 July 2020 addressed to me from the defendant states in part, after berating me for my conduct throughout:²³

1. I expressed during the course of the proceedings:
 - a. I had *only* attended the proceedings *under duress and threats of menace* by reason my estate was under threat and siege by the Bank and
 - b. I did no consent to the proceedings and had with drawn (sic) my energy from the proceedings, and
 - c. I did not consent to participate in the proceedings.

[65] The letter also noted:²⁴

5. You erred in believing you had “in rem,” and “in personam” jurisdiction to proceed to judgment when clearly you most certainly did not, *by reason that I had already orally expressed during the trial proceedings that I did not consent to the trial proceedings and had with drawn (sic) my energy from same, thereby denying you commercial energy to proceed;*

6. It follows your order – judgment is void ab initio;

7. Your void judgement will go to review or appeal.

[66] Nothing turns on the contents of this letter. It is noted simply because it was sent to the court after trial. It is marked as an exhibit.²⁵ It is not necessary to seek any further submissions from the plaintiff as to its contents.

[67] Accordingly I make the following orders:

1. The defendant pay to the plaintiff the amount of \$378,581.34 (Judgment Amount).

²³ Exhibit 12, p 1.

²⁴ Exhibit 12, p 2.

²⁵ Exhibit 12.

2. The defendant pay interest on the Judgment Amount from 22 July 2020 to the date of payment at the rate of 5.61% per annum.
3. The plaintiff recover, as against the defendant, possession of the land described as Lot 12 on Registered Plan 837232, and being the whole of the land contained in title reference 18162062, and known as 90 Henderson Road (or Street), Logan Reserve QLD 4133.
4. The defendant pay the plaintiff's costs of the proceeding on the indemnity basis, to be assessed if not agreed.