

# SUPREME COURT OF QUEENSLAND

CITATION: *RHG Mortgage Corporation Ltd v Sava* [2011] QSC 372

PARTIES: **RHG MORTGAGE CORPORATION LTD**  
(applicant)  
v  
**TREVOR COLIN SAVA**  
(respondent)

FILE NO/S: SC No 8983 of 2010

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Delivered ex tempore 8 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 8 November 2011

JUDGE: Atkinson J

ORDERS: 

- 1. The Defendant's application filed 29 September 2011 is dismissed.**
- 2. The Defendant's counter-claim is struck out.**
- 3. The Defendant pay to the Plaintiff the amount of \$293,483.77 including \$29,426.88 interest to today.**
- 4. The Plaintiff recover possession of the land described as Lot 2 on Building Unit Plain 4648, situated in the County of Canning, Parish of Mooloolah, being the whole of the land contained in Title Reference Number 16232226.**
- 5. Without prejudice to the Plaintiff's entitlements pursuant to the loan and mortgage, the Defendant pay the Plaintiff's costs of the proceedings, including the costs of this application.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the applicant sought summary judgment for a debt owing under a loan agreement and mortgage pursuant to section 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the respondent contended there should have been a change to his obligations under the mortgage on the grounds of hardship – whether summary judgment for the applicant should be ordered

*National Consumer Credit Protection Act 2009 (Cth),  
Schedule 1 s 72*

*Property Law Act 1974 (Qld), s 84*

*Uniform Civil Procedure Rules 1999 (Qld), s 292*

*Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R  
232, cited*

COUNSEL:

D J Kelly for the applicant

The respondent appeared on his own behalf

SOLICITORS:

Thynne & MacCartney for the applicant

The respondent appeared on his own behalf

HER HONOUR: The plaintiff, RHG Mortgage Corporation Ltd ("RHG"), filed an application for summary judgment pursuant to rule 292 of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR").

Rule 292 of the UCPR provides that a plaintiff may at any time after a defendant files a notice of intention to defend, apply to the Court for judgment against the defendant. If the Court is satisfied that the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim, and there is no need for a trial of the claim or the part of the claim, the Court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order as the Court deems appropriate.

The law in this area is well established and is set out particularly in the judgment of *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, where Williams JA held, "the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or ... they direct the Court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

The basis on which the plaintiff makes its claim for summary judgment is a claim, which was filed on 23 August 2010, for a debt owing pursuant to a loan agreement and a mortgage. The defendant is the registered proprietor of land the subject of

that mortgage. The land is described as Lot 2, on Building Unit Plan 4648 located at 2/6 Allambie Court, Buddina, in the State of Queensland, hereinafter referred to as "the land".

On 19 July 2005, the plaintiff entered into a loan agreement with the defendant. That agreement was varied on 29 June 2007. In the 29 June agreement, the plaintiff agreed to advance to the defendant \$250,052.66 by way of loan secured by a mortgage over the land.

The loan document and the mortgage are exhibited to an affidavit filed on behalf of the plaintiff.

The title search shows, as I have said, that there is a registered mortgage executed over the land in question.

A loan account exhibited to an affidavit filed on behalf of the plaintiff shows the advance of the money into the defendant's account. It also shows the repayments which have been made by the defendant. There is no suggestion that that running account is inaccurate.

The loan agreement required the defendant to make monthly payments into the account which he did for some period of time. The first default on the loan which the plaintiff refers to occurred in January 2009. The default continued for some months until on 4 August 2009 a lump sum was paid into the account by the defendant, apparently using superannuation money, which meant that the loan was not thereupon in default.

Thereafter, payments were made until October 2009, when the account was again in default, and then a lump sum was paid in December 2009.

However, the account went into default again in January 2010 and apart from a payment made on 4 February 2010, the loan account has been in default, and of course the debt, as a result, has continued to grow month by month.

On 16 June 2010, a default notice was issued to the defendant and sent to his address by ordinary mail, as is provided for in the mortgage documents. As the plaintiff submitted, the notice complied with s 84 of the *Property Law Act 1974 (Qld)*, and also with the Consumer Credit Code. The defendant failed to pay the amount in arrears, and as I have already said, remains in default.

An affidavit by the solicitors acting for the plaintiff brings the default amount up to date, to 31 October 2011, showing that the amount owed is now \$313,238.42.

Because of the failure to pay the amount set out in the default notice, pursuant to clause 19.3 of the mortgage, the entire amount became due and owing. As the plaintiff submitted, it is entitled to possession of the land under the mortgage. The defendant is in possession of the property. The plaintiff submits that it is entitled to judgment, having regard to the requirements of the loan and the mortgage for the amount owing under the loan and recovery of possession.

The defendant has filed a defence, and subsequent to that, an application to be granted leave to withdraw admissions in the defence and an amended defence and counter claim. There is, however, nothing in those proposed defences or counter claim which in any way alleviates the debt owed by the defendant under the loan agreement and the mortgage.

The defendant's submissions have been primarily concerned with whether or not there should have been a change to his obligations under the mortgage on the grounds of hardship. The relevant grounds are found in the *National Consumer Credit Protection Act 2009* (Cth), Schedule 1, commencing at section 72.

The general principle is set out in sub-section 1 of that section. It provides that a debtor who is unable reasonably because of illness, unemployment, or other reasonable cause, to meet the debtor's obligations under a credit contract, and who reasonably expects to be able to discharge the debtor's obligations if the terms of the contract are changed in the manner set out in sub-section 2, may apply to the credit provider for such a change.

Sub-section 2 sets out three alternative methods. It provides that an application by a debtor must seek to change the terms of the contract in one of those ways.

In spite of the material put before me by Mr Sava, I have not

been able to find any evidence of a complying application having been made, nor is there any evidence that if such an application were made and granted, that there is any reasonable expectation that Mr Sava would be able to discharge his obligations if the terms of the contract were changed in any of the manners set out in section 72(2).

Because there has not been any complying application, the obligations which inhere in the credit provider under section 72 (3) have not arisen. This matter came to Court on a previous occasion and it appears that the Judge hearing it adjourned it to allow Mr Sava, the defendant, to obtain legal advice with regard to making a complying application for hardship to the mortgagee/plaintiff or to the Court under section 74.

I am informed that the Judge requested the solicitors for the plaintiff to write to the respondent telling him the material that it would be necessary for him to provide in order to make such an application. The respondent expressed suspicion about providing that material to the plaintiff, and while providing some material, has nevertheless not provided the applicant with a complying application.

Of course there is no duty on the credit provider to tell the debtor what material he needs to provide, but on this occasion, the credit provider has done so. There not having been any proper application made to the credit provider, there is no occasion for the Court to consider any application made.

And in any event, if that were the case, there is nothing that suggests that any such application would be successful.

Accordingly, I propose to grant the relief sought by the plaintiff in its application.

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I make the order as per draft which I will initial and place with the file.

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