

# SUPREME COURT OF QUEENSLAND

CITATION: *Pepper Finance Corporation Limited v Edwards & Anor*  
[2018] QSC 152

PARTIES: **PEPPER FINANCE CORPORATION LIMITED**  
**ACN 094 317 647**  
(plaintiff)  
v  
**DAVID ROGER EDWARDS and WANDA MARGARET EDWARDS in their own capacity and as Trustee under Instrument 710233115**  
(defendants)

FILE NO: BS12261 of 2009

DIVISION: Trial Division

PROCEEDING: Application to set aside default judgment

DELIVERED ON: 6 July 2018

DELIVERED AT: Brisbane

HEARING DATE: 24 May 2018

JUDGE: Mullins J

ORDER: **1. The application filed on 15 December 2017 is dismissed.**

**2. Leave granted to the plaintiff pursuant to r 894(1) of the *Uniform Civil Procedure Rules 1999* to start enforcement proceedings to enforce the default judgment against the defendants.**

**3. The question of costs is adjourned to a date to be fixed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – DEFAULT JUDGMENT – SETTING ASIDE – GENERALLY – where mortgagee obtained default judgment for recovery of possession of the mortgaged property against the defendants – where seven years later the female defendant applied to set aside the default judgment – where the female defendant alleged that she relied on her husband in relation to borrowing from the plaintiff and using part of the funds for a development project – whether the plaintiff disclosed facts that gave rise to a defence of unconscionability against the mortgagee – where the mortgagee’s solicitors amended documents lodged for registration with the male defendant’s concurrence asserted to be on behalf of both defendants – whether the defendant has an arguable or prima facie defence

on the merits

*Land Title Act* 1994 (Qld), s 11A, s 76, s 78, s 110  
*Uniform Civil Procedure Rules* 1999 (Qld), r 72, r 290, r 894

*National Mutual Life Association of Australasia Limited v Oasis Developments Pty Ltd* [1983] 2 Qd R 441, considered  
*Yerkey v Jones* (1939) 63 CLR 649; [1939] HCA 3, considered

COUNSEL: S Cooper for the plaintiff  
 A M West for the defendant David Roger Edwards  
 L G Smits (*Sol*) for the defendant Wanda Margaret Edwards

SOLICITORS: Kemp Strang Lawyers for the plaintiff  
 Bradley Munt & Co for the defendant David Roger Edwards  
 Leonardus Smits Lawyer for the defendant Wanda Margaret Edwards

- [1] The defendant Mrs Edwards applies pursuant to r 290 of the *Uniform Civil Procedure Rules* 1999 (Qld) to set aside the default judgment that was regularly entered against her by a Deputy Registrar on 21 October 2010. The plaintiff opposes the application and applies for leave to commence enforcement proceedings to enforce the judgment. The default judgment was entered against both defendants for recovery of possession of specified real property situated at Fig Tree Pocket which is the home of the defendants and remains occupied by them. If necessary, the plaintiff also applies for leave to proceed against Mr Edwards pursuant to r 72 of the *UCPR*.

### **Nature of the claim**

- [2] By an agreement dated in November 2006, the plaintiff agreed to advance a loan of \$937,000 to the defendants in their own capacity and as trustee of The Edwards Family Trust that was secured by a registered mortgage over the Fig Tree Pocket property. They defaulted under the agreement and the registered mortgage number 710233121 in or around June 2009 and this proceeding was commenced on 3 November 2009 seeking recovery of possession of the property. The basis for the claim for possession was entitlement to possession upon the defendants' being in default under the mortgage and failing to comply with the notice of default in reliance on the provisions of the mortgage or pursuant to s 78 of the *Land Title Act* 1994 (Qld). No defence was filed by the defendants before the default judgment for recovery of possession of the Fig Tree Pocket property was entered. Although the plaintiff obtained enforcement warrants for possession of the property on two occasions, the judgment has not been enforced and the defendants remain in possession of the property.

### **Events after the default judgment**

- [3] Mr Edwards who is a lawyer became bankrupt on 29 August 2013 and his bankruptcy has been extended to 11 September 2021. The trustees in bankruptcy lodged caveat

number 715301237 on 9 September 2013 against Mr Edwards' interest in the subject property.

- [4] The first application to set aside the default judgment that was filed on 16 March 2017 was made on behalf of both defendants. That application was withdrawn by the defendants with the consent of the plaintiff when Mr Edwards' trustees in bankruptcy refused to continue with the application. On 19 September 2017 a further application was filed on behalf of Mrs Edwards to set aside the judgment and to seek a declaration that the mortgage granted by the defendants did not support repayments of any loans made by the plaintiff to the defendants. That application was amended on 15 December 2017 by which Mrs Edwards sought additional orders for the conduct of a mediation or case appraisal and for relief on a variety of bases, including unconscionable dealing or misleading and deceptive conduct or on the basis of the authority of *Yerkey v Jones* (1939) 63 CLR 649. These claims for additional relief in the application are misconceived. First, Mrs Edwards has to overcome the hurdle of setting aside the default judgment and, if she does, she can then seek to amend her defence to claim these additional forms of relief. It was premature to include final relief in the same application that seeks the setting aside of the default judgment.

#### **What has to be shown to set aside the default judgment?**

- [5] The factors that are usually addressed on an application to set aside a default judgment that was regularly entered include whether there is an explanation for the defendant's delay in defending the claim and whether the defendant has an arguable or prima facie defence on the merits, but it is the latter factor that is described as the most "cogent": *National Mutual Life Association of Australasia Limited v Oasis Developments Pty Ltd* [1983] 2 Qd R 441, 449-450.

#### **Explanation for the delay**

- [6] During the hearing of the application, I made a finding that Mrs Edwards had been served personally with the claim and statement of claim on 14 November 2009, despite her denial that she had received those documents from the process server. I accept her evidence, however, that she was in the habit of passing any legal documents she received onto her husband for his advice.
- [7] Mrs Edwards said she first became aware of this proceeding early in 2017 when she said she was informed by Mr Edwards that:

“We have a dispute with Pepper because of the irregularity of our Mortgage repayments. I believe the interest rate being charged by Pepper is excessive. The dispute is a legal one. I will deal with it.”

- [8] It appears from Mr Edwards' affidavit that he was aware that the plaintiff had obtained an order for possession against him and his wife, but he chose to conceal their difficulties from his wife because of her health problems. It is common ground that even after the judgment was obtained against the defendants, ad hoc repayments in respect of the debt were made on their behalf which forestalled the enforcement proceedings.

### **The making of the loan by the plaintiff**

- [9] Before analysing the proposed defence of Mrs Edwards, it is necessary to summarise the transactions that took place affecting the subject property at the time the plaintiff's loan was advanced.
- [10] The Fig Tree Pocket property was purchased by Mr and Mrs Edwards in 1998 from Mr and Mrs Finney. By transfer registered number 702864522 Mr and Mrs Finney transferred the fee simple to Mr and Mrs Edwards as joint tenants and Mr and Mrs Edwards as trustees as tenants in common in the shares of 51/100 and 49/100 respectively. It is apparent the intention was that Mr and Mrs Edwards in their own capacity as joint tenants would be the registered owners of a share of 51/100 of the estate in fee simple in the subject property and they as trustees would hold a 49/100 share in the property. The transfer document itself did not identify the trust on which Mr and Mrs Edwards held the 49/100 share in the property, but in accordance with Titles Office requirements at the time, reflecting the terms of s 110(3) of the *Land Title Act* 1994, a document specifying details of the trust, or the document creating the trust, would have been deposited with the instrument of transfer. Section 110(5) then provided for the registrar to keep a certified copy of the document and return the original to the person who deposited it.
- [11] According to Mr Edwards' affidavit, by 26 June 1998 he and Mrs Edwards were the trustees of The Edwards Investment Unit Trust (EIUT) and Mr Edwards asserts implicitly their intention was to hold the 49/100 share in the property as the trustees of the EIUT.
- [12] The EIUT was established by trust deed dated 1 November 1995 between Mr Edwards as the trustee and Mr and Mrs Edwards as the unitholders. Mrs Edwards subscribed to one unit as the trustee for The Edwards Superannuation Fund. Mr Edwards subscribed to one special unit. Clause 10.3 of the deed applied restrictions to the special units. The holders of special units would be entitled to receive an amount equivalent to 0.001 per cent of the trust fund in proportion to their holdings. The provisions of the deed relating to the equality of rights of unitholders and proportionate entitlement to the trust fund were expressly excluded in respect of special units or the holders of special units. That effectively gave Mrs Edwards as trustee for The Edwards Superannuation Fund the entitlement to the trust fund, apart from 0.001 per cent of the trust fund.
- [13] Mr Edwards had exhibited to his affidavit a copy of mortgage number 702864536 which was given by the defendants to the National Australia Bank Limited at the time they purchased the Fig Tree Pocket property. Mr Edwards asserts that the mortgage was given by he and Mrs Edwards for and on behalf of the registered owners, including themselves as trustees of the EIUT. The mortgage instrument does not identify on its face, as part of the description of the trustees, the trust of which the defendants were the trustees. Similarly, the defendants granted a mortgage over the Fig Tree Pocket property to the Commonwealth Bank of Australia in 2000 and although Mr Edwards asserts it was given by the defendants for themselves personally and as trustees of the EIUT, the mortgage merely recites that the mortgagors were Mr and Mrs Edwards and Mr and Mrs Edwards "as trustees under instrument 702864522" which refers to the trust that was notified to the Titles Office, when the transfer under dealing number

702864522 was lodged. Although Mr Edwards asserts that mortgage number 709124971 in favour of Heritage Building Society Limited was also given by the defendants for themselves personally and as trustees of the EIUT, the identification of the mortgagor in the mortgage does not extend to identifying the relevant trust, other than by reference to instrument 702864522.

- [14] At the time the loan was negotiated on behalf of the defendants with the plaintiff, they had granted existing mortgages over the Fig Tree Pocket property in favour of Heritage Building Society Limited that secured about \$630,000. Mr Edwards completed the loan application to the plaintiff with the assistance of a finance broker Mr Worth whom he says Mrs Edwards never met. Mr Edwards says that Mr Worth recommended that the loan purpose should be to refinance the Heritage Building Society mortgages, pay his tax debt (which was about \$80,000) and provide funds for “wealth creation”. The application to the plaintiff was signed by Mr and Mrs Edwards on 27 October 2006. Both the Fig Tree Pocket property and a property owned by the defendants in Moranbah were to be first mortgage security.
- [15] Mr Edwards had been referred to Mr Worth by clients whom Mr and Mrs Edwards proposed to join in a venture in purchasing land at Coppabella to construct an accommodation village for mine workers. That was the project for which the defendants sought additional funds for investment from the plaintiff.
- [16] Solicitors Cooper Grace Ward Lawyers acted on behalf of the plaintiff in respect of the loan to Mr and Mrs Edwards. The letter addressed to Mrs Edwards dated 21 November 2006 provided copies for Mrs Edwards of a loan agreement, general terms and conditions, the mortgage for each secured property and the memorandum referred to in the mortgage. Mrs Edwards was instructed to contact Mr Edwards as trustee for The Edwards Family Trust to sign the original documents. The borrowers were shown in the loan agreement as Mr and Mrs Edwards and then Mr and Mrs Edwards in their own capacity and as trustee for The Edwards Family Trust. (I infer that the Moranbah property was owned by Mr and Mrs Edwards as joint tenants.) It was therefore always the intention of the plaintiff that, to the extent, it was dealing with the defendants as trustees, it was dealing with them as the trustees of The Edwards Family Trust.
- [17] The Edwards Family Trust was created by deed made on 17 September 1981 pursuant to which Mrs Edwards was designated the original trustee in respect of the settlement sum of \$50. By deed made on 26 June 1998 between Mrs Edwards and Mr Edwards, Mrs Edwards appointed Mr Edwards to be a trustee with her of The Edwards Family Trust.
- [18] The loan agreement commences with a note to the borrower recommending the borrower considers obtaining legal and financial advice in relation to the loan. Before the execution page, there were declarations set out that applied to the borrower by signing the loan agreement including:
- “You have carefully read this loan agreement and the Pepper General Terms & Conditions and understand that each document between you and us establishes a legal contract between you and us. If you have any questions, ask before you sign.”

- [19] Further warnings were then included in a box that was headed “IMPORTANT” with instructions on things that the borrower needed to know before signing the document. There was also a further page to be completed, if the borrower chose not to obtain legal advice despite the page being headed “Legal Advice” and followed by a statement that “The Lender encourages you to obtain legal advice in relation to this loan”.
- [20] Mrs Edwards in her affidavit filed on 11 April 2018 deposed to her custom of signing legal documents as and when Mr Edwards asked her to do so without reading the documents or questioning him about them. She said she “placed complete trust and confidence in David in relation to all legal matters”. She said that she did not read the documents relating to the plaintiff “because David told me that they were part of obtaining finance for a development project at Coppabella, which he told me we should invest in”. It is apparent from paragraph 24 of her affidavit that she was aware at the time she entered into the loan agreement with the plaintiff that she and Mr Edwards were using the loan funds to repay the loans to the Heritage Building Society (\$630,000) and to invest about \$280,000 in the Coppabella project.
- [21] By transfer registered number 710233115 signed by the defendants on 28 November 2006 they, as trustees under instrument 702864522, transferred an interest of 49/100 of the estate in fee simple in the Fig Tree Pocket property to themselves as trustees of The Edwards Family Trust. The consideration was originally described in the transfer as:
- “Pursuant to the transferors’ wish to correct the error relating to the trust pursuant to the terms of which the property is held by them as trustees.”
- [22] Transfer 710233115 was originally signed by the defendants on the same day that they signed the mortgage over the Fig Tree Pocket property in favour of the plaintiff. When the mortgage was signed it showed as mortgagor both Mr and Mrs Edwards in their personal capacity, as well as in their capacity as trustee under instrument number 702864522 (which was the instrument by which they became the registered owners of the Fig Tree Pocket property). Even before the amendments made to transfer 710233115, it had been prepared on the basis that Mr and Mrs Edwards’ interest of 49/100 in the property would be transferred to themselves as trustees of The Edwards Family Trust. It appears that Mr Edwards prepared the transfer that was given dealing number 710233115 and attended personally to the stamping of the transfer. For that purpose Mr Edwards prepared a statutory declaration.
- [23] On 7 December 2006 Mr and Mrs Edwards as trustees by deed made with Mr Edwards as appointor altered the deed of settlement constituting The Edwards Family Trust by revoking the original clause 4 of the deed and replacing it with provisions set out in the deed dated 7 December 2006 which expanded the powers of the trustees. Mr Edwards asserts that was done at the request of Cooper Grace Ward.
- [24] The funds advanced by the plaintiff under the loan were disbursed on 11 December 2006 with \$629,738 paid to Heritage Building Society Limited, \$37,685 on a line of credit with Heritage Building Society, \$50,000 on account of Mr Edwards’ tax liability and \$277,575 for the Coppabella project.

- [25] Transfer 710233115 and the mortgage in favour of the plaintiff that was given registered number 710233121 were lodged in the Titles Office in the normal course by Cooper Grace Ward on 5 January 2007 in acting for the mortgagee (which was why the requisition on the transfer was directed to Cooper Grace Ward). The amendments subsequently made to transfer 710233115 after lodgement at the Titles Office were made by Cooper Grace Ward with the authority given to them by Mr Edwards asserted by him to be on behalf of both Mr and Mrs Edwards, in order to answer a requisition from the Titles Office in respect of the transfer:

“The consideration should be expanded firstly by reference to the dealing number under which the error occurred and then by an explanation of the full nature of the error.

Finally the intention of the transferees to hold as trustees under the newly deposited Deed of Trust should be expressed, if such is the case.”

- [26] That authority had been requested by Cooper Grace Ward in their letter dated 22 January 2007 addressed to Mr and Mrs Edwards, but sent by email to Mr Edwards. The subject matter of the letter is shown as:

“Pepper Home Loans and The Edwards Family Trust  
Transfer – Unit Trust to Family Trust”

- [27] The letter refers to a letter from Mr Edwards dated 18 January 2007 that gave the information that resulted in the suggested amendments to items 4 and 5 in transfer 710233115 on which the defendants were asked to comment. Mr Edwards’ letter dated 18 January 2007 has been located on the Cooper Grace Ward file and is exhibited to the affidavit of the plaintiff’s solicitor Ms Mundt filed on 16 May 2018. Mr Edwards attached to the letter of 18 January 2007 the statutory declaration which he said he supplied to the Stamps Office when the transfer was stamped “setting out how the error occurred”. The statutory declaration is not signed, but I infer from the contents of Mr Edwards’ letter dated 18 January 2007 that it reflects the terms of the statutory declaration that was signed and lodged by both Mr and Mrs Edwards. (No affidavit from Mr Edwards was sought to be filed in response to Ms Mundt’s affidavit to assert that the statutory declaration was not lodged in the terms of the copy attached to Mr Edwards’ letter of 18 January 2007.) Paragraph 1 of the declaration states:

“We are the registered joint proprietors as beneficial owners of 51% of the property known as [description of Fig Tree Pocket property set out]. We are both also registered as owners of the remaining 49% of the property as Trustees of the Edwards Superannuation Fund No 2.”

- [28] Mr and Mrs Edwards asserted in paragraph 4 of the declaration that “shortly before 1<sup>st</sup> November 1995 we had acquired a tax compliance superannuation fund entitled The Edwards Superannuation Fund”, but “we did not ever activate the fund although it later became our intention to do so” once the purchase of the Fig Tree Pocket property was completed. Paragraph 6 of this declaration suggests that it was always the intention of the defendants at the time of the purchase of the Fig Tree Pocket property to register themselves as joint owners as to 51 per cent of the property and as trustees of The Edwards Family Trust as to the remaining 49 per cent. The statutory declaration asserts that the conveyancing clerk in the solicitor’s practice that was being conducted by Mr Edwards at the time “mistakenly registered ‘The Edwards Superannuation Fund’ as one

of the mortgagors” of the Fig Tree Pocket property in lieu of “The Edwards Family Trust” and filled in the Form 24 with the wrong name of the Superannuation Fund (which was inactive) and by adding the notation ‘No 2’ when there was no Edwards Superannuation Fund No 2. (The Form 24 is the Property Information (Transfer) form that must accompany a transfer when lodged in the Titles Office to enable all relevant authorities to record the change in ownership of real property.) The letter dated 18 January 2007 suggests that Mr Edwards had confirmed from a search prior to finalising the transaction with the plaintiff that showed that the trust under which 49 per cent of the property was held was the EIUT. Curiously, the statutory declaration suggests that Mr and Mrs Edwards were registered as owners of 49 per cent of the property as trustees of the Edwards Superannuation Fund No 2, but always intended to own the 49 per cent interest as trustees of The Edwards Family Trust.

- [29] After the anticipated amendments were made by Cooper Grace Ward Grace Ward to items 4 and 5 of the transfer, the consideration was ultimately described in the transfer in these terms:

“Pursuant to the transferors’ wish to correct the error under Dealing No 702864522 relating to the trust pursuant to the terms of which the property is held by them as trustees, and the transferors’ desire to correct the error by having the interest in the property held by the transferee”.

- [30] Mr Edwards states in paragraph 30 of his affidavit filed on 23 January 2018 in relation to transfer 710233115:

“(d) it is self evident from the Transfer that the Edwards Family Trust did not hold the 49% interest before it was transferred to the Trustees of that Trust by means of that Transfer and that Wanda and I held it as Trustees of another Trust, which could only have been the EIUT in the circumstances expounded herein; however, the transfer was an improvident transaction, entirely voluntary and seemingly without motivation from the perspective of the Transferors, who gave no consideration to such matters;

(e) To the contemporaneous knowledge of Pepper, Doc. 18 is a copy of a letter dated 22 January 2007 which was addressed by Pepper’s Lawyers to Wanda and myself and was sent to me via email recommending changes to the text of the last said Transfer, with a view to ensuring that the 49% Interest was held by Wanda and myself as Trustees of the Edwards Family Trust in lieu of the EIUT; however, it now appears to me that Wanda as the remaining Trustee of the EIUT has a duty to set aside the Trust Transfer and at least in such event or otherwise as the remaining Trustee of the Edwards Family Trust she has a duty to set aside the Loan Agreement and Pepper’s Mortgage, as unconscionable transactions. Had I been aware of the associated breaches of trust, Wanda and I would not have proceeded with the Pepper’s Loan;”

- [31] Mr Edwards asserts in his affidavit he was told by Cooper Grace Ward that the plaintiff did not want to take a mortgage from a unit trust for policy reasons and that it was necessary to make the amendments to the transfer to answer the requisition raised by the Titles Office, which was not copied to him. That overlooks that the loan agreement shows that the plaintiff only intended dealing with the defendants as trustees of the

Edwards Family Trust. Mr Edwards was obviously mistaken about not receiving the requisition. Mr Edwards was also mistaken in characterising the letter from Cooper Grace Ward dated 22 January 2007 as seeking changes to the transfer with a view to ensuring the 49 per cent interest in the Fig Tree Pocket property was held by Mr and Mrs Edwards as trustees of The Edwards Family Trust in lieu of the EIUT. Transfer 710233115 was prepared by Mr Edwards himself and the trust deed for The Edwards Family Trust was the document that was submitted with that transfer to the Titles Office on behalf of Mr and Mrs Edwards to correct the so-called “error” as to the trust that pertained to transfer 702864522.

[32] On 17 November 2008 Mr and Mrs Edwards sold the Moranbah property for \$385,000 and paid the net proceeds of \$374,382.09 to the plaintiff. The Coppabella project did not proceed as anticipated and it appears that the investment in the project by Mr and Mrs Edwards may have been imprudent.

[33] Mrs Edwards asserts at paragraphs 26 and 27 of her affidavit:

“26. Had I known the commercial risks associated with the Coppabella project and that we could lose our residence if it failed, I would not have agreed to borrow \$280,000 from Pepper for that project under a first mortgage over our residence.

27. Similarly, had I been advised properly about the probable pitfalls of the Coppabella project and the Pepper Loan, I would have asked David to stay with the Heritage Loan or to keep the Pepper Loan around the same level, so that it could be reduced from the sale of the Moranbah property which we expected to sell at a substantial profit.”

### **The arguments advanced on Mrs Edwards’ behalf**

[34] Mr Smits relies on the fact that Mrs Edwards received no explanation or advice whatsoever from the plaintiff, when the loan application signed by Mr and Mrs Edwards disclosed that Mrs Edwards earned minimal net income and had been engaged in domestic duties for 30 years, there was no evidence there was any independent verification of Mr Edwards’ gross or net disposable income, Mr and Mrs Edwards did not sign the business purpose declaration, and the loan was a home loan based on the value of the assets which were mortgaged in favour of the plaintiff. Mrs Edwards is characterised as a “partial volunteer” which makes the principle in *Yerkey* at 685 applicable to her.

[35] Mr Smits submits that the amendments made by the plaintiff’s solicitors to transfer 710233115 had the effect of depriving Mrs Edwards of her interest in the property as the majority unitholder in the EIUT. His argument is that the mortgage in favour of the plaintiff was executed by Mr and Mrs Edwards as trustee under instrument 702864522 which meant they executed the mortgage as the trustees of the EIUT. He submits that there was no authority from Mrs Edwards for the mortgage in favour of the plaintiff to be amended by changing the number of the instrument that related to trust in respect of which she had executed the mortgage. Mr Smits alleges that the change in the instrument number for the trust shown in mortgage number 710233121 made by the plaintiff’s solicitors in order to answer the requisition was a fraud committed against

Mrs Edwards' interests by Mr Edwards with the plaintiff's knowledge. (For good measure, Mr Smits also relied on s 76(2)(b) of the *Land Title Act* 1994, but that relates to amendments of a registered mortgage, whereas the amendments were made to mortgage number 710233121 to obtain registration of that instrument.)

- [36] Mr Smits also seeks to rely on s 11A of the *Land Titles Act* 1994 in relation to the amendment to mortgage 710233121 to change the reference to the instrument number under which Mr and Mrs Edwards were trustees and submits that there could not have been "a proper verification of the trustee mortgagor" which makes the mortgage a nullity.
- [37] It is submitted that any "competent, independent and objective adviser" would have advised Mrs Edwards not to execute a transfer of her interest in the Fig Tree Pocket property under the EIUT, except for adequate consideration, and not to borrow any funds for the Coppabella project in the absence of satisfactory expert due diligence and appropriate agreements with the co-venturers. Mrs Edwards is described in the submissions as "a commercially unsophisticated borrower who received no independent or any advice ... or explanations from her husband, Pepper or any third party".
- [38] Mrs Edwards exhibited a proposed defence and counterclaim to her affidavit, although Mr Smits did raise in oral submissions that matters had progressed since that was drafted and the written submissions that he filed should be taken as representing Mrs Edwards' up-to-date position. The draft defence includes that transfer 710233115 was an improvident transaction from Mrs Edwards' perspective, that Mr Edwards and the plaintiff knew that she had no solicitor and no independent advice and of her special disadvantages or disabilities in respect of the subject transactions, Mr Edwards took advantage of those special disadvantages or disabilities, and the plaintiff has an accessorial liability for the breaches of trust owed by Mr Edwards to act in the interests of Mrs Edwards as a beneficiary of the EIUT.
- [39] With respect to the service of a default notice by the plaintiff on Mrs Edwards pursuant to s 84 of the *Property Law Act* 1974 (Qld), the loan agreement (described in the default notice as the credit contract) and the mortgage, Mrs Edwards' proposed defence pleads that no such notice was given personally to her by the plaintiff. During the hearing of the application, Mrs Edwards gave evidence that she had not been served with the notice and had never been to Redbank Plaza where the process server deposed to having served the notice on her. It is implicit in paragraph 35 of Mr Edwards' affidavit filed on 23 January 2018, that he did receive the default notice, although he had not located a copy of it.
- [40] Mrs Edwards also relies on the plaintiff's acceptance of payments made by the defendants after the entry of the default judgment as constituting a waiver or an estoppel against the plaintiff in respect of the enforcement of the default judgment.

### **The plaintiff's arguments**

- [41] The plaintiff relies on the fact that Mrs Edwards was herself a borrower under the loan agreement and liable for the total amount of the loan which distinguishes her position

from cases where a wife agreed to act as surety for her husband's obligations without understanding the effect of the guarantee and obtained no benefit from the transaction. Mrs Edwards obtained the full benefit of her pre-existing loans with Heritage Building Society being fully paid out and the benefit of the additional funds of \$280,000 to enable her to invest them with Mr Edwards in the Coppabella project.

- [42] Although it was a requirement of the plaintiff that it would advance the funds to Mr and Mrs Edwards in their capacity as trustees only if the trust were The Edwards Family Trust, rather than the EIUT, it was a matter for Mr and Mrs Edwards to decide between themselves as to whether or not they wished to borrow from the plaintiff and substitute The Edwards Family Trust as the relevant trust for which they held the 49 per cent interest in the Fig Tree Pocket property. That was a decision made by them before entering into the loan agreement with the plaintiff. Because the mortgage secured the personal obligations of both Mr and Mrs Edwards under the loan agreement, Mrs Edwards was always personally liable for the total amount of the debt irrespective of which trust was the beneficiary of the 49 per cent share in the property held by Mr and Mrs Edwards as trustees.
- [43] Even if Mrs Edwards were considered to be in a situation of disadvantage, the evidence does not show that the plaintiff knew or should have known of that disadvantage, or that the plaintiff took unconscientious advantage of Mrs Edwards' position in its dealings with her.
- [44] To the extent that Mrs Edwards argues that Mr Edwards caused her to be deprived of her interest in the EIUT, neither the plaintiff nor its solicitors knew or ought to have known that the transfer of the trust interest in the Fig Tree Pocket property from EIUT to The Edwards Family Trust amounted to any breach of trust on Mr Edwards' part or raise any conflict of interest between Mr Edwards and Mrs Edwards, when Mr and Mrs Edwards made a statutory declaration for the purpose of stamping transfer 710233115 that asserted that the relevant interest in the property was always intended to be held by The Edwards Family Trust.
- [45] There is nothing in Mrs Edwards' affidavit or the draft defence and counterclaim which clearly identifies the evidence from which facts could be proved that could be relied upon to establish the proposed grounds of defence. The draft defence is deficient in form and substance. It relies on broad assertions of misconduct by the plaintiff under various heads including unconscionable conduct, misleading and deceptive conduct and knowing participation in a breach of trust without pleading the facts that are necessary to make those claims. Mrs Edwards had not adduced relevant and admissible evidence.
- [46] The plaintiff relies on the affidavits of service from a licensed process server Mr Gregory Edwards who deposed to service of each of Mr Edwards and Mrs Edwards with the default notice on 10 August 2009 at 5:20pm at Redbank Plaza. The delay in the making of the allegation by Mrs Edwards that she was not served with the default notice has prejudiced the plaintiff, as Ms Mundt in her affidavit filed on 23 April 2018 deposed that she had been unable to confirm the current contact details for this process server.

### **Is there a prima facie defence?**

- [47] The argument on behalf of Mrs Edwards based on the amendments made to transfer 710233115 and mortgage 710233121 after Mrs Edwards signed the documents does not address the fact that it was the expressed intention of the defendants, as set out in the statutory declaration prepared by Mr Edwards, to transfer the 49 per cent interest they held in the Fig Tree Pocket property to themselves as trustees of The Edwards Family Trust before they signed the mortgage (in favour of the plaintiff) to correct the “error” that arose from The Edwards Family Trust not being the trust that was specified at the time transfer 702864522 was lodged for registration. That statutory declaration was relied on by the defendants for the purpose of stamping transfer 710233115 that was stamped as “Queensland Duty Exempt”. The argument also overlooks the fact that the plaintiff’s agreement to lend the money depended on the 49 per cent interest in the property being held by Mr and Mrs Edwards as trustees of The Edwards Family Trust.
- [48] The original reference to instrument number 702864522 on the mortgage signed by Mr and Mrs Edwards in favour of the plaintiff was, in fact, wrong in the light of the transfer that was signed by Mr and Mrs Edwards to correct the particulars of the trust on which they held their 49/100 share and was corrected to show the correct dealing number 710233115 for the transfer prepared by Mr Edwards and signed by Mr and Mrs Edwards that was lodged (and intended to be lodged) prior to the mortgage in favour of the plaintiff. No issue arose under s 11A of the *Land Title Act* 1994 in the terms in which it stood when the mortgage was lodged on 5 January 2007, as it applied to ascertaining that the person who executed the mortgage was identical with the person who was or was about to become the registered proprietor of the lot. That was relevantly Mr Edwards and Mrs Edwards who had executed the mortgage.
- [49] The gravamen of Mrs Edwards’ complaints are directed at the fact that she and Mr Edwards re-financed with the plaintiff, in order to obtain the funds to invest in the Coppabella project. It is apparent from Mrs Edwards’ affidavit that at the time the re-financing took place she was more than willing to leave it to her husband to make decisions for them both on the re-financing, so that they could invest in the project. In order to make the plaintiff liable for what turned out to be the bad investment decision in respect of the Coppabella project, Mrs Edwards needs to point to facts which would enable her to hold the plaintiff liable for her husband’s advice to her. It appears that they had decided on the course of action involving the investment in the Coppabella project, before applying to the plaintiff for finance. They had the assets in the form of their Fig Tree Pocket property and the Moranbah property to support the application for the loan. Despite Mr Smits’ extensive submissions and reliance on many case authorities, the law can apply in favour of Mrs Edwards only if she can point to evidence relevant to establishing the necessary constituent facts. The affidavits of Mr and Mrs Edwards fall far short of disclosing relevant admissible evidence that would make the plaintiff liable for the bad investment decision to invest in the Coppabella project. Mrs Edwards was a borrower from the plaintiff for the total amount of the loan for which she obtained real benefit and cannot be characterised as a surety of her husband’s debt and thus a volunteer to invoke the protection given in *Yerkey*.
- [50] To the extent that Mrs Edwards now claims that she was deprived of her interest in the EIUT by the transfer of the 49/100 share in the Fig Tree Pocket property from the EIUT

to The Edwards Family Trust, that was effected by the transfer prepared by Mr Edwards and signed by Mr and Mrs Edwards as transferors on 28 November 2006 and as transferees on 7 December 2006 in anticipation of the settlement with the plaintiff on 11 December 2006. None of the amendments made to that transfer after it was lodged with the Titles Office for the purpose of answering the requisition altered the nature of the transfer effected by instrument 710233115. Those amendments were made by Cooper Grace Ward on authority given to them by Mr Edwards holding himself out as acting on behalf of himself and Mrs Edwards. The dealing evidenced by the transfer was consistent with the loan agreement between the plaintiff and Mr and Mrs Edwards as trustees of The Edwards Family Trust and not as trustees of the EIUT.

- [51] Mrs Edwards has failed to show that she has an arguable or prima facie defence on the merits to the plaintiff's claim to enforce its registered mortgage over the Fig Tree Pocket property by recovery of possession based on the dealings that took place between Mrs Edwards and the plaintiff when the loan was advanced.
- [52] If the only available defence were based on Mrs Edwards' assertion that she had not been served with the default notice, the length of time that has passed since the default judgment was entered would then be a relevant consideration. This is particularly so, as Mr Edwards did not deny being served with the claim and statement of claim which pleaded expressly that by notice in writing dated 28 July 2009 and posted to the defendants on or about that date, the plaintiff gave the defendants notice of default. If the default notice had not been served either by post or by personal service, it would be surprising if Mr Edwards as a lawyer had not taken that point when served with the statement of claim. In any case, there has also been real prejudice identified by the plaintiff in relation to Mrs Edwards' claim made so late after the plaintiff claims to have served the default notice that the process server is unable to be located. I would therefore not exercise the discretion to set aside the default judgment based solely on Mrs Edwards' assertion that she was not served with the default notice that preceded the commencement of the proceeding.

### **Leave to commence enforcement proceedings to enforce the judgment**

- [53] In its amended application, the plaintiff seeks leave pursuant to r 894(1) of the *UCPR* to start enforcement proceedings to enforce the default judgment, as the judgment has not been enforced within six years after the day it was made. The plaintiff also seeks leave pursuant to r 72 of the *UCPR* to proceed against Mr Edwards in this proceeding on the basis that he bankrupt and such leave as required.
- [54] The affidavit of Ms Mundt filed on 23 April 2018 explains that the plaintiff did not enforce the judgment earlier, as Mr and Mrs Edwards made payments to the plaintiff from time to time to reduce the amount owing by them. The last payment was made on or about 9 August 2016. It appears those payments were accepted without prejudice to the plaintiff's rights. Ms Mundt exhibits the letters from the plaintiff's solicitors dated 23 November 2010, 27 July 2012 and 13 November 2013 that were sent without prejudice to the plaintiff's rights to enforce the judgment, but indicated the plaintiff's willingness to defer further recovery action while the defendants continued to make the monthly loan payments which the plaintiff indicated it would accept on a without prejudice basis. In the absence of any evidence from Mr and Mrs Edwards of

conversations or conduct contrary to that disclosed in the plaintiff's material on this point, it is not arguable that the plaintiff's conduct in accepting those loan repayments after judgment was entered did give rise to a waiver or estoppel.

- [55] The judgment that the plaintiff seeks to enforce against the defendants is for the recovery of possession of the Fig Tree Pocket property, so that it can endeavour to sell the property and realise its security. Mr West of counsel for Mr Edwards submitted that leave was not required under r 72 of the *UCPR* as enforcement proceedings follow after the judgment in the proceeding and therefore are not within the description of taking a step in the proceeding. I consider that Mr West's characterisation of the nature of enforcement proceedings in respect of a judgment for recovery of possession is correct. In addition, leave to enforce the judgment against Mr Edwards is not required under s 58(3) of the *Bankruptcy Act* 1966 (Cth) as the proceeding to enforce the judgment for recovery of possession of property mortgaged to a secured creditor against a bankrupt is not a remedy in respect of a provable debt. It is appropriate that the judgment be enforced against both Mr and Mrs Edwards as they both remain in occupation of the property.
- [56] The plaintiff's affidavits address the issues in r 894(3) of the *UCPR* relevant to the exercise of the discretion to give leave to start enforcement proceedings in respect of the judgment for recovery of possession. The amount of the debt secured on the property as at March 2018 was in excess of \$900,000. The explanation for the delay in enforcing the judgment was to accommodate the defendants' willingness to continue to make loan repayments. This is an appropriate case to give the leave required under r 894(1).

### Orders

- [57] I will give the parties an opportunity to make submissions on appropriate costs orders after the publication of these reasons.
- [58] It follows that the orders which should be made are:
1. The application filed on 15 December 2017 is dismissed.
  2. Leave granted to the plaintiff pursuant to r 894(1) of the *Uniform Civil Procedure Rules* 1999 to start enforcement proceedings to enforce the default judgment against the defendants.
  3. The question of costs is adjourned to a date to be fixed.