

FEDERAL COURT OF AUSTRALIA

EVANGELOS ROBERT PAVLOMANOLAKOS v. NATIONAL AUSTRALIA BANK; MURRAY LONGMUIR

and BRENTON JOHN CLARK

No. SAG 2 of 1992

FED No. 430

Number of pages - 5

Practice and Procedure

COURT

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIAN DISTRICT REGISTRY

GENERAL DIVISION

O'Loughlin J(1)

CATCHWORDS

Practice and Procedure - pleadings - statement of claim - whether reasonable cause of action disclosed - claim upon a Bank and its officers - allegation of unenforceable loan created by book-entry credit not supported by assets in currency or real wealth - reliance on Magna Carta and the Bible - order striking out substantial sections of statement of claim - liberty to applicant to replead to limited extent.

HEARING

ADELAIDE, 9 November 1992

12:2:1993

Mr. Pavlomanolakos represented himself.

Counsel for 1st, 2nd and 3rd Respondents: Dr. Baxter

Solicitors for 1st, 2nd and 3rd Respondent: Finlaysons

ORDER

THE COURT ORDERS THAT:

1. Paragraphs 7 to 16 (inclusive) and 19 to 22 (inclusive) of the

amended statement of claim filed on 26 October 1992 be struck out.

2. The applicant in the substantive proceedings pay the costs of the respondents in the substantive proceedings of and incidental to the order this day made, such costs to be taxed in default of agreement.

3. The applicant be at liberty to file and serve a further amended statement of claim in terms not inconsistent with the reasons of the Court this day published.

4. Argument as to the time within which such further amended statement of claim may be filed and served and as to the consequential matters (if any) arising from orders 1, 2 and 3 above be adjourned to a date to be fixed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

O'LOUGHLIN J On 14 January 1992 the applicant, Evangelos Robert Pavlomanolakos, filed an application and statement of claim in this Court claiming various heads of relief. In particular, he sought an injunction restraining the National Australia Bank Ltd, the first named respondent, ("the Bank") from exercising its powers of sale as a mortgagee under and pursuant to Memorandum of Mortgage No. 6555466 ("the Mortgage"); he also sought a declaration that no moneys were due and payable by the applicant to the Bank pursuant to the mortgage, or at all. The second and third named respondents, Messrs Longmuir (now deceased) and Clark are said to be officers of the Bank who had played some part in the events which are germane to these proceedings and which are summarised below.

2. By notice of motion dated 31 August 1992, long after pleadings had closed, the respondents moved to strike out substantial portions of the statement of claim. Argument on that motion was listed for hearing on 9 November 1992. On 26 October 1992, after the matter had been listed for hearing Mr. Pavlomanolakos, who acts for himself, lodged an amended statement of claim. On the same day he also filed a document entitled "Notice of Constitutional Matters". In that document he claimed that the present proceedings involved seven matters arising under the Constitution. The first five of those dealt with the subject of the creation of book-entry credits by Banks and other financial institutions which, so it was claimed, was unconstitutional. The remaining two sought declaratory orders that Magna Carta and the Bible were part of the law of Australia. Having regard to the conclusions that I have reached on the application to strike out, it is not necessary for me to address the constitutional issues that the applicant sought to argue. I am satisfied that none exist for the reasons that I will develop when discussing the contents of the amended statement of claim.

3. When the matter came on for hearing on 9 November 1992 it seemed a barren exercise, in light of the existence of the amended statement of claim, to hear argument about the claimed inadequacies of the original statement of claim. However, Dr. Baxter, counsel for the respondents, informed me that his instructions were to challenge substantial sections of the amended statement of claim and, as he was ready to present

argument, I therefore gave leave to Mr. Pavlomanolakos to file his amended statement of claim, and argument thereafter proceeded on its contents.

4. The first paragraph of the statement of claim identifies Mr. Pavlomanolakos as the owner of certain land. It is now common ground that the relevant land comprises his matrimonial home and a fruit block at Renmark in the Riverland area of South Australia; the fruit block was, and is, his primary source of income. In paragraphs 2 to 6 of the statement of claim the respondents are identified and there is an acknowledgment that the Bank "approved a mortgage loan to the applicant" of \$52,000 on 10 June 1988 upon the security of the mortgage. No complaint was made by the respondents about the provisions of the first six paragraphs.

5. Paragraphs 7 to 11 and 13 to 15 thereafter canvas the subject of book-entry credit. As to the debt represented by the mortgage, Mr. Pavlomanolakos claims that it "was created by the (Bank) as a book-entry credit 'out of thin air' and virtually at no cost to the (Bank)" (para 7) and that it did not "constitute proper consideration" (para 8). In paragraph 9 there is a complaint that the mortgage failed to state that it was "a barter contract which comprised book-entry credit created at no cost to the respondents (sic) in exchange for legal tender cash currency of the Commonwealth of Australia and/or the real wealth assets from the applicant". As a result, so it was claimed in paragraph 10, the "advertising and contractual documents" (presumably of the Bank) were "false and misleading". There was then an alternative plea in paragraph 11 to the effect that if the Bank could create cost-free book-entry credit "then the applicant claims the same right". Paragraphs 13-15 concluded the subject of book-entry credit in these terms:

"13. The first respondent failed to loan the applicant money as stated in the contract documents and instead loaned book-entry credit at no cost to the first respondent.

14. Book-entry credit is not money.

15. Book-entry credit is not legal tender in Australia."

6. The respondents claim that the eight paragraphs of the statement of claim that are referred to above and that specifically deal with the subject of book-entry credit should be struck out on the ground that they do not disclose any cause of action. They make a similar claim with respect to paragraph 19 and its reference to Magna Carta and paragraphs 20 and 21 and their references to the Bible.

7. That then leaves paragraphs 12, 16, 17, 18 and 22. Paragraph 12 states:

"12. The respondents are guilty of negligence and failing to exercise proper care as bankers and financiers to the applicant.

PARTICULARS

The respondents failed through their silence to adequately

and properly advise the applicant of the truth of the matter

of the business relationship between the parties."

8. As Dr. Baxter said, it may be open for the applicant to plead a cause of action in negligence but it is essential to identify the relevant duty of care. The failure to plead the existence and nature of such a duty coupled with the failure to particularise "the truth of the matter of the business relationship between the parties" warrant the striking out of paragraph 12. Mr. Pavlomanolakos, however, should be given leave to file a further amended statement of claim (should he wish to do so) alleging his cause of action in negligence.

9. Paragraph 16 of the statement of claim alleged that the mortgage was not properly executed in that Mr. Pavlomanolakos' signature was not witnessed by a person who was present at the time when he affixed his signature to the document. The plea was to the effect that some unspecified person added his signature as an alleged witness at some later date. Since this case was argued, a Full Court of this Court has handed down its decision in *Arnold v State Bank of South Australia* (unreported judgment delivered 18 November 1992). In that case (which also dealt with this question of book-entry credit) the claim was made that the mortgagors' signatures had not been properly witnessed in that the witness did not hold the necessary qualifications. The Full Court concluded, without difficulty, that any deficiency in the act of witnessing did not impugn the validity of the mortgage. It emphasised that the act of importance was the act of execution and it noted the existence and significance of s269 of the [Real Property Act 1886](#) (S.A.).

10. That section provides:

"The Registrar-General may, in any case where he is satisfied of the due execution of an instrument, or in any special case, dispense with the proof of execution hereinbefore required."

11. The Full Court went on to say further at pp 11-12 of its judgment:

"[Section 247](#) (of the [Real Property Act](#)) provides further support for the proposition that non-compliance with the witnessing requirements of [s.267](#) does not render the registration of a mortgage void: if the circumstances provided for by [s.247](#) exist, the Registrar-General has discretionary power to register 'any document', including a mortgage, provided only that it is 'signed by a registered

proprietor', notwithstanding that the mortgage is not 'in the appropriate form' provided for by [s.128](#) and notwithstanding that it does not otherwise accord with the provisions of the Act, including the provisions of [s.267](#)."

12. In my opinion, the matter is beyond doubt. The remarks of the Full Court have equal effect to the case at bar. As a consequence, paragraph 16 must be struck out.

13. Paragraph 17 contains a plea of fraudulent misrepresentation. The allegations are denied but the respondents do not seek to have the contents of the paragraph struck out. Paragraph 18 pleads a failure "to honour and abide by the originally agreed interest rate" and, as such, ties in with the plea of misrepresentation in the preceding paragraph. Paragraphs 17 and 18 may therefore remain. Paragraph 22 must be struck out; so far as is material it reads as follows:

"The three year rule in the [Trade Practices Act 1974](#) is waived by virtue of (i) the misleading and deceptive conduct of the respondents and (ii) the negligence of the respondents in their duty in law to the applicant as a customer of the bank..."

14. The reference to the "three year rule" is, of course, a reference to [subs 82\(2\) of the Trade Practices Act 1974 \(Cth\)](#) which provides:

"An action under sub-section (1) may be commenced at any time within 3 years after the date on which the cause of action accrued".

15. If Mr. Pavlomanolakos has a cause of action under the [Trade Practices Act](#) against one or more of the respondents, it is not open for me, at this interlocutory stage, to identify or make a finding about the date on which that cause of action accrued. It is clear, however, that the Statute does not give to the Court any discretionary power to waive compliance with the time limit. Thus, although a respondent must actually plead the time constraint as a defence: [Arcadi v Colonial Mutual Life Assurance Society Ltd. \(1984\) ATPR 40-473](#), the Court has no discretion to extend the time limit that is imposed by the sub-section: [Keen Mar Corporation Pty. Ltd. v Labrador Park Shopping Centre Pty. Ltd. \(1988\) ATPR 40-853](#) at 49,195.

16. I return then to the eight paragraphs of the statement of claim that deal with book-entry credit and to those paragraphs that refer to Magna Carta and the Bible. Prior to argument in this matter, single Judges of this Court had already ruled on strike out applications with respect to similar statements of claim: [Napier v National Australia Bank Ltd. \(unreported: Spender J: judgment delivered 16 April 1992\)](#) and [Fisher v Westpac](#)

Banking Corporation (unreported: French J: judgment delivered 18 August 1992). To those must now be added, as I have already mentioned, the judgment of the Full Court in Arnold's case. The striking similarity between the statements of claim in this case, Arnold's case, and Fisher's case render a detailed analysis of the challenged paragraphs unnecessary. It is sufficient to say that Arnold's case went on appeal from an order under O20 r2 summarily dismissing the proceedings and that the Full Court in the course of dismissing the appeal identified, as a correct statement of law, the following passage from the judgment of French J in Fisher's case:

"There is nothing to prevent a bank evidencing a loan by a credit entry. Its obligation under the loan agreement is nevertheless a real one. If the money is advanced by way of electronic transfer or appropriate book-entries there can none the less be real rights and real obligations created which are enforceable at law. Contract documents and securities recording a loan in such cases do not mislead or deceive for want of hard currency backing for it."

17. In Fisher's case French J had said:

"In relation to the remaining pleas based on the Magna Carta and the Bible, it is sufficient to say that they disclose no legally tenable cause of action."

18. In Arnold's case the Full Court did not expressly make a similar statement even though it said:

"Magna Carta is also invoked as guaranteeing the rights of the appellants to their matrimonial home and their livelihood. In reliance upon the fact that witnesses in the Federal Court generally (though not of course always) give their evidence under the sanction of an oath rather than an affirmation, and that similarly, judges generally swear an

oath of office on the Bible, the mortgage is attacked by
reference to various biblical passages, including some
striking directly at usury."

19. Nevertheless, the fact that the Full Court approved of what French J had said in Fisher's case and the fact that it dismissed the appeal in Arnold's case must, by necessary implication, mean that the Full Court was of the opinion that neither Magna Carta nor the Bible could, in the circumstances of these cases, found causes of action. It follows therefore that there should be an order striking out paragraphs 7-11, 13-15 and 19-21 of the statement of claim.

20. A summary of the situation is as follows:

1. Paragraphs 1-6 remain unchallenged.
2. Paragraphs 7-11 and 13-15 dealing with book-entry credit are struck out and may not be repleaded.
3. Paragraph 12, alleging negligence is struck out but may be pleaded in a further amended statement of claim.
4. Paragraph 16, alleging improper witnessing of the mortgage is struck out and may not be repleaded.
5. Paragraphs 17-18 alleging misrepresentation remain.
6. Paragraphs 19-21 dealing with Magna Carta and the Bible are struck out and may not be repleaded.
7. Paragraph 22 dealing with time limits is struck out and may not be repleaded.

21. There will be orders accordingly, including leave to the applicant to file and serve a further amended statement of claim in terms consistent with these reasons. I will hear the parties before determining the time within which the new statement of claim is to be filed and any other consequential matters.

22. The applicant must pay the respondent's costs.