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**Federal Court of Australia**

**Re Sharon Mary Napier, As An Executor of the Estate of the Late Colin Ross Napier v National Australia Bank Limited [1992] FCA 167 (16 April 1992)**

**FEDERAL COURT OF AUSTRALIA**

Re: SHARON MARY NAPIER, as an Executor of the Estate of the late COLIN ROSS

NAPIER

And: NATIONAL AUSTRALIA BANK LIMITED

No. Q G8 of 1992

FED No. 304

Practice and Procedure

**COURT**

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY

GENERAL DIVISION

Spender J.(1)

**CATCHWORDS**

Practice and Procedure - Federal Court of Australia - motion to strike out application, statement of claim and particulars - motion to dismiss action - applicant appearing in person - trade practices - misleading and deceptive conduct - unconscionability - oppression - most claims disclose no reasonable cause of action - leaving residue would result in confusion - statement of claim and particulars struck out - distinction between material facts and particulars - liberty to applicant to replead.

Federal Court Rules O. 11 r. 16; O. 20 r. 2.

[Dey v Victorian Railways Commissioners \[1949\] HCA 1; \(1949\) 78 CLR 62.](#)

[Commercial Bank of Australia v Amadio \[1983\] HCA 14; \(1983\) 151 CLR 447.](#)

[Trade Practices Commission v David Jones \[1985\] FCA 228; \(1985\) 7 FCR 109.](#)

**HEARING**

BRISBANE

16:4:1992

For the applicant: Mrs S.M. Napier appeared in person.

Counsel for the respondent: Mr G.H. Brandis

Instructed by: Flower and Hart

**ORDER**

1. The statement of claim filed on 16 January 1992 and the further and

better particulars filed on 13 March 1992 be struck out.

2. The applicant in the principal proceedings pay the respondent in

the principal proceedings' costs, to be taxed if not agreed.

THE COURT GRANTS:

Liberty to the applicant to file and serve an amended application

and a fresh statement of claim by 4 p.m. on Friday 29 May 1992.

## DECISION

This is a notice of motion by the National Australia Bank Limited ('the Bank'), seeking that a statement of claim filed by Sharon Mary Napier, as an executor of the estate of the late Colin Ross Napier, on 16 January 1992 be struck out. The Bank also seeks for the application filed on 16 January 1992 and the further and better particulars of the statement of claim filed on 13 March 1992 to be struck out. The Bank also asks that the applicant's action be dismissed, or, alternatively, that it be stayed for ever.

2. The application filed by Mrs Napier on 16 January 1992 claims damages for breach of [s. 52 of the Trade Practices Act 1974](#) for misleading or deceptive conduct; damages for breach of [s. 52A of the Trade Practices Act](#) for unconscionable conduct and damages for breach of [s. 53 of the Trade Practices Act](#) for false representation. Each of those sections prohibits certain conduct but remedies are provided by, inter alia, [ss. 82 and 87 of the Trade Practices Act](#). The application also claims "damages for fraudulent accounting, money payable, interest, restoration of title to property, injunction, and such further or other relief as may be just".

3. In the statement of claim filed with the application on 16 January 1992 the applicant claims that mortgages given to the respondent over property are void and of no effect, the mortgage contracts having been vitiated by actions of the respondent. Mrs. Napier also seeks an injunction restraining the respondent from acting under the terms of the mortgages in question. The three mortgages are in evidence before me. The first is registered bill of mortgage number 217958 between Mrs Napier and her stepson, David Ross Napier, as executors of the estate of the late Colin Ross Napier and the Bank. This mortgage is in respect of two properties: one, lot 6 on Plan EG132 in the County of Elgin, Parish of Bidgel and the other, lot 7 on Plan EG179 in the County of Elgin, Parish of Mamaree. The first property is known as 'Merchison Park', and the latter is called 'Lauriston'. Both properties are at Glenmorgan.

4. The second mortgage is one made between Colin Ross Napier, Mrs Napier's deceased husband, and the Bank in respect of 'Merchison Park', and the third is a mortgage made between Mr Napier and the Bank in respect of 'Lauriston'.

5. The application ought properly to be brought not only by Mrs Napier as executor, but also, it seems to me, on her own behalf. It may also be that her stepson ought to be a party to these proceedings.

6. The first mortgage between Mr Napier and the Bank bears date 26 February 1985 and was registered on 26 August 1985. The second between Mr Napier and the Bank is dated 14 August 1986 and was registered on 11 November 1986. The third mortgage between the executors of the estate of Mr Napier and the Bank bears date 27 May 1988 and was registered on 24 October 1988, but it is asserted by Mrs Napier that in fact that mortgage was executed a little more than a year earlier.

7. Mrs Napier is appearing on her own behalf. That circumstance raises serious difficulties in litigation where complex legal issues are involved but the fact is that the requirements of the Federal Court Act and the Federal Court Rules in the jurisdiction which this Court exercises apply to all litigants. If the applicant's process is such that it ought properly be struck out, the Bank no less than any other litigant is entitled to have that happen. I approach the matter with a sympathetic appreciation of the difficulties facing a party not legally trained who seeks to conduct her own case in complex commercial litigation but I am also conscious of my obligation as a judge of the Federal Court of Australia to do equal justice to all. A judge cannot be both umpire and longstop.

8. The notice of motion by the Bank is based on O. 20 r. 2 which provides:

"(1) Where in any proceeding it appears to the Court that in

relation to the proceeding generally or in relation to any

claim for relief in the proceeding -

(a) no reasonable cause of action is disclosed;

(b) the proceeding is frivolous or vexatious; or

(c) the proceeding is an abuse of the process of the Court,

the Court may order that the proceeding be stayed or dismissed

generally or in relation to any claim for relief in the

proceeding.

(2) The Court may receive evidence on the hearing of an

application for an order under sub-rule (1). "

Order 11 r. 16 provides:

"Where a pleading -

(a) discloses no reasonable cause of action or defence or

other case appropriate to the nature of the pleading;

(b) has a tendency to cause prejudice, embarrassment or delay

in the proceeding; or

(c) is otherwise an abuse of the process of the Court,

the Court may at any stage of the proceeding order that the whole

or any part of the pleading be struck out. "

9. The proper approach to a motion to strike out appears in the judgment of Dixon J., as he then was, in *Dey v Victorian Railways Commissioners* [1949] HCA 1; (1949) 78 CLR 62 at 91, where he said:

"The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."

10. At 92 he reinforced that view where he said:

"It is in my opinion of more importance to maintain the integrity of the principle that under cover of the inherent jurisdiction to stop abuse of process litigants are not to be deprived of the right to submit real and genuine

controversies to the determination of the courts by the due procedure appropriate for the purpose than for this Court to add another to the many judicial attempts that have been made to construe and apply the perplexing provisions that stand in Victoria as s. 5(2)(b) of the Workers' Compensation Act 1928."

11. As the application referred to earlier indicates, various discrete bases for relief are sought to be relied on by Mrs Napier. The basis which looms large and which is relied on in almost all of the other bases sought to be relied on concerns Mrs Napier's view about the creation of credit. The basis of this aspect of her claim appears from paragraphs 5 to 15 inclusive of her statement of claim. Because it is so central to her claim and as the statement of claim indicates, the matters there referred to touch almost all of the other bases relied on for relief, it is necessary to set out in full what the applicant says is the position concerning this aspect of her claim.

"5. Each of the above mortgages was given to the Bank at first instance as a direct result of false representation by the Bank, either explicitly or implicitly, concerning its right to recover moneys made available through its accounting system.

6. All moneys allegedly secured by the mortgages were not at any time and could not have been the rightful property of the Bank or of any of its servants, agents or customers.

7. All moneys allegedly secured by the said mortgages were merely new accounting items entered in account books kept by the Bank at insignificant cost to the Bank and could not have represented any property owned by the Bank or by any of its servants, agents or customers, other than the

Applicant or her late husband.

8. No valuable consideration moved from the Bank in exchange for the giving of the said mortgages.

9. All moneys made available through the said accounting processes of the Bank, allegedly as considerations given by the Bank in return for the giving of mortgages were, throughout their existence, a portion of the Public Credit of the Commonwealth of Australia and should have been, but were not, so accounted by the Bank.

10. The Bank by its actions implicitly claimed and then effectively assumed ownership of such portions of the Public Credit of the Commonwealth and pretended to lend such funds, creating the false impression that a right to recover such moneys inhered in the Bank.

11. Such moneys were effectively and wrongfully appropriated by the Bank to its own benefit and in breach of the implied duty of trust taken unto itself in its role as a professional accounting organization specialising in money matters.

12. The Bank's implicit claim to ownership of Public Credit, created as above, is not authorised by the Constitution and laws of the Commonwealth and is unconstitutional and void.

13. Such moneys, not being property of the Bank, are not and cannot be a lawful consideration to support any thing

done, or upon which any lawful rights can be erected, by or  
to the benefit of the Bank.

14. Applicant were in the form of legal tender, as  
provided for in the [Currency Act 1965](#) and the Commonwealth  
Constitution.

15. In the premises, the conduct of the Bank was  
misleading or deceptive, within the meaning of the term as  
used in and in breach of section 52 of the Trade Practices  
Act and/or fraudulent. (sic)"

12. The point that these paragraphs seek to raise asserts in essence that no moneys were advanced pursuant to the various mortgages. It is said that the Bank is asserting ownership of public credit and the thrust of the cause of action pleaded appears in paragraph 8, namely that:

"(n)o valuable consideration moved from the Bank in exchange for  
the giving of the said mortgages."

13. In this claim, as appears from the further and better particulars supplied by Mrs Napier, much reliance has been placed on a book by Laurence Hoins bearing the title, "How to Screw 'Your' Bank". In those further and better particulars she sets out parts of that work and, in particular, a draft statement of claim appears which includes, inter alia, an allegation in paragraph 5 in these terms:

"The alleged debt was created by the first respondent as a  
book-entry credit out of thin air and virtually at no cost  
to the first respondent and thus the first respondent has no  
right whatever to claim payments in cash currency of the  
Commonwealth of Australia in return for book-entry credit  
created out of thin air and totally unbacked by either real  
wealth or security in the hands of the first respondent. "

14. While it is not quite clear, it appears that the position prior to the execution of the first mortgage was that other borrowings were paid out and the total indebtedness of Mr Napier consolidated in the borrowing, the security for which is expressed in the bills of mortgage executed by him.

15. With respect to those who genuinely entertain a contrary view, I am satisfied that no reasonable cause of action is disclosed by paragraphs 5 to 15 inclusive, and in respect of that part of the statement of claim, I am satisfied that the cause of action pleaded by Mrs Napier comes within O. 20 r. 2. This view is supported by a consideration of the correspondence between Mr Hoins and various officers of the Reserve Bank of Australia and others which appears in the bundle of correspondence which Mrs Napier put before me and which I marked as Exhibit 1.

16. So far as unconscionability is concerned, paragraph 16 of the statement of claim pleads:

"Further and/or in the alternative, the

conduct of the Bank

in taking mortgages as it did was

unconscionable, within the

meaning of the term as used in and in

breach of section 52A

of the [Trade Practices Act](#) and/or

fraudulent. (sic) "

17. So far as particulars of that claim are concerned, it appears from, for instance, paragraph 3(a) of the further and better particulars that Mrs Napier is claiming that:

"The substance of the false representation by the Bank

exists in the Bank's explanations and advertising of its

basic lending policy, wherein it is implied that the Bank

undertakes to 'lend' funds to 'willing borrowers' on terms

which include the charging of interest on the outstanding

balance and the implicit demand that funding cannot be made

UNLESS a mortgage over valuable property or similar security

is given to the Bank.

This policy implicitly and wrongly assumes



(and so falsely represents) that such 'loan' funds actually exist and are the rightful property of either the Bank, its depositors or its shareholders or that such are the source(s) of those funds. "

18. For the same reasons which, in my opinion, the claim dealing with the creation of credit pleaded in paragraphs 5 to 15 fails to disclose a cause of action, this claim similarly is not a reasonable one.

19. Paragraph 17 of the statement of claim says that there are false representations implicit in the conduct of the Bank and so far as that allegation is concerned the particulars again pick up the complaint concerning the creation of credit.

20. Specifically in paragraph 3(f) of the further and better particulars Mrs Napier claims:

"It is false to assert or imply that either the capital of the Bank or any single deposit or group of deposits made with the Bank or that any other fund which is properly within the possession of the Bank, is the source or origin of funds made available to a new borrower. "

21. And paragraph 3(h) of the further and better particulars makes it plain that those representations are said to constitute a breach of [s. 53 of the Trade Practices Act](#). In particular it is said:

" ...the Bank persistently represents the existence of rights which are contrary to the specific wording of Magna Carta relating to the disposition of property taken as security for an alleged debt; the Bank persistently makes false or misleading representations concerning the value (i.e. cost) and place of origin of funds which it purports to 'lend' and of the value of the accounting services which it actually renders in maintaining a 'loan' account."

22. Paragraphs 18, 19 and 20 allege overbearing conduct or overbearing pressure on the part of the Bank applied by the then manager Mr Sid Pyne to Mr Napier prior to the execution of the earlier mortgages, and to Mrs Napier and her stepson subsequent to his death.

23. The nature of those assertions is fleshed out in paragraph 4 of the further and better particulars and in particular paragraph 4(c) and 4(d). The statement of claim and the particulars supplied make broad brush assertions which are conclusions rather than assertions of fact which, if proved, would establish the conclusion alleged.

24. By way of example, paragraph 4(d) of the further and better particulars of Mrs Napier alleges:

"The conduct of the Bank was unconscionable in that:

(i) the Bank took unfair advantage from its relatively

stronger bargaining position over Mr Napier while he was

at a distinct disadvantage;

(ii) the alleged interests of the Bank in the overdue funds

were not legitimate interests and its implied right to

demand immediate or any repayment thereof was not an

inherent right of the Bank;

(iii) the aggressive manner of Mr Pyne was clearly intended to

intimidate and belittle those to whom he was speaking

and to induce acceptance of the terms which the Bank

effectively was able to dictate. "

25. The provision of particulars cannot cure defects in pleading. I refer in particular to the observations by Fisher J in *Trade Practices Commission v David Jones* [1985] FCA 228; 7 FCR 109 at 112. It seems to me that no particulars of fact or assertions of fact are given which are if accepted capable of constituting unconscionability.

26. Whether the case be framed as one of duress or of unconscionable conduct, facts have to be pleaded which, if accepted, will prove either that pressure was exerted such that the will of the customer of the Bank was overcome and that the pressure exerted was illegitimate or, in the sense in which unconscionability is discussed by Deane J in *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 particularly at 474, that the customer of the Bank was subject to a special disability of which the Bank was aware and that it took unfair advantage of that superior position.

27. In the view I take of such limited facts as are pleaded, neither basis appears on the pleading and even if those facts that are alleged in the pleading are made out, those matters would not be capable of constituting either duress or unconscionable conduct.

28. So far as the question of unconscionable conduct concerning the Bank's treatment of Mrs Napier is concerned, I think it right to acknowledge that it is asserted that the execution of the mortgage between her and her stepson on the one hand and the Bank on the other occurred a very short period after the death of her husband and it was said from the bar table that it would have been obvious to the officer of the Bank engaged in that transaction that she was in a position of disadvantage and not sensible of her own interest at the time of the execution of that document.

29. That case is not pleaded at the moment but if it were to be relied on it would require a precise and detailed pleading - a prospect that does not seem likely given what has appeared so far. Nonetheless, there is material to suggest that such a case might emerge should there be an opportunity to re-plead.

30. There is one aspect of the pleadings which seems to me to be in a different category from the others and that is the complaint implicit in what is pleaded in paragraphs 21 to 23 inclusive which allege that:

"21. A bridging interest rate of 19.5% was conditionally accepted by Mr Napier at first instance on the understanding and agreement that a fixed interest facility would be given when the prevailing rate dropped to a level of not more than 15.5%. Mr Napier was assured by Mr Pyne that the Bank could match the combined interest rate of 15.56% which applied to pre-existing loans with other institutions, which the Bank was proposing to consolidate. The Applicant was consistently led to believe that the same agreement and understanding applied at the signing of the most recent mortgage.

22. Such assurances given by Mr Pyne proved to be false representations within the meaning of the term as used in and in breach of the terms of [section 53](#) of the Trade Practices Act.

23. Since probate was granted on 21 July 1987, the Applicant and her coexecutor have been consistently misled by the Bank to believe that the prevailing fixed term bill

rate had never dropped sufficiently for her to obtain the agreed fixed term rate. In fact, the prevailing rate is believed to have dropped, to 14.7% in mid-June 1987 and, in December 1987, to 13.9%. Such conduct by the Bank was either a false representation and/or misleading, within the meaning of the terms as used in and in breach of section 52 and/or [section 53 of the Trade Practices Act](#). Further and/or in the alternative such conduct was, in all the circumstances, unconscionable, within the meaning of the term as used in and in breach of section 52A of the Trade Practices Act.

31. It seems to me that the complaint implicit in those paragraphs is that there was a prediction as to the future course of interest rates; that in breach of what was then represented by Mr Pyne, there was no communication with Mr or Mrs Napier concerning the decline in interest rates which did, in fact, occur in 1987 and that, as a consequence, the rate of interest paid or payable pursuant to the provisions of the mortgage was considerably in excess of what ought properly to have been payable had the representations made by Mr Pyne been honoured.

32. While I accept that a breach of s. 52 is not precisely pleaded, particularly in the absence of any assertion that the prediction as to the future course of interests rates was either not genuinely entertained by Mr Pyne at the time of its making or that, in some other way because of the failure to advise or act on the part of the Bank, there was conduct which amounted to conduct which was misleading or deceptive, it seems to me that at least the skeleton of a case is made out in that respect.

33. It is therefore not appropriate simply to strike out the statement of claim in its entirety, with no opportunity to the applicant to replead. On this aspect of the matter, I have had regard to the letters which constitute exhibits 2 and 3. It seems to me that a close reading of those does not give the same support to the complaints of the applicant as was submitted should be the case. In particular the earlier letter contained a representation by Mr Pyne that Mr Napier might apply at some later time to convert the bridging finance loan facility to one of a fixed interest loan so that the onus, in a sense, was on the borrower to make that application.

34. In paragraph 11(b) of the further and better particulars of the statement of claim detailing "Total Estimated Losses July '87 - June '90 : \$470,000", there is an element which is referred to as "Excess interest charges (over and above the 15.5 per cent agreed rate) \$60,000". I take this to relate to the measure of damages sought to be relied on in respect of this aspect of the matter. There are, however, further difficulties in the way of the applicant concerning this aspect of the matter and that is the possible significance of time limitations. In the light of what I propose to do, it is appropriate that I say nothing further about that aspect of the matter.

35. While I am conscious of the caution with which courts should approach the striking out of pleadings, or causes of action, as indicated at the outset of these reasons, it seems to me that on a fair reading of the statement of claim and the further and better particulars that have been provided, this statement of claim should be struck out in its entirety. It is, in my view, impossible for the respondent sensibly to plead to it. It seems to me that most of the causes of action which it seeks to set up are not reasonably open to the applicant. In the view I take of the entire statement of claim, almost all of it would have to be struck out, and to leave the residue would be confusing, to put it no higher. The better course is to strike out the whole of the statement of claim.

36. The statement of claim fails to plead material facts. It contains confusing and irrelevant material and matters which are pleaded in a nebulous or speculative or vague way. I think that it might be possible to plead a viable cause of action, but the objectionable parts of the entire document are so intertwined with material which is not so objectionable that the burden cast on the Bank to plead to the statement of claim is properly to be classified as oppressive.

37. I propose to allow Mrs Napier the opportunity of pleading a fresh statement of claim. For the reasons I have earlier expressed, any claim based on the view of the creation of credit expressed in the statement of claim that I have struck out is almost certain to meet the same fate as the cause of action pleaded in paragraphs 5 to 15 of the statement of claim filed on 16 January this year. I know from the interest of those in the court today, that the proceedings brought by Mrs Napier were hoped to be used as a vehicle to ventilate the creation of credit views of Mr Moins and those who are attracted by his views, but I make it plain that in my opinion no reasonable cause of action is disclosed in that part of the pleading.

38. As to oppression, much the same applies, and I do not regard the prospects of successfully pleading a viable cause of action as very high.

39. As to unconscionability, and as to the question of s. 52 conduct concerning interest rates, it is best that I say nothing for the moment.

40. For these reasons I strike out the statement of claim filed on 16 January 1992, and the further and better particulars of that statement of claim. I grant liberty to apply to the applicant to file an amended application and a fresh statement of claim. Because the formulating of any further statement of claim seems to me to be of critical importance as to whether there is any cause of action which Mrs Napier, either as executor or on her own behalf, can bring, I propose to permit a reasonable time for the filing of a fresh statement of claim. I direct that any fresh statement of claim by the applicant be filed and served by 4 pm on Friday, 29 May 1992.

41. As to costs, I order that the applicant in the principal proceedings pay the respondent in the principal proceeding's costs of the motion to be taxed if not agreed. Pursuant to the Rules of the Federal Court, no such taxation will occur until the conclusion of this litigation, in the absence of an earlier order by the Court.