



New South Wales Supreme Court

CITATION :	St George Bank Limited v John Wilson & Anor. [1999] NSWSC 1150
CURRENT JURISDICTION :	Common Law
FILE NUMBER(S) :	11203/99
HEARING DATE(S) :	4 August 1999
JUDGMENT DATE :	30 November 1999
PARTIES :	St George Bank Limited - Plaintiff John Wilson & Anor - Defendants (John Wilson in person)
JUDGMENT OF :	Simpson J at 1
COUNSEL :	Plaintiff - S Reuben
SOLICITORS :	Plaintiff - David Landa Stewart
CATCHWORDS :	
CASES CITED :	General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 Scanlan's New Neon Limited v Tooheys Limited (1944) 62 WN (NSW) 53 Stephenson v Garnett [1898] 1 QB 677 Wilson v St George Bank Limited, unreported, 17 September 1996) Master Greenwood Garcia v National Australia Bank Ltd (1989) 194 CLR 395
DECISION :	Summary judgment for the St George Bank

**THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION**

SIMPSON J

Tuesday 30 November 1999

11203/99

ST GEORGE BANK LIMITED v John WILSON
Judgment

HER HONOUR :

1 The present proceedings were commenced by statement of claim filed on 19 May 1999.

2 The plaintiff, St George Bank Limited (to which I will refer, for convenience, as “the Bank”) claims possession of certain land of which the defendants are jointly the registered proprietors. The basis of the claim is expressed to be default by the defendants under the terms of the mortgage to which the land was subject. On 2 July 1999 the first defendant, John Wilson, acting on his own behalf, filed a defence to the statement of claim. On the same date Mr Wilson, purporting to act on behalf of the second defendant, his wife (Laraine Joy Wilson) filed a document under a cover sheet entitled “Defence of Second Defendant”. Annexed to this document was a hand-written letter, apparently signed by the second defendant. It will be convenient hereafter to refer to the two defendants by their names.

3 By notice of motion the Bank seeks orders that each defence be struck out and that summary judgment be entered on the statement of claim. SCR Pt 15 r 26 was cited as the statutory authority for the making of the first order sought, and SCR Pt 13 r 2 as the authority for the second. By Pt 15 r 26 the court is empowered to make such an order, relevantly, where the pleading:

- (a) discloses no reasonable defence;
- (b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or
- (c) is otherwise an abuse of the process of the court.

4 Pt 13 r 2 permits summary judgment to be entered for a plaintiff where:
(a) there is evidence of the facts on which the claim is based;

and

(b) there is evidence given by the plaintiff or some responsible person that, in the belief of the person giving the evidence, the defendant has no defence to the claim.

5 At the commencement of the hearing into the Bank's notice of motion Mr Wilson appeared unrepresented. He filed in court an affidavit sworn by his wife, the substance of which was as follows:

"I have no desire to attend the Supreme Court of New South Wales at any time to participate in any way in these proceedings in person nor to be represented by legal counsel."

6 Mr Wilson made clear that he claimed the right to have all issues, including issues of law, determined by a jury. I ruled that the issues raised by the Bank's notice of motion were issues of law only, and fell to be decided by a judge sitting without a jury. On hearing that ruling, Mr Wilson left the court. The matter thereupon proceeded in the absence of both defendants.

The Application to Strike out the Defences

7 It is well established that the power to strike out a pleading will be exercised only in plain and obvious cases. In this regard the principles stated in **General Steel Industries Inc v Commissioner for Railways (NSW)** (1964) 112 CLR 125, whilst specifically concerned with and directed to initiating process, are equally applicable to defences. If it appears that a real issue exists between the parties, even where it may be obscurely or ambiguously or confusingly expressed, the power conferred by the rules ought not be exercised to prevent the litigation of that issue. The principle applies equally to applications under either of the rules presently invoked. One particular circumstance that may justify the exercise of the power is the prior conclusive determination, adversely to the party who seeks to raise it, of the issue raised in the pleading. This is especially so where the determination was made in proceedings between the same parties:

Scanlan's New Neon Limited v Tooheys Limited (1944) 62 WN (NSW) 53; **Stephenson v Garnett** [1898] 1 QB 677. That is of present relevance.

8 In 1996 Mr Wilson instituted proceedings against the Bank concerning the same property and the same mortgage. The essence of the claim he there made was that the mortgage contract was void for uncertainty because it provided for a variable rate of interest which could be ascertained by reference to data published by the Bank. The Bank successfully sought an order striking out the statement of claim, relying on the same two rules as it now invokes. Master Greenwood dismissed the statement of claim (**Wilson v St George Bank Limited**, unreported, 17 September 1996).

9 Mr Wilson appealed to a single judge of this Division (Hamilton AJ, 30 September 1996, (and to the Court of Appeal, Clarke JA and Abadee AJA on

28 October 1996). He was unsuccessful on each occasion. His application for special leave to appeal to the High Court was refused (11 April 1997). The issue he then sought to litigate was his assertion that a loan agreement providing for a variable interest rate was void for uncertainty. By the refusal of his application for special leave to appeal to the High Court, that issue has been finally and conclusively determined against him.

10 Yet that is the substance of the defence he now pleads. Included in his defence are the following passages:

“4. These proceedings ... are the result of previous proceedings ... when the judgments handed down were wrong and wrongful ...

[The judgments to which he there refers are the judgments rejecting his argument that a contract providing for a variable rate of interest is void for uncertainty. He goes on to identify by name the judges involved in the various decisions.]

5. The judges mentioned above in paragraph 4 all had before them the brief of my case containing information about the fraud committed by the banks ... issuing variable interest rate loan contracts which are illegal under common law. Common law demands that there be “certainty of terms”. And because, by definition and in reality, variable means uncertain and certain means not variable , loan contracts incorporating variable or uncertain interest rates or terms are void for uncertainty ...

8. The judges mentioned above in paragraph 4, all perverted the course of justice ... in that ... a court must declare that loan contracts incorporating variable interest rates are void for uncertainty ...

10. This defendant denies that the plaintiff has any right to claim a Writ of Possession because plaintiff has acted fraudulently by making out that the loan contracts ... are valid when variable interest rates, incorporated into those contracts, render those contracts void for uncertainty.”
(emphasis in original)

11 The issue thus sought to be raised by Mr Wilson is precisely the issue he has already unsuccessfully litigated throughout all tiers of the NSW judicial system. Those paragraphs must be struck out.

12 I have carefully examined the document in an attempt to discern any other defence of substance which might, however unintelligibly pleaded, lie there concealed. The remaining paragraphs in the document contain the following:

“1. This defendant denies the validity, ie, the truth and soundness, of the plaintiff’s Statement of Claim.

2. This defendant invokes the power, purpose and function of the Court which is to establish the truth, the whole truth and

nothing but the truth and to administer Justice.

3. This defendant calls upon the adherence by judges to their Oath of Allegiance and Judicial Oath which are to “be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second” and to “do right to all manner of people ...

[This paragraph goes on to recite the alleged evil and fraud perpetrated by banks, corruption of the judiciary, and matters to do with the coronation of the Queen of England].

6. The judges mentioned above in paragraph 4 all have committed judicial corruption ...

9. This defendant, on 28 May 1999, has filed a Notice of Motion for the case to be Tried by a Jury, accompanied by an Affidavit. Should a judge want to deny a Trial by Jury, then that is the very reason there should be Trial by Jury because it means the judge has something to hide and that something can only be that judges are corrupt ...”

13 Pt 15 of the Supreme Court Rules contains the rules of Court governing pleading. R 7(1) provides:

“A pleading of a party shall contain, and contain only, a statement in summary form of the material facts on which he relies, but not the evidence by which those facts are to be proved.”

14 It is quite apparent from the extracts above that these paragraphs do not plead any material facts relevant to the cause of action. They are incapable of providing the foundation for any defence to the statement of claim. In terms of r 26 they are incapable of disclosing, alone or in conjunction with any other pleading, any defence; and they have a tendency to cause prejudice, embarrassment and delay in the proceedings. They must be struck out.

15 That leaves paragraphs 11, 12 and 13. Paragraph 11 is framed in the following terms:

“11. This defendant denies the plaintiff has any right to claim a Writ of possession because the Memorandum of Mortgage ... and the Mortgage, itself, were not executed. For the Memorandum and the Mortgage, itself, to have been executed, the Mortgagee had to lend money and no money was lent which constitutes acting fraudulently on the part of the Plaintiff. Herein the annexure marked “F” gives figures from the Reserve Bank of Australia pertaining to the practice of money creation other than by the Reserve Bank of Australia which is the only legitimate source of money for the Commonwealth of Australia while the Annexure marked ‘G’ illustrates an example of how the money created by banks profits the banks.”

16 Prima facie, the first sentence alleges a fact which is capable of being

material to the cause of action and, if proven, constituting a defence. Parts of the second sentence, although the logic is impenetrable, are capable of being construed as the assertion of a fact material to the cause of action; that is, on one construction, it denies the advances of money which are the foundation for the Bank's cause of action. It is unclear whether the third sentence is intended to plead a fact supporting the assertions made in either or both of the preceding sentences, or to make a fresh and different assertion of fact. It is incapable of doing the former, and if it is intended to do the latter, it asserts a fact which is incapable of being material to the cause of action. The third sentence of paragraph 11 will be struck out.

17 Paragraph 12 asserts:

“The Memorandum in question stated an amount of \$35,146-10 and the mortgage in question stated an amount of \$150,000-00. Both these amounts are the subject of a Notice of Motion for Discovery.”

18 Although it may be that in this paragraph Mr Wilson intended to assert some material discrepancy between the documents said to establish the Bank's cause of action, it is impossible to discern with any clarity what issue he seeks to raise. This paragraph will be struck out.

19 In paragraph 13 Mr Wilson pleads:

“This defendant asserts, because of the fraudulent activities of the St George Bank Limited and the wrongful and corrupt judgments awarded against him, that not only should the Writ of Possession be struck out but that the Court should institute proceedings for the indictment of that bank and the judges named in paragraph 4 above.”

20 This paragraph appears to be a combination of a reiteration of the claims made in paragraphs 4, 5, 8 and 10, and an assertion that this Court should itself institute criminal proceedings against the Bank, some serving and retired judicial officers of this Court, of the Court of Appeal and the High Court. Any such action is entirely beyond the bounds of the power of this Court. The paragraph will be struck out.

21 There thus remains of Mr Wilson's defence to the statement of claim the first two sentences of paragraph 11 which are set out above. If either of the facts therein asserted is true, Mr Wilson would or might have a good defence to the Bank's claim. As I read these paragraphs, they amount to a denial of facts on which the Bank's claim is based and therefore concern facts on which the Bank carries the onus of proof. It will be necessary to return to these matters.

22 Notwithstanding the affidavit sworn by Mrs Wilson which was filed in court by Mr Wilson at the commencement of the proceedings, it is appropriate and necessary to consider the defence earlier filed on her behalf. Although that document was filed as a “defence”, in form and substance it is unrecognisable as such. It is constituted by a hand written letter, which I set out in full below:

“This letter is my answer to a request to provide a defence to the action taken by St George Bank against John Wilson and myself - Laraine Joy Wilson. The proceedings, to date, have been without my full knowledge or consent.

John wishes to pursue the matter even at the risk of self-destruction and the loss of our home. I do not. I have no means of controlling his actions, I have no means of paying the mortgages or costs. Having signed the loan and mortgage papers, unwillingly, under duress - my husband's - is something I regret .” (emphasis added)

23 Were it not for the last sentence of this letter I would have no hesitation in striking out the document. There is clearly no proper pleading of any fact material to the Bank's claim. Even the last sentence does not, in terms, plead any fact which could of itself constitute a defence or partial defence to the Bank's claim. In the light of recent decisions of the Court of Appeal and the High Court (eg **Garcia v National Australia Bank Ltd** (1998) 194 CLR 395) I am left with the uncomfortable feeling that, properly advised, Mrs Wilson may be able to mount an arguable defence to the Bank's claim. However, it is not for this Court to impose legal advice or representation on an unwilling litigant and Mrs Wilson's subsequent affidavit establishes that she does not wish to participate in the litigation. As it stands, her “defence” does not plead material facts sufficient to establish a defence and must also be struck out.

24 That brings me to the Bank's claim for an order for summary judgment under Pt 13 r 2. Only two things potentially stand in the way of making such an order. The first is the two remaining sentences in Mr Wilson's defence. The second is the possibility that either defendant may wish to reformulate his or her defence.

25 In this regard it is relevant to examine the factual assertions made by Mr Wilson, in the light of evidence adduced on behalf of the Bank. The first assertion is that the mortgage memorandum was not executed, but this is plainly contradicted by the affidavit of Jan Cropp, sworn 22 July 1999 in which, not only is it deposed that the mortgage was executed, but a signed copy is annexed. There can be no substance in Mr Wilson's assertion to the contrary. The pleading raises a false issue which can be resolved only one way, unless Mr Wilson's true intention is to suggest that his purported signature on the document was a forgery. To do that he would be obliged to plead in very clear terms to that effect. He has not done so. The second assertion is that no money was lent under the mortgage. Again, this is contradicted by the affidavits of Jan Cropp sworn 22 July 1999 and 2 August 1999, to the latter of which are annexed copies of bank records supporting the assertion. In other words, there is apparently objective evidence contrary to the assertions made by Mr Wilson in the defence. It is appropriate to take this evidence into account under Pt 13 r 2.

26 Evidence of the remaining matters necessary to support the Bank's claim is contained in the affidavits of Ms Cropp, and three affidavits sworn

by Patrice Daly, a solicitor employed by the Bank's solicitor. It is only necessary to say that I am satisfied, in terms of Pt 13 r 2 (1) (a), that there is evidence of the facts on which the claim is based. Further, Ms Daly, by affidavit sworn 21 July 1999, deposed to her belief that Mr and Mrs Wilson have no defence to the claim, thus completing the evidentiary matters necessary to provide the foundation for the relief available under this rule. I am satisfied that the Bank has established its entitlement to such an order. Accordingly, I propose to enter summary judgment for the Bank.

27 It will be necessary for the Bank to prepare short minutes of orders in accordance with these reasons.

Last Modified: 12/02/1999

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