

## **WILSON v ST GEORGE BANK LIMITED**

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

CLARKE JA and ABADEE AJA

28 October 1996

[1996] NSWCA 560

APPEAL FROM SUMMARY JUDGMENT DISMISSED — NO ARGUABLE CAUSE OF ACTION  
DISCLOSED IN STATEMENT OF CLAIM

**Clarke JA.** Mr John Wilson has filed a notice of appeal from a decision by Hamilton AJ on 30 September 1996 in which the learned judge dismissed an appeal brought by Mr Wilson from a judgment of Master Greenwood given on 17 September 1996.

In the course of preparation for the hearing both parties seem to have directed their mind to the need to secure the leave of this court to bring the appeal. Quite unusually, St George Bank Limited, the opponent, has not sought, as I understand it, to strike out the appeal but in a gesture helpful to Mr Wilson has invited the Court to consider an assumed application by Mr Wilson for leave to appeal and to dismiss it.

The factual background is that Mr Wilson filed a statement of claim in the Supreme Court seeking a declaration that a loan account that he has with the Bank is void; or, alternatively, the severance of part of what is described as a contract. Without going into the detail of the statement of claim, my understanding is that Mr Wilson complains that a mortgage which he entered into with the St George Bank is void, or partly void because in one respect it is uncertain in its terms.

The mortgage provides for the payment of a fixed rate of interest for the first five years of its term and for the following two years makes the following provision (I am not quoting from the mortgage but the effect of the mortgage).

On the fifth anniversary of the first advance of your loan the above fixed interest rate will cease. At that time the following interest rate options will be available:

- (a) A further interest rate period at the rate applicable for St George's fixed rate residential loans at that time; or
- (b) St George's variable residential loan interest rate applicable at that time.

The point is that at the end of five years the fixed interest rate ceases and there then is an option available to Mr Wilson to determine whether, in the ensuing period of the mortgage, he will pay interest at the St George fixed interest rate for

residential loans, or the St George variable interest rate for residential loans. His complaint is that the provision for interest during the final two years is not fixed, ie, the interest rate payable in respect of those two years is not known at the time of the mortgage and accordingly there is an uncertainty in the agreement between the parties which renders the agreement void or partly void.

The St George Bank, upon receipt of the statement of claim, moved to strike it out or, alternatively, secure an order that the proceedings be summarily dismissed on the ground that there was no arguable cause of action disclosed in the statement of claim. The argument of the St George Bank was that it was clear that there was no uncertainty in the terms of the mortgage and that the parties had expressly agreed upon the manner or mechanism by which the interest rate for the mortgage would be fixed in the last two years of its term. Accordingly, there was no substance at all in the complaints in the statement of claim and it should be struck out and the proceedings dismissed.

Master Greenwood heard the application and on 17 September 1996, he ordered that Mr Wilson's claim be summarily dismissed. Mr Wilson thereupon appealed from that judgment and the appeal was, as I have earlier indicated, heard by Hamilton AJ and dismissed.

The Supreme Court Act in section 101(2)(i) provides that an appeal shall not lie to this court, except by leave of the Court of Appeal, from a judgment or order of the court in a division on an application for summary judgment under the Rules. As I understand the motion considered by Master Greenwood, and upheld by him, it was an application for summary judgment.

Accordingly, Mr Wilson can bring an appeal to this Court from Hamilton AJ's order only by leave of this Court and, despite the absence of a formal application by him, the Court is disposed in the circumstances to treat the present hearing as an application for leave to appeal. Clearly, if Mr Wilson does not get leave to appeal he cannot seek any other orders from this court, which acts only on the basis of the existence of 20 pending appeals.

The question then is whether Mr Wilson should be granted leave to appeal. In my opinion the material before the court demonstrates that there was no uncertainty in the terms agreed between the parties, and therefore no invalidity of the agreement. The uncertainty that exists is only as to what interest will be payable by Mr Wilson for the last two years of the term. The parties have, however, in their contract provided an agreed mechanism for determining with certainty what that interest rate will be. Such a method of determination of interest rates and analogous payments is well known to the law and, provided that the parties have agreed in terms that could be described as certain as to the mechanism which is to

be applied in determining what the interest rate or other payment should be, the agreement does not fail for lack of certainty.

I regard that proposition as such trite law as to need no authority for its support. It is well established and is applied as settled in the commercial law of this State on a regular basis. Although the decision in *Tonelli v Komirra Pty Limited* (1972) VR 737 was somewhat different, it provides an example of the method by which the law upholds contracts as sufficiently certain where a mechanism is provided for determining interest rates payable in the future which have not been expressly agreed at the time of the contract.

In my opinion there is no substance at all in law in Mr Wilson's complaints and I would be disposed to dismiss the application with costs.

**Abadee AJA.** I agree with the orders proposed by Clarke JA and his reasons for them.

**Clarke JA.** The orders of the court will be that leave to appeal from the judgment of Hamilton AJ is refused with costs.

Orders accordingly.

Counsel for the appellant: IN PERSON

Counsel for the respondent: S REUBEN

Solicitors for the respondent: DAVID LANDA: STEWART and CO