
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : CONNELL -v- AUSTRALIA AND NEW ZEALAND
BANKING GROUP LIMITED [2023] WASCA 48

CORAM : MURPHY JA
MITCHELL JA

HEARD : 24 MARCH 2023

DELIVERED : 24 MARCH 2023

PUBLISHED : 24 MARCH 2023

FILE NO/S : CACV 32 of 2022

BETWEEN : PAUL ANTHONY CONNELL
Appellant

AND

AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED
First Respondent

MIRANDA HEIDI JOY CONNELL
Second Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : MASTER SANDERSON

File Number : CIV 1384 of 2020

Catchwords:

Banking and finance - Application for summary judgment for plaintiff in action by bank against borrower for repayment of loan and possession of property used as security for loan - Whether master erred in holding that arguments as to description of defendant and production of 'wet ink' contract provided no arguable defence to action

Legislation:

Nil

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : No appearance
First Respondent : T E Strack
Second Respondent : No appearance

Solicitors:

Appellant : In person
First Respondent : Dentons Australia
Second Respondent : In person

Case(s) referred to in decision(s):

Spencer v The Commonwealth [2010] HCA 28; (2010) 241 CLR 118

REASONS OF THE COURT:

1 At the conclusion of the hearing on 24 March 2023, we ordered that the appellant's application in an appeal filed on 2 February 2023 be dismissed and that the appeal be dismissed. We also ordered the appellant to pay the first respondent's costs of the appeal to be assessed if not agreed. These are our reasons for making those orders.

Background

2 On 16 March 2020, the first respondent (**Bank**), as plaintiff, commenced the primary proceedings against the appellant and the second respondent, as defendants. The Bank claimed possession of certain land situated in Madeley of which the defendants were registered proprietors. The Statement of Claim in the writ relevantly pleaded that:

1. The defendants were registered proprietors of the Madeley property.¹
2. On or about 18 February 2015, the Bank and defendants entered into a written loan agreement by which:²
 - (a) the defendants borrowed \$681,074.96 (**loan amount**) from the Bank and agreed to repay the loan amount to the Bank in accordance with the terms and conditions of the loan agreement;
 - (b) the defendants secured repayment of all money payable under the loan agreement by a first registered mortgage over the Madeley property; and
 - (c) on or about 27 February 2015, the Bank advanced the loan amount to the defendants.
3. The terms of the loan agreement provided that:³
 - (a) the defendants would be in default if they did not pay any of the amount owing under the loan agreement when it was due;

¹ Statement of Claim, par 2.

² Statement of Claim, par 3.

³ Statement of Claim, pars 4 and 5

- (b) if the defendants were in default, the Bank could issue a notice of default specifying the default and providing a time for rectifying the default;
 - (c) if default was not rectified within the specified time the whole of the loan amount became immediately due and payable and the Bank could sue the defendants for the amount owing and take possession of the Madeley property.
4. As at 12 December 2019, the defendants had failed to pay \$43,708.41 when it was due, and were in default under the loan agreement and mortgage.⁴
5. The Bank issued a notice of default dated 13 December 2019 to the defendants.⁵
6. The defendants failed to rectify the default within the time specified in the notice of default, so that the whole amount owing pursuant to the loan agreement was due and payable and the Bank was entitled to possession of the Madeley property.⁶
- 3 On 6 September 2021, the appellant filed a defence to the primary proceedings. Apart from admitting the defendants were the registered proprietors of the Madeley property,⁷ the appellant's defence was not responsive to the pleading in the statement of claim. There was a bare assertion that various documents and the Bank's claim for possession should be 'deemed null and void'.⁸ The appellant counterclaimed for an order dismissing the Bank's case, an order that the Bank make a public apology and an award to the appellant for 'personal pain and suffering'.
- 4 By summons filed on 14 January 2022, the Bank sought summary judgment for possession of the Madeley property and dismissing the appellant's counterclaim. The principal affidavit in support of the summary judgment application deposed as to the facts referred to at [2] above and annexed what were deposed to be true copies of the loan agreement and mortgage. Both documents appeared to have been signed by the defendants. The appellant's signature was under the style 'Paul

⁴ Statement of Claim, par 6.

⁵ Statement of Claim, par 7.

⁶ Statement of Claim par 8.

⁷ Defence, par 1.

⁸ Defence, pars 2 - 8.

Anthony Connell'. The affidavit deposed as to the belief that the appellant had no defence to the Bank's action.⁹

5 On 14 March 2022, the appellant filed an affidavit in opposition to the Bank's summary judgment application. The affidavit began in the following terms:

I, am Paul-anthony, and I am a living man and hold the Office of Executor for Contracts for Paul Anthony Connell Estate, domicile at [the Madeley property], Executor, sincerely declare and affirm:

1. I occupy the Office of Executor for Contracts for Paul Anthony Connell Estate.
2. In relation to an application for Summary Judgement against Paul Anthony Connell regarding [the primary proceedings], I, Paul-anthony being the Executor for all Contracts for Paul Anthony Connell Estate, am therefore the Principal in this matter.

6 The appellant's affidavit proceeded to depose as to certain procedural matters, including that documents relating to the summary judgment application were served by way of email to 'a Mr Paul Connell'. The affidavit proceeded:¹⁰

I am called by the name; Paul-anthony and am the man that executes contracts in the name 'Paul Anthony Connell' (proper noun - Natural Private Person) as The Occupant of the Office of Executor for The Paul Anthony Connell, Estate.

I do not contract for any misnomer of the said proper noun name nor with any title attached thereto.

They [the Banks solicitors] have also used 'Mr' without a full stop which is not proper English and is therefore a foreign Language,

I believe they are using both the misnomer and the foreign Language in an attempt to deceive me to act for and/or be surety for the Legal Person/Entity (Artificial Public Person) that is owned by 'The State', and the use of deception to gain a financial Advantage is an offence under the laws of The Commonwealth.

7 After referring to an alleged conflict of interest by the Bank's solicitors, the appellant's affidavit posed a series of questions prefaced by the statement:¹¹

⁹ Affidavit of Maria Tytarenko affirmed 6 January 2022.

¹⁰ Appellant's affidavit affirmed 12 March 2022, pars 14 - 17.

¹¹ Appellant's affidavit affirmed 12 March 2022, par 24.

Until these questions are answered, it therefore cannot be shown or proved in substance or beyond reasonable doubt that [the Bank] have not breached any alleged agreement or full disclosure was not given.

8 On 15 March 2022, the master made orders giving the Bank leave to bring the summary judgment application. The appellant was ordered to give possession of the Madeley property to the Bank within 56 days of the date of judgment. The orders also gave judgment to the Bank against the appellant on the appellant's counterclaim and dismissed the counterclaim.

9 At the hearing on 15 March 2022, after hearing from the appellant, the master gave the following short oral reasons for granting summary judgment:¹²

Well, this is an application for summary judgment. Leave is required because the - the application is brought out of time. The delay is explained and I'm satisfied that there should be an extension of time to bring the - the application. The requirements of order 14 of the Supreme Court Rules are that a plaintiff must swear to an honest belief that there is no defence to the proceeding and that the - the statement of claim accurately - accurately reflects the plaintiff's claim.

Once that is done, the - the evidentiary onus shifts to the defendants to establish that they have a serious question to be tried. In this case, the - the affidavit material filed by particularly Mr Paul Anthony Connell, the second named defendant, simply doesn't disclose any cause of action. I can see nothing in the material which would indicate any conflict of interest, any fraud. As to the identity of the defendants, the identity seems to me to be plain and straightforward and an argument to the contrary just has no chance of success.

Accordingly, I'm satisfied that there ought to be judgment for the plaintiff in terms of the minute.

10 Subsequently, on 31 March 2022, judgment in default of appearance was entered against the second respondent.

The appeal to this court

11 On 4 April 2022, the appellant filed an appeal notice in this court against the orders of the master granting summary judgment to the Bank.

12 After some delay, on 27 October 2022, the appellant filed his appellant's case in the appeal. The grounds of appeal are as follows:

¹² Primary ts 4 - 5.

- That the Plaintiff in the Original Summary Judgement with Master Sanderson and Case Hearing with Registrar Fatharly, failed to identify the Defendant and Mr Paul Anthony Connell as being one and the same.
- That Mr Paul Anthony Connell is not actually a living man.
- That the Plaintiff in the Originating case in the Supreme Court never actually served any documents on Mr Paul Anthony Connell, but used other legal means to bypass due process of Law.
- That the Plaintiff did not submit any evidence nor testimony to in fact determine that there was a Defendant in the case.
- During the Summary Judgement Hearing on 15th March 2022, no evidence was produced to Master Sanderson by the [Bank or its solicitors] that there was in fact a claim, nor a counter-signed wet ink signaturred contract in existence to substantiate any claim.
- Paul-anthony, Office Holder of Executor for Contracts for Paul Anthony Connell Estate was present in court on the 15th March, and affidavits and submissions were not tabled and discussed in objection to Orders being sought, therefore full disclosure was not uncovered and Summary Judgement was made without any opposition.
- Hence the above grounds have led to this appeal, whereby the Court can uphold the rule of law and subsequent ORDERS be issued contained further in this document under document 'ORDERS SOUGHT' on the basis that Legal Maxim: 'if the plaintiff does not prove his case, the defendant is absolved'. And the Plaintiff did not prove its case.

Notices to show cause

13 A registrar's notice to attend dated 27 October 2022 was subsequently issued requiring the parties to attend for the purpose of the appellant showing cause why the appeal should not be dismissed on the basis that none of the grounds of appeal has a reasonable prospect of succeeding. The matter was listed for hearing on 8 December 2022, but that hearing date was vacated at the request of the appellant. The matter was relisted for hearing on 19 January 2023.

14 On 6 December 2022, the registrar issued a notice to attend on 19 January 2023 to show cause why the appeal should not be dismissed on the basis that none of the grounds of the appeal has a reasonable prospect of succeeding.

15 The appellant did not attend the hearing on 19 January 2023. He emailed the court indicating that he was unwell and would be seeing a neurologist on 23 January 2023. The Court made orders that:

1. Subject to any order made pursuant to an application filed under order 3 of these orders, the question of whether the appeal should be dismissed on the basis that none of the grounds of appeal has a reasonable prospect of succeeding shall be determined on the papers.
2. The appellant may, by no later than 4.00 pm on 2 February 2023, file supplementary written submissions to show cause why the appeal should not be dismissed on the basis that none of the grounds of appeal has a reasonable prospect of succeeding.
3. Any application for a further oral hearing must be made by filing an application in an appeal no later than 4.00 pm on 2 February 2023 specifying the earliest date proposed by the appellant for an oral hearing and supported by an affidavit which annexes a report of the appellant's neurologist as to whether the appellant was fit to participate in an oral hearing on 19 January 2023 and, if he was not fit, setting out:
 - (a) the reasons why the neurologist is of the opinion that the appellant was unfit; and
 - (b) when the appellant is expected to be fit to participate (either in person or by telephone) in an oral hearing of an estimated duration of no more than one hour.

16 On 2 February 2023, the appellant filed the application dated 2 February 2023, together with a supporting affidavit.

17 On 6 February 2023, the registrar issued a notice to attend on 24 March 2023, to (1) consider the appellant's application filed 2 February 2023 and, (2) hear oral submissions on the appeal in the event the appellant's application for a further oral hearing is granted.

The application filed 2 February 2023

18 On 2 February 2023, the appellant filed an application, seeking orders in the following terms:

1. Order that the case should not be determined on the papers according to CACV 32 of 2022 Order 1 made on the 19th of January 2023; and
2. Order that presentation of further evidence to the court be allowed before or specifically on any future hearing date[;] and

3. Order that an attached affidavit be sufficient evidence to warrant a further oral hearing.
4. Order that the neurologist report of Dr Daniel Clarke be accepted as evidence pursuant to parts a) and b) of CACV/32 of 2022 Order 3 made on the 19th of January 2023.
5. Order that a further oral hearing may occur any time from Thursday the 23rd of March 2023 onwards[.]

19 In his supporting affidavit, the appellant annexed what appeared to be a report by Dr Clark, consultant neurologist, to a general practitioner in relation to Dr Clark's review of the appellant on 23 January 2023.

20 The appellant did not annex to his affidavit a report from his neurologist in the terms required by par 3 of the orders made on 19 January 2023. In his affidavit the appellant said, in effect, that he had sought such a report, but it had not been forthcoming. Nor did the appellant take the opportunity, provided by order 2 of those orders, to file further written submissions on the question of why the appeal should not be dismissed on the basis that none of the grounds of appeal has a reasonable prospect of succeeding.

21 The appellant did not attend the hearing on 24 March 2023. On 23 March 2023, the appellant sent an email to the court indicating that he was not able to attend the hearing because he was unwell and requesting a further adjournment of the hearing for about a month. On the morning of the hearing on 24 March 2023, the appellant emailed a copy of a Patient Health Summary from the Landsdale Medical Centre. The summary indicates that the appellant attended on 17 March 2023 complaining of certain matters for which he is being treated. The summary does not indicate that the appellant is incapable of attending court or participating in a hearing by video or audio link.

22 The appellant's application does not comply with order 3 of the orders made on 19 January 2023, in that it is not supported by a neurologist's report dealing with the matters referred to in that order. The appellant has not produced any medical opinion which clearly indicates that he is incapable of attending court or participating in a hearing by video or audio link. In all the circumstances, we were not satisfied that further delays would be in the interests of justice, and we dismissed the appellant's application in an appeal filed on 2 February 2023.

Disposition of the appeal

23 At the hearing on 24 March 2023, we were satisfied that none of the appellant's grounds of appeal has any reasonable prospect of succeeding.

24 The evidence before the master included what was deposed to be true copies of the loan agreement and mortgage signed by the appellant. The appellant's affidavit did not deny that the signatures were his, but rather sought to construct some legal artifice between the appellant and 'Paul-anthony' who holds the 'Office of Executor for Contracts for Paul Anthony Connell Estate'. That is plainly a legal nonsense which does not provide the appellant with any arguable defence to the Bank's claim for possession of the Madeley property. It was sufficient for the Bank to produce what was deposed to be a true copy of the original loan agreement signed by all parties to the agreement, without producing 'a counter-signed wet ink signed contract'.

25 The appellant's affidavit did not dispute that money had been advanced under the loan agreement, that the defendants were in default of repayments, a default notice had been issued and the default had not been rectified. Nor did he depose as to any facts which might arguably provide a defence to the Bank's claim or support his counterclaim against the Bank.

26 We recognise that summary judgment should be awarded only in the clearest of cases, where one party can demonstrate that the question will certainly be resolved in their favour.¹³ However, there is nothing in the appellant's grounds of appeal or the material before the master which provides any proper basis for doubting that summary judgment was properly granted in this case.

27 It was for these reasons that we dismissed the appeal at the conclusion of the hearing on 24 March 2023. In our view, it was appropriate that costs should follow the event.

¹³ *Spencer v The Commonwealth* [2010] HCA 28; (2010) 241 CLR 118 [54] - [55].

REASONS OF THE COURT

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

EM

Associate to the Honourable Justice Mitchell

24 MARCH 2023