

DISTRICT COURT OF QUEENSLAND

CITATION: *Westpac Banking Corporation v Adhikari* [2023] QDC 203

PARTIES: **WESTPAC BANKING CORPORATION**
(plaintiff/respondent)
v
RAJAN ADHIKARI
(defendant)
and
DOUGLAS GRAEME MCCOY
(applicant)

FILE NO: BD No 1433/2023

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 10 November 2023

DELIVERED AT: District Court at Brisbane

HEARING DATE: 16 October 2023

JUDGES: Sheridan DCJ

ORDERS: **1. The application filed on 11 October 2023 is dismissed.**
2. Douglas Graeme McCoy pay the plaintiff's costs of and incidental to the application to be assessed on the indemnity basis.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – GENERALLY – where the plaintiff was the mortgagee of property owned by the defendant – where the plaintiff obtained default judgment for recovery of possession of the property – where the plaintiff was granted leave to issue an enforcement warrant for possession of the property – where a non-party purporting to own the property and also purporting to act on behalf of the defendant files an appeal against the grant of leave and applies for a stay of the enforcement warrant for possession pending appeal – whether the court should grant a stay of the enforcement warrant for possession

LEGISLATION: *Uniform Civil Procedure Rules 1999* (Qld), r 681, r 761, r 913, r 915

CASES: *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111

Colgate-Palmolive Company & Anor v Cussons Pty Ltd
 (1993) 46 FCR 225
Grocon Constructors (Qld) Pty Ltd v Juniper Developer No 2 Pty Ltd [2015] QSC 333
House v The King (1936) 55 CLR 499
Raschilla & Anor v Westpac Banking Corporation [2010] QCA 255
Westpac Banking Corporation v Adhikari [2023] QDC 169

COUNSEL: D M Turner for the plaintiff/respondent
 The applicant appeared on his own behalf

SOLICITORS: MinterEllison for the plaintiff/respondent
 The applicant appeared on his own behalf

Introduction

- [1] By an application filed on 11 October 2023, Mr Douglas McCoy sought an order for a stay of execution of a warrant for the repossession of property described as “1/7 and 2/7 Brugha Close Collingwood Park” (**Property**) by the plaintiff, Westpac Banking Corporation.
- [1] The stay was sought pending the determination of an appeal from the decision of this court made on 21 August 2023 which granted leave to Westpac to issue the warrant.
- [2] Execution of the enforcement warrant was to take place on 12 October 2023. Upon the filing of the application, Westpac postponed the enforcement warrant pending the determination of this application.
- [3] I have concluded that the application ought be dismissed.

Judgment in favour of Westpac

- [4] Westpac is the registered mortgagee of the Property. The defendant named in the proceedings is the registered proprietor.
- [5] Westpac commenced proceedings against the defendant on 10 June 2021, seeking recovery of possession of the Property as a result of non-payment by the defendant of a loan which was secured by a mortgage.
- [6] On 10 February 2023, judgment by default for possession was entered in favour of Westpac.

- [7] Both the defendant and Mr McCoy were served with the judgment for possession on 13 February 2023, under cover of a letter from Minter Ellison. The letter was sent to the respective email addresses held for each of the defendant and Mr McCoy and to residential addresses associated with the defendant. No appeal has ever been lodged against the judgment and the defendant has failed to comply with the judgment for possession.

Application for Enforcement Warrant

- [8] Pursuant to r 915 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), on 21 July 2023, Westpac applied for the issuance of an enforcement warrant for possession.
- [9] As it was possible that people other than the defendant were in occupation of the Property under a lease or tenancy agreement, Westpac applied pursuant to r 913(2) of the UCPR for leave to issue the enforcement warrant.
- [10] On 24 July 2023, Westpac's application filed 21 July 2023 was sent to the defendant, Mr McCoy and the occupiers of the Property by post to their respective known residential addresses, including to the occupiers at 1/7 and 2/7 Brughha Close, Collingwood Park, and to the respective email addresses held on file for the defendant and Mr McCoy. The two original supporting affidavits filed with the application and draft enforcement warrant were forwarded at that time.
- [11] The occupiers of 1/7 and 2/7 Brughha Close, Collingwood Park were personally served on 2 August 2023 with a copy of the judgment for possession and Westpac's application for the issue of an enforcement warrant. The covering letter from Minter Ellison confirmed the hearing date of 18 August 2023. At the time of service, the occupiers were asked by the process server whether they had a tenancy agreement. One of them responded that it was a private arrangement with the owner Douglas for a further six months. The other responded that they knew the owner.
- [12] The application was heard before Judge Porter KC on 18 August 2023.
- [13] The defendant and the occupants of the Property did not appear at the hearing. Mr McCoy appeared on his own behalf and purportedly on behalf of the defendant.

[14] At the hearing, further affidavit material was read and filed on behalf of Westpac with copies being provided to Mr McCoy at the hearing.

[15] At the hearing, Mr McCoy sought an adjournment of the application to put on evidence. This was refused. It was not only held that Mr McCloy had plenty of notice of the application and should have prepared material for the hearing, but also that any adjournment would have been futile given that Mr McCloy had no arguable basis to resist the issue of a warrant.¹

[16] Subsequently, Mr McCoy filed a notice of appeal against the judgment in the Court of Appeal.

The underlying case

[17] Mr McCoy bases his opposition to the issuance of an enforcement warrant on the ground that he is the owner of the Property.

[18] Mr McCoy relies upon a standard Queensland Law Society and REIQ contract for the sale of houses and residential land apparently signed by the defendant and Mr McCoy on 9 April 2019. The purchase price was said to be \$420,000. The deposit was said to be \$5,000 cash; which the document recorded the registered owner took. Against the item for the balance deposit were the words, “Sweat Equity”. In the place where entries are usually made if the contract is subject to finance, appear, in the place for the finance amount, the sum of \$415,000 and, in the place for the date for finance, the words “When negotiate Settlement with Wespac Bank”. Against the item for the settlement date were the words, “Date to be Appointed”.

[19] In the place of special conditions, the following five items appear:

“1.3. The seller sells the Property As Is, as he is going oversea[s] very soon and assigns all rights to the buyer.

1.4. The seller is behind in Mortgage payments and together we will need to find out the Pay Out Figure to complete settlement.

1.5. The seller will supply letters of request for Pay Out Figure of Mortgage from Westpac Bank.

¹ *Westpac Banking Corporation v Adhikari* [2023] QDC 169, [7].

1.6. The seller will supply his Power of Attorney to allow Westpac Bank to supply all necessary details to Settle.

1.7. This is agreed as an Unconditional Sales Contract and both Seller & Buyer can work together to obtain settlement details to complete for Buyer.”

[20] None of this is very promising, nor are the other two documents relied upon for the assertion that Mr McCoy was the owner of the Property; or entitled to be.

[21] One of the documents upon which Mr McCoy relies is a Queensland Land Title transfer form apparently signed by the defendant and himself but the document is not witnessed, is undated and unstamped, and there is no suggestion that the consideration of \$420,000 referred to in it was paid.

[22] The other document upon which Mr McCoy relies is a Queensland Land Title form for caveats apparently signed by the defendant and Mr McCoy on 9 April 2019. It describes the interest being claimed as one in fee simple based upon a signed unconditional contract with the deposit paid and transfer signed. There is again no suggestion that the remainder of the purchase price has been tendered or paid.

[23] Mr McCoy says that the defendant signed a power of attorney on 9 April 2019 appointing him as his attorney in relation to the Property. He says that the defendant swore an affidavit on 23 December 2022 before a Justice of the Peace and attached a copy of that power of attorney signed by him on 9 April 2019.

[24] Mr McCoy says that on 15 August 2023 he sent by registered post to Westpac (and to their solicitors, Minter Ellison) his “offer and payment to discharge the Mortgage” and relies upon a document described as “An Offer for Peaceful Settlement being a Convertible Note/Promissory Note and Bill of Exchange Payment for \$450,000”.

[25] The document described itself as a promissory note in the sum of \$450,000 redeemable on demand at Freckles Café 102-104 Byron Street, Inverell NSW 2360 at 10.30 hours “without; let, delay, hindrance or ado, on the 28th day of August, AD 2023”.

- [26] In his application for a stay, Mr McCoy alleges Westpac (and Minter Ellison) “received the offer and accepted the offer and kept the offer and the payment attached” and contends that the fact of his payment was withheld from the judge at the hearing on 18 August 2023. Later in oral submissions, Mr McCoy asserted that Westpac (or Minter Ellison) had not responded to his offer, they had not sent it back or rebutted it and not met, and had failed to attend at the nominated settlement, and that amounted to acceptance.
- [27] Mr McCoy further relies upon a Westpac request to vary security form apparently signed by the defendant. This document sent to Westpac in August 2023 merely authorises the release of the security to clear or reduce the loan. The form stated that the sale price of the Property was \$420,000. By the time that form was sent, the money owing exceeded that amount. There is a stamp on the form stating “Stamp Duty Paid”, but its providence is unclear.
- [28] Neither the so-called offer, promissory note or the Westpac form advance the claim for ownership alleged to be contained in the contract, transfer or caveat.

Dealings with Mr McCoy

- [29] It remains to deal with one further matter and that is the complaint that for some time Mr McCoy and the defendant have been requesting a payout figure of the mortgage, both in writing and in meetings with bank officers, and Westpac has been refusing to deal with them.
- [30] In relation to Mr McCoy, Westpac relies upon a conversation one of their officers had with the defendant in April 2023 during which it is said the defendant advised Westpac to refrain from engaging with Mr McCoy any further. The contents of the conversation were recorded in a letter sent by Minter Ellison to the defendant dated 27 April 2023. Mr McCoy responded. Included in a typewritten letter dated 15 May 2023 was a handwritten notation apparently from the defendant advising Westpac to deal with Mr McCoy. Notwithstanding that indication, on 22 May 2023 Minter Ellison wrote to Mr McCoy advising him that in view of the direct contact Westpac had with the defendant they would not deal with him. They also advised that if the defendant wished to appoint some other party, he should contact the Westpac case manager or attend a Westpac branch with 100 points of identification. Neither

happened. Minter Ellison also sent emails on 4 and 7 August 2023 stating that as Mr McCoy was not the borrower or registered proprietor, Westpac would not settle with him. None of this is surprising.

Westpac's submissions as to the stay pending appeal

- [31] Westpac submitted the appeal was untenable on any of the grounds apparently advanced. Whilst it was said that the appeal articulates a number of overlapping grounds, it was submitted that it was possible to discern three, namely that:
1. The application and the proposed enforcement warrant are defective because the defendant's name is misspelt;
 2. In proceeding to make the order on 18 August 2023, Judge Porter KC had wrongly refused the adjournment sought by Mr McCoy; and
 3. The conduct of the hearing before Judge Porter KC was unfair.
- [32] Westpac submitted that the first ground was correctly dismissed by Judge Porter KC on the basis that the name could be and was corrected in the actual order made.
- [33] The second, being the refusal to adjourn the hearing, required the exercise of a discretion by Judge Porter KC and, as such, it would need to be shown that his Honour had made an error of the kind referred to in *House v The King*.²
- [34] It was submitted that there was no tenable reason to consider that his Honour was in error. It was submitted that an adjournment to enable Mr McCoy to put on evidence complaining that Westpac was refusing to deal with him as buyer under a contract and provide him with a payout figure were irrelevant to the application before the Court; as his Honour found.
- [35] The application before Judge Porter KC was for leave to issue an enforcement warrant and that application proceeded on the basis of the judgment for possession. That judgment had never been appealed and the basis for the judgment was Westpac's registered mortgage.
- [36] In terms of the ground of unfairness, it was submitted that Mr McCoy was given notice of the application on 24 July 2023, almost a month prior to the hearing. Whilst Mr McCoy had been given some of the affidavit material on the morning of

² (1936) 55 CLR 499, 504-505.

the hearing, given the contents of the affidavits, it was submitted that he had received much of the material prior to the hearing.

[37] Westpac also referred to the websites maintained by Mr McCoy and the videos linked to those sites containing presentations by Mr McCoy on how to present yourself in court and how to take over properties. The videos included Mr McCoy giving advice to viewers on how people can represent themselves, on preparing affidavits and submissions and on contract law.

Consideration

[38] The Court may grant a stay of an order pending an appeal pursuant to r 761(2) of the UCPR. In the exercise of that power, a court should not grant a stay absent a demonstration of a good arguable case on appeal and having given consideration to the competing disadvantages.³

~~[39]~~ Despite his claims that he has in place an executory contract to purchase the Property from the defendant, Mr McCoy is not the registered proprietor of the Property. Westpac still maintains a registered mortgage over the Property. It has not been paid out. Neither Mr McCoy nor the defendant have tendered payment of the mortgage debt, which as at 13 October 2023 is in the sum of \$595,116.59.

[40] There is no evidence that Westpac did anything which bound it to the dealing between Mr McCoy and the defendant, or the purported offer by Mr McCoy to Westpac. There is an abundance of correspondence between Westpac and the defendant and Westpac and Mr McCoy which indicates very clearly that Westpac would not deal with Mr McCoy and did not accept the power of attorney document upon which Mr McCoy sought to rely.

[41] Apart from an affidavit addressing issues of service, the further affidavits predominantly contained correspondence between Westpac and/or Minter Ellison and Mr McCoy. Mr McCoy must have been very familiar with the contents of those documents. It is accordingly difficult to give much weight to the complaint by Mr McCoy of the hearing being unfair because he was not served with all the affidavits well prior to the hearing.

³ *Raschilla & Anor v Westpac Banking Corporation* [2010] QCA 255, 2-3; *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111, [15].

- [42] Whilst Mr McCoy originally contended that he did not have an opportunity to put all the documents before the court on the last occasion, later, when referring to the large volume of material which had been handed to him by Westpac at the hearing before Judge Porter KC, he conceded that he did not think he needed more evidence “when the evidence is already in here.”
- [43] Neither Mr McCoy nor the defendant have ever taken any steps to have the judgment for possession obtained in February 2023 set aside.
- [44] There is nothing showing that Mr McCoy has a good arguable case for refusal of the warrant, nor is there any material showing that the balance of convenience lies with him. Indeed, the balance of convenience is strongly in favour of the registered mortgagee.
- [45] Accordingly, the application filed on 11 October 2023 by Mr McCoy should be dismissed.

Costs

- [46] Pursuant to r 681 of the UCPR, the court can make a costs order against a non-party. Such orders can be made against non-parties responsible for the bringing of proceedings, like Mr McCoy.⁴
- [47] Westpac seeks that the costs should be paid on an indemnity basis since the application is frivolous and wholly without merit.
- [48] Mr McCoy has persisted with the making of his claim to ownership of the Property notwithstanding the glaring difficulties with the documents upon which he relies for this assertion, and the absence of any evidence that he has paid the purchase price or even tendered it to the defendant. He has persisted with his reliance on a power of attorney from the defendant, despite statements from Westpac to him that it did not accept that it was still provident, and the absence of any contemporary attendance on Westpac or sworn evidence from the defendant on the subject. There is no basis for his claims that he has tendered sufficient moneys for payment out of the mortgage and is therefore entitled to be registered proprietor of the land. The claim

⁴ *Grocon Constructors (Qld) Pty Ltd v Juniper Developer No 2 Pty Ltd* [2015] QSC 333, [15]-[24].

by Mr McCoy cannot stand against the register of titles or the unchallenged judgment, and there is, accordingly, no basis for his opposition to the enforcement warrant.

[49] His contentions are completely groundless and ought never have been made and, having regard to the principles in *Colgate-Palmolive Company & Anor v Cussons Pty Ltd*,⁵ justify the making of an indemnity costs order.

Orders

[50] Accordingly, the orders will be:

1. The application filed on 11 October 2023 is dismissed.
2. Douglas Graeme McCoy pay the plaintiff's costs of and incidental to the application to be assessed on the indemnity basis.

⁵ (1993) 46 FCR 225, 232-234, [24].