



McLEAN -v- WESTPAC BANKING CORPORATION [2011] WASCA 224

On 10 October 2011, the Western Australian Court of Appeal unanimously dismissed a mortgagor's appeal against an order for possession of real property. The Court of Appeal delivered the reasons for its decision on 19 October 2011.

Jackson McDonald acted for Westpac:

- in its original possession action against the mortgagor in the Supreme Court;
- in proceedings commenced by the mortgagor against Westpac in the State Administrative Tribunal Action; and
- in the mortgagor's appeal of judgment in the Supreme Court to the Court of Appeal.

Westpac was successful in all three instances.

Background

The borrower, Ms McLean applied for, and was granted, a loan with St.George. The loan was secured by a mortgage over a property situated in Busselton. Relevantly, at all material times, the property was not occupied by Ms McLean but was tenanted. In 2009, Ms McLean defaulted on her loan. A default notice was served on her in accordance with the *Transfer of Land Act* and the *Consumer Credit Code*. Ms McLean failed to correct the default. St.George issued Supreme Court proceedings seeking possession of the security property and applied for summary judgment on 25 January 2010.

The summary judgment application was not heard until late in 2010 because Ms McLean applied to the State Administrative Tribunal ("**SAT**") to set aside the loan agreement. Westpac successfully argued that SAT did not have jurisdiction to determine Ms McLean's action on the basis that the loan was not subject to the *Consumer Credit Code*. The SAT dismissed Ms McLean's action on jurisdictional grounds on 14 September 2010.

St.George then applied to have its summary judgment application re-listed for hearing in the Supreme Court.

On 19 November 2010, the Honourable Justice Ken Martin gave judgment in favour of Westpac (formerly St.George) and ordered that Ms McLean deliver up vacant possession of her property to Westpac.

Ms McLean appealed that decision on three grounds:

1. *The Learned Judge erred in fact and law by not applying the correct principles concerning the TPA and by holding the Loan Applicant did not warrant investigation using court processes.*
2. *The Learned Judge erred in law and fact in holding that Ms McLean signing the loan agreement avoided the effect of the statements in the Loan Application for the purposes of the TPA, when Ms McLean did not know that the information she supplied to the finance broker had been changed in the Loan Application.*
3. *The Learned Judge erred in law by holding that the delays caused by determining whether or not the SAT was the appropriate forum to determine this dispute was a factor in favour of granting summary judgment and not applying principles relevant to unrepresented litigants when it was clear that Ms McLean was an unrepresented litigant for significant periods during CIV 3080 of 2010. Further the Learned Judge erred in fact in holding that there was no evidence supporting Ms McLean's assertion that the Loan Application was false.*



Decision

The Court of Appeal unanimously dismissed Ms McLean's appeal on all three grounds stating that all of the grounds were without merit.

The Court held that Ms McLean's unsubstantiated allegations that false representations were made by her mortgage broker to the bank provided no arguable defence and gave rise to no issue or question which ought to be tried.

Relevantly, Ms McLean did not lead any evidence that Westpac was involved in the purported amendment of the loan application. She merely:

...invite[d] the court to speculate about the possibility of serious misconduct by other parties in the absence of any or any cogent evidence pointing in that direction in circumstances where Ms McLean has not been forthcoming in her affidavit in disclosing information which would be highly relevant to the alleged misconduct she now imputes to others.

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