Australia & NZ Banking Group Ltd v Graham [1999] NTSC 142

PARTIES:	AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED v GRAHAM, Michael Gerard and GRAHAM, Marion
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	193/98
DELIVERED:	17 December 1999
HEARING DATES:	18 November 1999
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

Plaintiff:	N Rochow
Defendant:	J Kelly

Solicitors:

Plaintiff:	Noonans
Defendant:	Hunt & Hunt

Judgment category classification:	C
Judgment ID Number:	mar99041
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Mar99041

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Australia & NZ Banking Group Ltd v Graham [1999] NTSC 142
No. 193/98

BETWEEN:

AUSTRALIA & NEW ZEALAND BANKING GROUP LIMITED CAN 005 357 522
Plaintiff

AND:

MICHAEL GERARD GRAHAM and MARION GRAHAM
Defendants

CORAM: MARTIN CJ

REASONS FOR JUDGMENT
(Delivered 17 December 1999)

[1] Application by the plaintiff ("the Bank") for summary judgment, alternatively for an order that the defence be struck out, and by Michael Gerard Graham (the defendant) for leave to file an amended defence. The plaintiff advances its application by reference to the proposed amended defence acknowledging that it can point to no prejudice which it would suffer if leave were granted.

[2] The plaintiff is mortgagee of property at Nhulunbuy over which the two defendants hold title as sub-lessees. The mortgage was given to secure

guarantees given by them to the Bank in respect of monies lent by the Bank on an overdraft account to Marick Pty Ltd.

[3] The plaintiff seeks an order for possession of the property against the defendant alleging default under the security, service of notice required under s 132 of the *Real Property Act* (1978) NT and default. Judgment was entered against Mrs Graham in default of appearance some time ago.

[4] The defendant alleges that there has not been compliance with the requirement of the statute and of the mortgage as to service of the statutory notice upon him. The plaintiff does not rely upon evidence as to service of the notice on the defendant personally, or by leaving it on the mortgaged land or at his last know place of abode in the Territory. It relies upon service by post addressed to the defendant at the mortgaged land and at a Darwin Post Office box number. The terms of the mortgage authorise service at the mortgagor's address appearing in the mortgage, at his place of abode or business last recorded in the books of the mortgage, or addressed to the registered proprietor of the mortgaged property at his address appearing in the register book. There is no address for the mortgagor in the mortgage or in the register book and no evidence of any address recorded in the books of the mortgagor. The defendant says that he has not received the notice (that is irrelevant) but acknowledged that it may be possible for the deficiency in proof to be remedied at trial. The statutory notice was also forwarded by post to Mrs Graham at the mortgage property. The Bank relies on that as being service on the defendant, but it seems to me that that

method of service does not avail the bank as against the defendant either, since it suffers from the same deficiencies as that involving service upon the defendant himself. Only one application for judgment may be made under r 22.02, except by order of the Court.

[5] As to the proposed amended defence, both parties went into evidence, the issue being whether the defendant could satisfy the Court that there was a question which ought to be tried in respect of the plaintiff's claim (r 22.06(1)(b)):

> "The power to award summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried" *Fancourt v Mercantile Credits* (1983) 154 CLR 87 at 99.

[6] There is little room for dispute upon the facts thus far disclosed, but the defendant says there is a real case to be investigated in law. The proposed amended defence claims, in effect, that prior to demand being made for payment under the mortgage, a new agreement had been entered into between the Bank and Marick Pty Ltd which precludes the Bank from relying upon the guarantee and that mortgage.

[7] The agreement is evidences by a letter dated 10 October 1997 from the Bank to the Company. The Bank was pleased to advise the Company that its "application for a Fully Drawn Advance of $73,000 to refinance your Overdraft has been approved". The term of the loan "10 years commencing when your loan is drawn", interest rate and repayment provisions were set

out. The first repayment was to be made "not later than a month from the date of the final drawdown of your Loan". The date by which the loan was to be drawn was not stated, nor any express provision made by which that date could be fixed. Under the heading "Security" appears the following:

> "Unlimited Directors Guarantee given by Michael Gerard Graham
>
> Registered Guarantee Mortgage given by Michael Gerard Graham and Marion Graham over 14 Satral Ave Nhulunbuy (to be discharged)
>
> Registers Mortgage given by Michael Gerard Graham over 14 Satral Ave Nhulunbuy (to be registered)
>
> Letter lodging documents in support of Guarantee above (held)"

[8] There is no express provision that the Bank would not be obliged to lend unless the security had been completed to the satisfaction of the Bank.

[9] There was attached to that letter a document headed "About your ANZ Fully Drawn Advance" containing "some important Terms and Conditions which apply to your ANZ Fully Drawn Advance". On the face of it, that document contains terms and conditions relating to the loan once the account had been drawn down.

[10] Under the heading "Advancing the Loan" appears:

> "ANZ reserves the right to defer the drawing of your Loan, or to decline the advance of your Loan or any undrawn part of it should there be an Event of Default as defined below."

[11] The Events of Default are described:

> "- if you fail to make any agreed payment in respect of your Loan on the due date;

- if you or any guarantor defaults in the performance of any term or condition of any Loan or other facility with the Bank whether contained in these Terms and Conditions or in any other document or otherwise or of any term, condition, covenant, warranty or undertaking contained in any security for your Loan or any other Loan facility with the Bank;
- if (being a corporation) there shall be a change, in the opinion of the Bank and without the prior written consent of the Bank, in the effective control of you or any or either of you or of any guarantor;
- if any event of circumstance occurs or arises which in the opinion of the Bank causes a material adverse change in the financial condition of you or any or either of you or of any guarantor such as is likely to prejudice (in the opinion of the Bank) your ability or the ability of any or either of you or of any guarantor to meet your or their obligations under your Loan or any security therfor."

[12] It seems that in banking circles the words, "events of default" are usually events upon the happening of which the loan may be called up (*Weaver and Craigie Banker and Customer in Australia* p 721).

[13] The defendant signed at the foot of that document as a director of the Company.

[14] The Company's application for the loan is not in evidence nor is there any other evidence which may be relevant to the application and approval. The defendant contended that he had done all that was required of him to enable the drawdown to be made and that he awaited the Bank's advice in that regard. He said that on being so advised, the Company would have commenced making the monthly repayments in accordance with the agreement.

[15] It is his contention that the steps to be taken in regard to the transfer of Mrs Graham's interest in the property to him and the rearrangement of the security, was not a condition precedent to the new agreement coming into operation. The terms of the offer placed no time limit upon the anticipated dealings with the property.

[16] Those dealings have never taken place because the lessor of the property refused to consent to the transfer of Mrs Graham's interest to the defendant claiming that improvements on the land had not been constructed in accordance with the relevant building codes and had not been removed. Had there been no difficulty in obtaining the consent of the lessor, there does not appear to have been any reason why the new financial arrangements should not have been implemented. It seems that all documents are in the hands of the Bank with the exception of the consent.

[17] The delay concerned the Bank, it being of the view that the new arrangements had not been put in place because the rearrangement of title and security was a condition precedent, not a promissory condition. In January 1998 it demanded payment of the monies outstanding on the Company's overdraft account. Mr Graham protested that he was awaiting advice as to commencement of the new arrangement, and made a payment later in that month, purportedly in accordance with that new arrangement, and stated his intention to see that the instalments were made thereafter. There is evidence that an amount approximating the monthly instalment was

paid to the credit of the Company's overdraft account in January, but not of any other payments.

[18] As at 12 February, the Bank indicated by letter that it would not allo the FDA to be drawn down until the consent of the lessor had been obtained to the dealings with the mortgaged property and, given the delay since October, sought complete financial statements for 1997 and all details of "current contracts and extended profit".

[19] The Bank warned the Company that failure to remove the unapproved improvements, a carport or garage, and provide the financial information by close of business on 27 February would "automatically terminate approval of the loan". It then said it relied upon a right to make the changes to the approval letter to be found on p 3 of the attachment, and stated that the changes took effect from the day after that letter was posted. It seems to me that the Bank had thereby sought to impose a time limit within which the security was to be effected, and sought further information as to the financial affairs of the company.

[20] Although the defendant initially asserted the garage or carport was moved in November 1987, he later conceded that he had not seen the property, but believed that that was the fact. In an affidavit sworn on 28 September 1999, he said that he had been informed by his son that he had visited the property and that the carport had been removed. Whatever may be the truth in that regard, the consent of the lessor has not been forthcoming. It seems to me

that admissible evidence as to whether the improvement is still in place should not be hard to obtain.

[21] On 4 June 1998 the Bank demanded payment of the defendants as guarantors of the Company's overdraft under the mortgage securing that account. Service of that demand is not disputed. If there was such a default, it was not remedied. The Bank says it served the statutory notice on 17 July 1998, but that is disputed (see above). Proceedings seeking an order for possession under that mortgage were commenced in October 1998.

[22] By the proposed amended defence, the defendant, relying upon his views of the arrangement for the FDA, asserted that the Bank was contractually obliged to advance that loan to the Company to discharge the overdraft, the Company stood ready to make the repayments as required once that loan had been made, and accordingly the Bank was not entitled to demand repayment of the overdraft account. He abandoned a setoff and counterclaim contained in the original defence.

[23] The Bank argued that the arrangement for the FDA never came into operation because it was a precondition that the security be provided, and that that was never done. It said it was entitled to vary the loan contract by imposing a time limit for the security and seeking further financial information and that the defendant failed; it was not entitled to very the contract in that way, then it was not varied and the original FDA loan agreement prevails and that has not been brought into effect. That being so,

the original contract relating to the overdraft remains and it has taken the necessary steps to enforce its rights thereunder.

[24] In the Bank's view it would be futile to allow the proposed amendments since the defendant could not possibly succeed in resisting its claim on that basis.

[25] The defendant identifies the questions which ought to be tried as including the following. What is the true meaning of the security clause in the FDA Loan Agreement? (Extrinsic evidence may be admissible to discover the "factual matrix"). Was the Bank entitled to unilaterally vary the loan agreement? Are the new conditions it sought to impose permitted under the terms of the loan agreement? Is he not released from his obligations as guarantor of the Company's overdraft account by reason of the loan agreement?

[26] In my opinion, the documentary evidence thus far available to the Court supports the defendant's contention that there are questions which ought to be tried in respect of the plaintiff's claim. It is not clear to me that there is no real question to be tried. I would include in the list, on an assumption that the original arrangement in respect of the Company's overdraft is still in place, whether or not the Bank has complied with the legal requirements as to the service of the statutory notice upon the defendant.

[27] The Bank's application for judgment is dismissed. Leave will be granted to the defendant to file and serve the proposed amended defence.

[28] In the ordinary case the defendant must pay the costs of and occasioned by the amendment of the defence and the costs thrown away because of the amendment (r 63.11.7). In this case he was successful in resisting an application for judgment at the same time. In all those circumstances there will be no order as to costs.

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