Supreme Court

New South Wales

Case Name:	Yusofzai v Andask Pty Ltd
Medium Neutral Citation:	[2019] NSWSC 124
Hearing Date(s):	15 February 2019
Date of Orders:	15 February 2019
Decision Date:	28 February 2019
Jurisdiction:	Common Law
Before:	Davies J
Decision:	1. The plaintiffs' summons filed 15 February 2019 is dismissed. 2. By consent, the plaintiffs pay the defendant's costs fixed in the sum of $6,583.50.
Catchwords:	INJUNCTIONS – Injunction to restrain mortgagee's power of sale – application brought the afternoon before scheduled auction – where notice of default had been issued under s 57(2)(b) Real Property Act 1900 (NSW) and s 92 Conveyancing Act 1919 (NSW) – whether the notice had been properly served – whether the notice was misleading or invalid – where the notice did not express an immediate intention to exercise mortgagee's power of sale – notice neither misleading nor invalid – whether the lender waived its rights by earlier representations – doctrine of election – no evidence of inconsistent rights – no waiver – balance of convenience – injunction refused MORTGAGES AND SECURITIES – mortgages - duties, rights and remedies of mortgagee - power of sale – scope of application of National Credit Code – whether notice should have been given under s 88

	National Credit Code – debtor not a natural person nor strata corporation – mortgage a genuine commercial arrangement – no notice required under s 88
Legislation Cited:	Conveyancing Act 1919 (NSW) ss 92, 170 National Credit Code ss 5(1), 88 Real Property Act 1900 (NSW) ss 57, 58 Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Australia and New Zealand Banking Group Ltd v Bragg (No. 3) [2017] NSWSC 208 Darren John Ciavarella v Hargraves Secured Investments Ltd [2015] NSWSC 865 Morlend Finance Corp (Vic) Pty Ltd v Westendorp [1993] 2 VR 284 Newborough (Lord) v Jones [1975] 1 Ch 90 Northumbrian Ice Cream Co Ltd v Breakaway Vending Pty Ltd [2006] NSWSC 1216 Sargent v ASL Developments Ltd (1974) 131 CLR 634 The Commonwealth of Australia v Verwayen (1990) 170 CLR 394 Websdale v S & JD Investments Pty Ltd (1991) 24 NSWLR 573
Category:	Principal judgment
Parties:	Waise Yusofzai (First Plaintiff) Melissa Yusofzai (Second Plaintiff) Andask Pty Ltd (Defendant)
Representation:	Counsel: K Madgwick (Plaintiffs) D Turner (Defendant) Solicitors: Saurabh Gupta (Plaintiffs) Assured Legal Solutions (Defendant)
File Number(s):	2019/51529

JUDGMENT

1 On 15 February 2019 I refused to grant an injunction in favour of the plaintiffs to prevent the sale of land owned by them at 14 Anzac Avenue, Denistone.

The auction was scheduled to take place at 11:15am on 16 February 2019. These are my reasons for so doing.

2 The plaintiffs bought the land in about March 2014 for $850,000 as an investment. There was a dilapidated house on the land and they were intending to renovate it and reside there with their three children.

3 In mid-2014 the first plaintiff, Mr Yusofzai, started his own real estate business. He and the second plaintiff, his wife, operated the business through a company, Y Corp Developments Pty Ltd.

4 In August 2015 they gave a mortgage to Westpac over the property to secure a loan of about $750,000 which they used to pay their living and business expenses. In about mid-2017 Mr Yusofzai wanted to increase his borrowing to start renovating the property and to have funds for day to day expenses. He was told that Westpac was unlikely to lend him more money.

5 He came through his professional dealings to know a solicitor, Nick Khosh. He discussed with Mr Khosh that he needed to refinance the mortgage over the land. Mr Khosh in turn introduced him to a broker, Michael Charlton, at Guardian Financial Services. Mr Charlton ascertained that Andask Pty Ltd, the defendant, was prepared to lend him $875,000. In the meantime, the plaintiffs had agreed with another company, Capital Securities Pty Ltd, to take out an interim loan.

6 On 18 August 2017 Y Corp Developments Pty Ltd entered into a Deed of Loan with Andask. The plaintiffs also entered into a Deed of Guarantee and Indemnity of the loan to Y Corp. At the same time, the plaintiffs gave a mortgage over the Denistone property as security for the loan.

7 It was a requirement of the Deed that the guarantors, who were the plaintiffs, obtain independent legal advice and sign appropriate forms to that effect. Each of the plaintiffs signed statutory declarations that they had received independent legal advice regarding the loan and the security documents. Mr Khosh provided the independent legal advice.

8 The purpose of the facility in item 2 of Schedule 1 to the Deed of Loan was "Re-finance of existing debt and working capital". Item 4 provided that the term of the facility was,

> The period commencing on the date of this Deed and ending six months from the first day of the month following the date of this Deed.

9 By September 2018 Y Corp had fallen behind in payment of interest. On 12 October 2018 Andask issued a notice under s 57(2)(b) of the *Real Property Act 1900* (NSW) and s 92 of the *Conveyancing Act 1919* (NSW) ("the Default Notice"). That notice required payment of the outstanding principal, the interest for September and October 2018 and enforcement expenses. All of these amounts were required to be paid within three months from the date of the notice. The three month period was given because the notice was also under s 92 of the *Conveyancing Act.*

10 Y Corp brought the interest payments up to date by December 2018. In his affidavit, Mr Yusofzai said that prior to that happening:

> One or both of Mr Hawes and Mr Kant told me that if the interest payments continued the defendant would continue the loan.

He said that after the arrears were paid Mr Hawes said:

> The interest is all made up now, we are good to continue.

He said that nobody said anything about calling up the loan.

11 Mr Kant was a director of the defendant. Mr Hawes was the mortgage manager of the defendant.

12 Mr Yusofzai said that in late December he saw that a fence had been erected around the land and that there was a notice on the fence saying that any enquiries should be directed to "Greg Halls". It is not clear if that is a typographical error in Mr Yousfzai's affidavit for "Greg Hawes".

13 Mr Yusofzai spoke to the broker Mr Charlton who told him not to call Greg.

14 In January 2019 Mr Charlton told Mr Yusofzai that he had found an investor who might be willing to refinance the loan but wanted a 20% equity in the land. Mr Yusofzai refused that offer.

15 On about 17 January 2019 Mr Yusofzai became aware that Andask was proposing to sell the land. He said that since that time he has tried to find equity partners, and to secure sales of real estate to be able to pay down the loan. Nothing eventuated from his discussion with Mr Charlton about refinancing. He said he has called in loans previously made to family and friends but he has not managed to refinance what is owing to Andask.

16 He said that he engaged his solicitor on about 1 February 2019 to advise him about the matter.

17 As mentioned, the auction was scheduled for 16 February 2019 but the present application to the Court was not made until the afternoon of 15 February 2019.

18 Mr Yusofzai said that he did not believe that he had seen the Default Notice from October 2018 until after he engaged his solicitor. He said that his wife did not believe that she had seen it prior to engagement of the solicitor.

19 The application for the injunction was put on four bases. First, it was said that no notice had been served under s 88 of the *National Credit Code*. Secondly, it was said that the plaintiffs had never received the Default Notice. Thirdly, it was said that the Default Notice was invalid because it was misleading. Fourthly, there was said to be a waiver of the rights of Andask to call up the loan by reason of the statements made by the officers of Andask in September to December 2018 concerning the payment of interest.

20 The defendant disputed that the loan was one to which the *National Credit Code* applied because the borrower was Y Corp Developments Pty Ltd. The defendant said that the evidence demonstrated that the Default Notice had been appropriately served, particularly when regard was had to s 170 of the *Conveyancing Act.* The defendant submitted that the form of the Default Notice complied with s 57 of the *Real Property Act* and was not misleading. The defendant objected to the evidence asserting that one or both of Mr Hawes and Mr Kant told Mr Yusofzai that if the interest payments continued the defendant would continue the loan, on the basis of the form of that evidence.

National Credit Code

21 Section 5(1) relevantly provides:

5 Provision of credit to which this Code applies

(1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:

(a) the debtor is a natural person or a strata corporation; and

(b) the credit is provided or intended to be provided wholly or predominantly:

(i) for personal, domestic or household purposes; or

(ii) to purchase, renovate or improve residential property for investment purposes; or

(iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and

(c) a charge is or may be made for providing the credit; and

(d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

22 In the present case the debtor, Y Corp, is neither a natural person nor a strata corporation. However, the plaintiffs submit that the true parties to the contract were themselves and not Y Corp, relying on the fact that the broker told them that they would have to take out the loan through Y Corp and guarantee the loan themselves.

23 There seems to be a number of difficulties with that submission. First, Mr Charlton was a broker and there is no evidence to suggest that he was the agent of the defendant. Ordinarily, a mortgage broker is the agent of the borrower: *Morlend Finance Corporation (Vic) Pty Ltd v Westendorp* [1993] 2 VR 284 at 308; *Australia and New Zealand Banking Group Ltd v Bragg (No. 3)* [2017] NSWSC 208 at [47]-[49].

24 Secondly, paragraph 10 of Mr Yusofzai's affidavit makes clear that before Mr Charlton even commenced to look for lenders, he told the plaintiffs that any loan would have to be made to the company with the plaintiffs to guarantee and provide security for the loan. The evidence then shows that before the defendant entered the picture, an interim loan had been arranged with Capital Securities Pty Ltd. That evidence does not provide any support for the submission that there was a collateral or prior agreement with the defendant as to how the loan was to be structured.

25 Thirdly, the Deed of Loan contained an acknowledgement in clause 30 in these terms:

> The borrower confirms that:
>
> > (1) It has not entered into this Deed or the Facility in reliance on, or as a result of, any statement or conduct of any kind of or on behalf of the lender, the mortgage manager or any of its or their related bodies corporate… .

26 Fourthly, Y Corp by Mr Yusofzai executed a Business Purpose Declaration under the National Credit Code which relevantly said:

> I/we declare that the credit to be provided to me/us by the credit provider is to be applied wholly or predominantly for:

- Business purposes; or
- Investment purposes other than investment in residential property.

That Business Purpose Declaration contained within a box a notice headed "**IMPORTANT**" which read:

> You should **only** sign this declaration if this loan is wholly or predominantly for:

- Business purposes; or
- Investment purposes other than investment in residential property.

> By signing this declaration you may **lose** your protection under the National Credit Code.

27 There is nothing in the evidence to suggest that the arrangement whereby Y Corp was the borrower with the plaintiffs as the guarantors and mortgagors was a sham and not otherwise a genuine commercial arrangement. In those circumstances the *National Credit Code* did not apply to the provision of credit and there was no obligation to serve a notice under s 88.

Notice under the Real Property Act and Conveyancing Act

28 Aden James Bates, an employed solicitor in the employ of the defendant's solicitor, affirmed an affidavit saying that he caused to be sent by Express Post the Default Notice to Y Corp at its principal place of business and at its registered office, and to Mr and Mrs Yusofzai, both at the mortgaged property address and at 17 Bluett Avenue, East Ryde being their last known address as shown on their drivers' licences.

29 Section 170 of the *Conveyancing Act* relevantly provides:

> **170 Service of notices**
>
> (1) Any notice required or authorised by this Act to be served shall be in writing, and shall be sufficiently served:
>
> (a) if delivered personally,
>
> (b) if left at or sent by post to the last known residential or business address in or out of New South Wales of the person to be served,
>
> (b1) in the case of a mortgagor in possession or a lessee, if left at or sent by post to any occupied house or building comprised in the mortgage or lease, …

30 The plaintiffs submitted that the evidence which was needed to prove service was set out in *Northumbrian Ice Cream Co Ltd v Breakaway Vending Pty Ltd* [2006] NSWSC 1216 at [12]. I do not consider that that judgment is one of general application. The case was concerned with whether default judgment should be granted for want of a defence being filed. Justice Brereton said at [12] that,

> where no notice has been given of the application, strict satisfaction of the requirements [for service] is necessary.

The case was not considering the requirements of s 170 of the *Conveyancing Act*, but rather the obligations under the *Uniform Civil Procedure Rules 2005* (NSW) for service of originating process as a preliminary to obtaining default judgment.

31 In any event, Mr Bates also annexed to his affidavit copies of emails from Australia Post saying that the Express Post parcels had been delivered at stated times and dates to the various addresses. It is not necessary for the defendant to prove that copies of the Default Notice were actually received where there has been compliance with s 170 of the *Conveyancing Act*: *Newborough (Lord) v Jones* [1975] 1 Ch 90 at 94, a case considering a similar statutory provision.

32 I am satisfied that both Y Corp and the plaintiffs were served with copies of the Default Notice, in the sense that they arrived at the premises to which they were addressed. I note that there is no denial from Mr Yusofzai that he and his wife saw the Default Notice prior to the engagement of the solicitor, only a statement of belief that they had not.

33 The plaintiffs submitted that the notices were, in any event, invalid because the notices said (inter alia):

> 5. If you do not pay the Total Amount Due within the time specified in Schedule 3, then:
>
> …
>
> - The lender *may exercise* its power of sale in relation to the mortgaged land referred to in Schedule 2 and sell the mortgaged land;
>
> (emphasis added)

34 The plaintiffs submitted that a statement that the lender "may exercise" its power of sale was inconsistent with what s 57(3) required. Section 57(3) provides:

> (3) A notice referred to in subsection (2) complies with this subsection if:
>
> (a) it specifies that it is a notice pursuant to section 57 (2) (b) of the *Real Property Act 1900*,
>
> (b) it requires the mortgagor, charger or covenant charger on whom it is served:
>
> (i) to observe, except in relation to any time expressed in the covenant, agreement or condition for its observance, the covenant, agreement or condition in respect of the observance of which the mortgagor, charger or covenant charger made default, or
>
> (ii) as the case may be, to pay the principal, interest, annuity, rent-charge or other money in respect of the payment of which the mortgagor, charger or covenant charger made default,
>
> (c) if the costs and expenses of preparing and serving the notice are to be demanded, it requires payment of a reasonable amount for those costs and expenses and specifies the amount, and
>
> (d) it notifies the mortgagor, charger or covenant charger that, unless the requirements of the notice are complied with within one month after service of the notice (or, where some other period exceeding one month is limited by the mortgage, charge or judgment for remedying the default referred to in the notice, within that other period after service of the notice), *it is proposed* to exercise a power of sale in respect of the land mortgaged or charged. (emphasis added)

35 The plaintiffs submitted that the mortgagee was required to say in the Default Notice that it proposed to exercise the power of sale, and it was not sufficient to say that it may do so. The plaintiffs submitted that in that regard the Default Notice was invalid because it was misleading.

36 In my opinion two matters lead to the conclusion that the notice is neither misleading nor invalid. First, and most importantly, s 58 of the *Real Property Act* provides:

> **58 Power to sell**
>
> (1) Where a mortgagee, chargee or covenant chargee is authorised by section 57(2) to exercise the powers conferred by this section, the mortgagee, chargee or covenant chargee *may sell* the land mortgaged or charged, … (emphasis added)

That is precisely the wording used by the plaintiffs in the Default Notice.

37 Secondly, it has been held that a notice is not necessarily invalidated even where there is a misstatement of the amount of principal or interest due provided that there has been a default and the default is identified: *Websdale v S & JD Investments Pty Ltd* (1991) 24 NSWLR 573 at 578-579. In the same way, where the notice identifies the rights the sender will acquire if the notice is not complied with, that will be sufficient to comply with s 57. The Default Notice clearly stated that the mortgagee would be able to sell the land.

38 The Default Notice was neither misleading nor invalid.

Waiver

39 As referred to earlier, in his affidavit Mr Yusofzai says:

> One or both of Mr Hawes and Mr Kant told me that if the interest payments continued the defendant will continue the loan.

40 He thereafter says that he was able to bring the interest payments up to date by December 2018. The plaintiffs submit that the evidence amounts to a waiver on the defendant's part of the requirement to pay the principal sum, at least at that time. I note the objection of the defendant to this part of the evidence, but I am prepared to admit the evidence for the purpose of considering the waiver argument.

41 In *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 Mason J said (at 406):

> … As often as not, the term "waiver" is used to describe the result of the application of various principles rather than to designate a particular legal concept or doctrine. The consequence is that the expression "waiver" has been the subject of robust criticism, notably by Dr Ewart in his work *Waiver Distributed*, (1917); see also *Bysouth v. Shire of Blackburn and Mitcham (No. 2)* (1928) VLR 562 at p 579; *Larratt v. Bankers and Traders' Insurance Co.*

(1941) 41 SR (NSW) 215 at p 226; *Kammins*, per Lord Diplock at pp 882-883. This is because "waiver" is an imprecise term capable of describing different legal concepts, notably election and estoppel.

It has been doubted that waiver exists as a defence or answer in any case except where it is used as an alternative designation for some other defence or answer, for example, election, estoppel or new agreement: *Bysouth*, per Lowe J. at p 579. Generally speaking, as Jordan C.J. pointed out in *Larratt* (at pp 226-227), an existing legal right is not destroyed by mere waiver in the sense of an express or implied intimation that the person in whom the right is vested does not intend to enforce it: see *Mulcahy v. Hoyne* (1925) 36 CLR 41 per Isaacs J. at pp 55-56; *Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co*. [1922] 2 AC 250 per Lord Sumner at pp 261-262. In these cases, unless consideration is present, something in the nature of an election or an estoppel is required.

According to its strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right by acting in a manner inconsistent with that right: *Craine v. Colonial Mutual Fire Insurance Co. Ltd.* (1920) 28 CLR 305 at p 326; *Grundt v. Great Boulder Pty. Gold Mines Ltd.* (1937) 59 CLR 641 at p 658. However, the better view is that, apart from estoppel and new agreement, abandonment of a right occurs only where the person waiving the right is entitled to alternative rights inconsistent with one another, such as the right to insist on performance of a contract and the right to rescind for essential breach: see *Kammins*, at p 883. This category of waiver is an example of the doctrine of election.

Another category of waiver is one in which a person is prevented from asserting, in response to a claim against him, a particular defence or objection which would otherwise have been available. Here waiver is said to arise when the person agrees not to raise the particular defence or so conducts himself as to be estopped from raising it: see *Kammins*, at p 883.

In these circumstances, the authorities dealing with waiver of statutory rights do not call for special consideration. They speak with different voices, sometimes in the language of election, at times in that of estoppel and at other times in terms of unconscionability: see, for example, *Ward v. Raw* (1872) LR 15 Eq 83; *Phillips v. Martin* (1890) 11 NSWLR 153 at pp 157-158, 159; *Wilson v. McIntosh*. Quasi-estoppel by acquiescence is another approach which has found favour: *Willmott v. Barber* (1880) 15 Ch D 96, at pp 105-106; *Kammins* at pp 884-885. The old references to unconscionability may be taken today as forerunners of the modern principles of estoppel, now that prevention of unconscionable conduct has been identified as the driving force behind equitable estoppel: *Waltons Stores*, at pp 404, 419, 450.

42 It seems clear that the plaintiffs are relying on waiver in the former sense discussed, that is, as an election by the defendant.

43 In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J said (at 641):

> The doctrine [of election] only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the

> elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence.

44 It is difficult to discern from the paucity and the form of the evidence relied upon that the defendant has done an intentional act with knowledge of abandoning a right. At the time the statement is alleged to have been made the time for compliance with the Default Notice had not expired. Further, there is no evidence to suggest that the defendant was abandoning the right which it claimed in that notice, namely, that the loan, which had long expired, did not need to be repaid.

45 It is difficult to see in the present case where there are inconsistent rights. Payment of the overdue interest instalments was not inconsistent with the obligation to pay the principal sum which was then due, and had been made due and payable by the service of the notice. The plaintiffs cannot point to any actions on the defendant's part which were inconsistent with the obligation to pay the principal sum. Nothing was said to suggest that the Default Notice had been, or was to be, withdrawn. Even if the defendant said that the Default Notice would not be enforced, that would not amount to abandonment of the right, in the absence of consideration from the plaintiffs or some reliance producing a detriment. There was no suggestion that the plaintiffs acted to their detriment to bring the alleged waiver within the category of estoppel.

46 In my opinion, no waiver is demonstrated.

Balance of convenience

47 Even if I had been of the opinion, prima facie, that a waiver was demonstrated, a number of matters results in the balance of convenience operating in favour of the defendant.

48 First, there is no satisfactory explanation for the very late application. Mr Yusofzai has been aware since 17 January 2019 that the defendant was proposing to sell the land. Whilst he explained that he has been endeavouring to raise money either to pay down the loan or to refinance, no explanation is given about why the application was not brought until the afternoon before the auction. Similarly, he said that he engaged his solicitor on 1 February 2019 but there is no explanation from the solicitor to explain the lateness of the

application, and what he has been doing in the fortnight before the application was made. As Kunc J said in *Darren John Ciavarella v Hargraves Secured Investments Ltd* [2015] NSWSC 865 at [27]-[28], it is expected that applications in these types of matters will be brought expeditiously.

49 The result is that the defendant continued to incur marketing costs of approximately $5000 and became liable for the auction fee of $700. Whilst an offer was made by the plaintiffs to pay the auction fee as a condition of obtaining the injunction, no offer was made in respect of the marketing costs which will necessarily be thrown away.

50 Secondly, and more significantly, the evidence from the plaintiffs demonstrate that they are in no position either to repay the loan or to refinance the loan. For that reason, no purpose would be served by delaying the proposed auction sale.

51 Thirdly, the evidence points to a decline in the value of the land to the point where there must be some doubt that there will be sufficient equity in the land the defendant to recover the principal sum and interest due. A valuation from the Opteon Property Group dated 22 June 2017 valued the property at $1,350,000. The property has been marketed for the present sale by McGrath. The price feedback from those who passed through the property demonstrates a price range of $900,000 to $950,000. When legal costs, marketing costs, land tax of $22,000 and auction costs are added to the amount owing to the defendant, the property would need to sell for at least $935,000 for the defendant to recover what is owing.

52 Furthermore, there are two caveats on the land, suggesting that, when considered with the amount owing to the defendant and the likely sale price of the land, the plaintiffs will receive little or nothing from the sale.

53 I was provided with an explanation from the Bar table of how these caveats were to be resolved with the caveators, although there was no evidence touching the matter. As to the caveat by Commission Flow Pty Ltd, there is said to be a conditional agreement for the payment by the plaintiffs of $60,000. As to the caveat by Capital Securities, a lapsing notice is to be issued by the

plaintiffs because, it is said, there was an agreement to lodge it over another property.

54 The uncertainty about those caveats still leaves the position that any amount the plaintiffs are likely to receive from a sale is so negligible that they have a minimal interest in the sale in any event. On the other hand, there is undoubtedly owing to the defendant more than $900,000 which the defendant will only be paid from a sale of the property.

Conclusion

55 It was for those reasons that I made the following order:

(1) The plaintiffs' summons filed 15 February 2019 is dismissed.

56 The parties, subsequently to my having made that order, agreed costs as follows:

(1) The plaintiffs pay the defendant's costs fixed in the sum of $6,583.50.

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