



Supreme Court
New South Wales
Common Law Division

Case Title: ANZ Banking Group v Londish (No 2)

Medium Neutral Citation: [2014] NSWSC 432

Hearing Date(s): On the papers

Decision Date: 11 April 2014

Jurisdiction: Common Law

Before: Adamson J

Decision: (1) Order the first defendant to pay the second and third defendants' costs of the proceedings

Catchwords: COSTS – whether joinder of additional defendant was reasonable – where the question of whether plaintiff's alternate claim against party joined would have been successful becomes hypothetical due to plaintiff's success against the first defendant – where plaintiff's alternate claim against joinder party is at least arguable – relevance of first defendant's insolvency

Legislation Cited: *Contracts Review Act 1980* (NSW)

Cases Cited: *ANZ Banking Group v Londish* [2014] NSWSC 202
Australia and New Zealand Banking Group v Londish [2013] NSWSC 1423
Hills Industries Limited v Australian Financial Services and Leasing Pty Limited [2012] NSWCA 380
Schipp v Cameron (Supreme Court (NSW), Einstein J, 12 October 1998)

Texts Cited:

Category: Costs

Parties: Australian & New Zealand Banking Group
(Plaintiff)
Vicki Christine Londish (First Defendant)
Perpetual Trustee Company Limited as
custodian for Fidante Partners Limited
(Second Defendant)
Fidante Partners Limited (Third Defendant)

Representation

Counsel:
J Stoljar SC/RI Bellamy (Plaintiff)
G Drew (First Defendant)
V Bedrossian (Second and Third
Defendants)

Solicitors:
Gadens Lawyers (Plaintiff)
JSA Legal (First Defendant)
Norton Rose Fulbright (Second and Third
Defendants)

File number(s): 2012/60587

Publication Restriction: Nil

JUDGMENT

Introduction

- 1 On 12 March 2014 I published my reasons for judgment in the substantive proceedings: *ANZ Banking Group v Londish* [2014] NSWSC 202 (**the principal judgment**). I made an order that the first defendant (**Mrs Londish**) pay the plaintiff's (**ANZ**) and the second and third defendants' (**Perpetual**) costs of the proceedings that would take effect if no party applied for a different order. Perpetual has applied for an order that:

ANZ pay its costs of the proceedings on an ordinary basis up to and including 13 November 2013 and thereafter on an indemnity basis, as agreed or assessed.

- 2 ANZ resisted Perpetual's application and contended that the order I proposed ought be made. By consent of the parties, the matter has been determined in chambers on the basis of evidence and written submissions.

- 3 Mrs Londish confirmed that she did not wish to make submissions as to the appropriate costs order or in response to the submissions of either ANZ or Perpetual.
- 4 This decision ought be read with the principal judgment.

Evidence

- 5 Perpetual read, in support of its application, an affidavit of Christopher Cruikshank sworn 21 March 2014 in which the deponent deposed that, as at 13 November 2013, Perpetual had incurred costs of \$84,000. It also tendered a *Calderbank* offer dated 13 November 2013 which was expressed to be open for acceptance until 4 pm on 27 November 2013 in which Perpetual offered to settle the proceedings on the basis of the ANZ discontinuing the proceedings against it with no order as to costs.
- 6 Perpetual also relied on a notice to admit facts served on ANZ on 22 March 2013 in which it sought admissions regarding various matters germane to ANZ's claim against it. ANZ disputed each of these facts by notice dated 5 April 2013.
- 7 The ANZ read, in opposition to Perpetual's application, an affidavit of Kylie Rae sworn 25 March 2013, to which was annexed an email and attached letter dated 10 October 2013 from ANZ's solicitors to Mrs Londish's solicitors in which the ANZ invited Mrs Londish to put an offer to the ANZ to settle the proceedings. The letter read in part:

"In addition to the usual costs, charges & expenses of the proceedings we are instructed to seek a Sanderson or Bullock order against your client in relation to the costs associated with the joinder of Perpetual/Fidante to the proceedings. This is on the basis that it was matters raised in your client's defence, in particular, allegations denying our client's entitlement to be subrogated to the position of the former mortgagee, which necessitated the joinder of those parties to the proceedings.

As at today's date the debt is approximately \$4,654,810.33 (this does not necessarily include debiting of all enforcement costs and charges to the loan account).

Interest, costs and charges will continue to accrue pending repayment of the debt in full.

We advise that our client remains willing to consider any reasonable offers put by your client to settle this matter prior to the parties incurring the time and expense of a Hearing."

Parties' submissions

Perpetual's submissions

- 8 Perpetual contended that the ANZ ought pay its costs because the ANZ was the only party which made a claim against it and it had been unsuccessful in its claim in that it had not been granted any relief against Perpetual. ANZ's claim against Perpetual was brought in restitution.
- 9 Perpetual submitted that the following factual findings made in the principal judgment had the effect that the ANZ was unsuccessful in its claim for restitution against Perpetual and therefore ought pay its costs:
 - (1) The Challenger mortgage was enforceable and was not set aside pursuant to the *Contracts Review Act* 1980;
 - (2) Mrs Londish authorised the relevant funds to be paid to Perpetual in discharge of her debt to it;
 - (3) The Challenger mortgage was valid and good security;
 - (4) There was no total failure of consideration because the ANZ obtained a valid, enforceable mortgage in return for the funds advanced.
- 10 Perpetual argued that it ought not be left to bear its costs of the proceedings in circumstances where the ANZ took the risk that, if it was successful against Mrs Londish, it would fail to obtain any relief against

Perpetual. Perpetual submitted that it was in the interests of justice that Perpetual not be left to recover its costs against Mrs Londish because of the risk that she was insolvent. It relied on the following passage from *Ritchie's Supreme Court Practice* at 42.1.45:

In practice, the choice between a Bullock or Sanderson order has little significance where all the parties concerned are solvent and able to pay: *Bankamerica Finance Ltd v Nock* [1988] AC 1002; [1988] 1 All ER 81. But where one of the parties is likely to be insolvent, the exercise of the discretion calls for a careful application of the general costs principles (that is, that costs usually follow the event) and an assessment of the fairness (in the particular circumstances) of either making, or refusing to make, a costs order against the party with means: *Vucadinovic v Lombardi* [1967] VR 81; *Schipp v Cameron* (NSWSC, Einstein J, No 6425/91, 12 October 1998, unreported, BC9806860).

- 11 Further, and in the alternative, Perpetual relied on its *Calderbank* offer and submitted that it was unreasonable of ANZ not to accept the offer. It contended that ANZ had been on notice of the arguments Perpetual would advance against it in the substantive proceedings since its application for joinder before Hall J at which such arguments had been foreshadowed: *Australia and New Zealand Banking Group v Londish* [2013] NSWSC 1423.

- 12 Perpetual made the following further submission based on ANZ disputing the facts in the notice to admit facts:

The plaintiff ought to have admitted the facts set out in the Notice to Admit Facts. Had it done so, it would have been plain that there was no factual or legal basis for its claims to restitution (or subrogation), including (but not limited to) by reason of the fact that it would not have been possible for the Plaintiff to point to any injustice arising from its deliberately adopted contractual position with Mrs Londish. Without any relevant injustice, any restitutionary claim must fail.”

- 13 Perpetual also contended that the ANZ's claim in restitution against it was not soundly based and was at odds with what Allsop P said in *Hills Industries Limited v Australian Financial Services and Leasing Pty Limited* [2012] NSWCA 380 (**Hills Industries**) at [84]:

It is tolerably clear that in circumstances where the payer intends that the third party's debt to the payee be discharged, and the third

party authorised the payment and discharge, and discharge has occurred, the payer cannot recover from the payee [citations omitted].

ANZ's submissions

- 14 ANZ submitted that the joinder of Perpetual was reasonable since Mrs Londish put in issue the legal enforceability of the Challenger Mortgage and Loan, having regard to the circumstances surrounding her execution of the transaction documents.
- 15 It submitted that Perpetual had not proved that Mrs Londish was insolvent and would not be in a position to meet an order for costs against her in favour of Perpetual.
- 16 It contended that there had been no need to determine the restitutionary claim by ANZ against Perpetual and that therefore no conclusion ought be drawn that the claim would not have succeeded.
- 17 ANZ submitted that it was not unreasonable for it not to accept the *Calderbank* offer in circumstances where it was necessary for Perpetual to be a party, in the event that Mrs Londish successfully impugned the Challenger Mortgage and Loan in the substantive proceedings. Furthermore, ANZ had only just moved to join Perpetual at the time the notice to admit facts was served. Its notice of motion was filed on 11 March 2103 and the notice to admit facts was served on 22 March 2013. It contended that it was not incumbent on it to make wide-ranging admissions in circumstances where Perpetual had not served a defence to the ANZ's claim and, indeed, did not do so until 31 October 2013.
- 18 ANZ submitted further that it is not apparent what, if any, further costs were incurred by Perpetual in proving the matters in respect of which admissions were sought.

- 19 ANZ submitted that it was in the interests of justice that the order originally proposed when the reasons for the principal judgment were published be made because Mrs Londish was the person whose conduct was directly responsible for its joinder and she had been on notice that an order of this kind would be sought.
- 20 In reply, Perpetual listed the evidence in the substantive proceedings to the effect that Mrs Londish was likely to be insolvent. It also contended that the ANZ would be in the best position to know her financial situation. It contended that the ANZ would have been in a good position at an early stage to appreciate the strength of its case against Mrs Londish and the poor prospects of her defending the claim for possession on the basis of any alleged injustice said to arise from the Challenger Loan and Mortgage.

Reasons

- 21 The issues in the principal proceedings largely concerned the circumstances surrounding the execution by Mrs Londish of the Challenger Loan and Mortgage. These circumstances were the cornerstone of Mrs Londish's contention that the ANZ mortgage ought be set aside as being unjust since its purpose was, in the main, to refinance the Challenger Loan and Mortgage. Once she put those matters in issue, the ANZ moved this Court for leave to join Perpetual. Leave was granted by Hall J: *Australia and New Zealand Banking Group v Londish* [2013] NSWSC 1423.
- 22 Given that the ANZ wanted to bring a claim in restitution against Perpetual, in the event that the ANZ mortgage was held to be unenforceable because of any injustice surrounding the Challenger Loan and Mortgage, the procedural step of adding Perpetual as a party to its claim against Mrs Londish was not only desirable, but also necessary, in order that all issues in dispute between the parties could be determined in a single proceeding.
- 23 My findings in the principal proceedings meant that I did not need to decide the question, which had become hypothetical, whether the ANZ

was entitled to restitution from Perpetual for the monies it had advanced in discharge of the Challenger Mortgage. It is not appropriate that such a question be determined on a costs application. It is sufficient to say that I considered ANZ's claim against Perpetual to be arguable (as did Hall J on the joinder application). I do not read what Allsop P said in *Hills Industries* as foreclosing ANZ's claim in restitution.

- 24 As for Perpetual's submissions that are based on the *Calderbank* letter and the notice to admit facts, I am not persuaded to exercise my discretion with respect to costs in Perpetual's favour on those bases. The *Calderbank* offer was, in the circumstances, no more than a demand for capitulation at a time when ANZ had, in my view properly, moved the court to join Perpetual in order that all issues could be determined in the single proceeding. That Perpetual had incurred significant costs does not, in my view, change the characterisation of its offer in any material way. The notice to admit facts was, in the circumstances, a device to found the present application, as distinct from a procedural step designed to narrow the issues in dispute or to require a party to make proper admissions or else suffer a costs penalty.
- 25 It is not necessary to decide the question whether Mrs Londish is insolvent or who, as between Perpetual and ANZ, would bear the onus of proof. That Mrs Londish has not made submissions on this application, which directly concerns her, is some indication that the risk of insolvency has ensued. It is reasonable to infer that there is at least a risk that Mrs Londish will be unable to pay any order for costs made against her in favour of Perpetual. Although there is some debate in the authorities on whether the insolvency of one of the parties is to be taken into account (see the authorities considered by Einstein J in *Schipp v Cameron*) I accept its relevance to the exercise of my discretion.
- 26 The real question is: who should bear Perpetual's costs of Mrs Londish's unsuccessful collateral challenge to the Challenger Loan and Mortgage? The obvious person to do so is Mrs Londish, since she raised, and lost on,

that issue (among others). Perpetual contended, however, that, if she is required to pay those costs and she is insolvent, Perpetual itself will be required to bear its own costs. The other candidate to be required to pay Perpetual's costs is the ANZ. A reason to require the ANZ to pay Perpetual's costs is that it was the party which was responsible for joining Perpetual and which alleged a claim against it, which in the events that happened, did not need to be determined. But for the ANZ, Perpetual would not have been joined since Mrs Londish made no claim against it.

- 27 On the assumption (which I make for the purposes of testing the argument) that Mrs Londish is insolvent, the question becomes whether ANZ should bear Perpetual's costs or whether Perpetual should bear its own costs. The issues between these two parties were not resolved because they became hypothetical. I do not consider that the ANZ ought be placed in the position of insurer for Mrs Londish's insolvency. If the effect of the costs order is that Perpetual will be required to bear its own costs, the principal cause of this effect is Mrs Londish's insolvency, not the ANZ's joinder of Perpetual.
- 28 In all the circumstances, which include the real possibility that Mrs Londish is insolvent, I do not consider that an order requiring the ANZ to pay Perpetual's costs is appropriate.
- 29 In my view, the appropriate order is the one I foreshadowed.

Order

- 30 I make the following order:
- (1) Order the first defendant to pay the second and third defendants' costs of the proceedings.
