Court of Appeal
Supreme Court

New South Wales

Case Name:	Kekatos v Westpac Banking Corporation
Medium Neutral Citation:	[2016] NSWCA 205
Hearing Date(s):	9 August 2016
Date of Orders:	9 August 2016
Decision Date:	12 August 2016
Before:	Basten JA; Meagher JA; Sackville AJA
Decision:	1. Grant leave to appeal in respect of orders 1 and 2 made on 5 November 2015. 2. Set aside orders 1 and 2 made on 5 November 2015. 3. Otherwise dismiss the application for leave to appeal. 4. Order the applicant pay the respondent's costs.
Catchwords:	APPEAL – application for leave – where default judgment for money sum and possession of property set aside by consent – where subsequent application to set aside consent order and reinstate default judgment but for lesser amount – whether arguable defence to judgment for lesser amount – leave refused
Legislation Cited:	Real Property Act 1900 (NSW), s 57(2)(b) Supreme Court Act 1970 (NSW), s 101(2)(e)
Category:	Principal judgment
Parties:	Vicki Kekatos (Applicant) Westpac Banking Corporation (Respondent)
Representation:	Counsel: D Allen (Applicant) T D Castle with D Moujalli (Respondent)

	Solicitors: Ronayne Owens Lawyers (Applicant) Gadens Lawyers (Respondent)
File Number(s):	2015/370599
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Common Law
Citation:	[2015] NSWSC 1629
Date of Decision:	5 November 2015
Before:	Adamson J
File Number(s):	2015/370509

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **THE COURT**: The applicant (**Mrs Kekatos**) is the owner of a residential property in the eastern suburbs of Sydney. In March 2008 she mortgaged that property to the respondent bank (**Westpac**). That registered mortgage secured what were referred to as the Kekatos Facilities and the Bronte Facility. In December 2013 Westpac commenced proceedings against Mr and Mrs Kekatos. As against Mrs Kekatos it sought judgment for the amounts outstanding under the Kekatos Facilities and Bronte Facility and for possession of the mortgaged property. On 31 January 2014 Westpac obtained default judgment against Mrs Kekatos in an amount of $15,780,893 (omitting cents) and for possession of the property. It subsequently consented to that judgment being set aside, later unsuccessfully sought summary judgment against Mrs

Kekatos and, in September 2015, sought orders that the earlier consent order be set aside and the default judgment reinstated.

2 That last application was determined on 5 November 2015: *Westpac Banking Corporation v Kekatos* [2015] NSWSC 1629. The primary judge made the following orders:

> (1) Set aside the order made on 16 April 2014 that default judgment be set aside in so far as it is necessary to give effect to orders (2), (3), (4) and (5) below.
>
> (2) Order that the default judgment entered on 31 January 2014 be reinstated in part as set out in orders (3) and (5) below.
>
> (3) Judgment for the plaintiff against the first defendant for possession of the land comprised in folio identifier 5/16538 being the land situated at and known as 41A New South Head Road, Vaucluse, New South Wales, 2030.
>
> (4) Grant leave to issue a writ of possession with respect to (3).
>
> (5) Judgment for the plaintiff against the first defendant in the sum of $2,500,000, being the amount owing in respect of the First Facility and the Second Facility referred to in paragraphs 5(a) and (b) in the statement of claim, plus interest payable in respect of each of those Facilities.
>
> (6) Direct the parties to provide a minute of order setting out the amount of the judgment sum (including interest to date) to my Associate within seven days so that an order for judgment can be made and entered in chambers for that sum.
>
> (7) Strike out the first defendant's further amended defence and amended cross claim.
>
> (8) Grant leave to the first defendant to file a further defence and cross-claim limited to the Third Facility referred to in paragraph 5(c) of the statement of claim and the Bronte Facility referred to in paragraph 8 of the statement of claim.
>
> (9) Unless any party makes an application in writing to my Associate within seven days hereof for a different order, order the first defendant to pay the plaintiff's costs of the plaintiff's motion filed on 4 September 2015.

3 On 19 November 2015, and by consent, the Court entered judgment for a particular sum and noted the following undertakings:

> 1. In respect of orders 5 and 6 made on 5 November 2015, the Court directs that judgment be entered for the plaintiff against the first defendant in the sum of $3,164,261.85 being the amount outstanding in respect of principal and interest to 10 November 2015 under the First Facility and Second Facility.
>
> 2. In respect of orders 3 and 4 made on 5 November 2015, the Court notes the undertaking of the plaintiff not to apply for the issue of a writ of possession for 41A New South Head Road Vaucluse NSW 2030 (being folio identifier 5/16538) before 1 February 2016.

3. In respect of orders 3, 4, 5, 6 and 8 made on 5 November 2015 the Court notes the further undertakings of the plaintiff that, in the event that the property at 41A New South Head Road Vaucluse is sold and the proceeds of sale exceed the judgment sum of $3,164,261.85 together with any costs of enforcement and sale of the property:

(a) The plaintiff will hold the amount of that excess and apply it against the balance of the debt claimed by the plaintiff against the first defendant in these proceedings;

(b) In the event that any part of that excess is ultimately found in these proceedings to be payable to the first defendant, the plaintiff will pay that amount to the first defendant with interest thereon under section 100 of the Civil Procedure Act 2005 (NSW).

4 Mrs Kekatos sought leave to appeal from the judgment and orders made on 5 November 2015. That application should be treated as extending to the order made on 19 November 2015. It was accepted that leave was required, on the basis that the judgment entered was interlocutory: *Supreme Court Act 1970* (NSW), s 101(2)(e).

5 On 9 August 2016, at the conclusion of the concurrent hearing of that application and appeal, this Court made the following orders:

1. Grant leave to appeal in respect of orders 1 and 2 made on 5 November 2015.
2. Set aside orders 1 and 2 made on 5 November 2015.
3. Otherwise dismiss the application for leave to appeal.
4. Order the applicant pay the respondent's costs.

6 These are the Court’s reasons for making those orders.

7 The Kekatos Facilities consisted of three separate loans for amounts of $800,000, $1.7 million and $500,000. The proceeds of those loans were used to discharge an existing mortgage to Perpetual Limited (**Perpetual**) in respect of earlier advances made to Mrs Kekatos by Macquarie Bank Limited. Those advances had in turn been used to refinance two mortgage loans taken by Mrs Kekatos, one of $800,000 which enabled the purchase of the residential property in 1992; and the other of $1.6 million which was used to purchase a commercial property at Burwood. The Bronte Facility, in respect of which Mrs Kekatos was liable as a guarantor, was a commercial bill acceptance/discount facility with a limit of $9 million provided to Bronte Properties Pty Ltd for use in property development.

8 The Kekatos Facilities expired on 3 March 2013. Mrs Kekatos did not repay the moneys then outstanding under those facilities. In August 2013 Westpac issued separate default notices under the mortgage and statutory notices pursuant to s 57(2)(b) of the *Real Property Act 1900* (NSW) in respect of moneys owing under the Kekatos Facilities and Bronte Facility. Mrs Kekatos failed to comply with those notices. It would seem that no payments have been made to Westpac in reduction of the Kekatos Facilities since at least March 2013.

9 The circumstances in which Westpac consented to the setting aside of the default judgment and subsequently moved to set the consent order aside are explained in some detail by the primary judge at [23] to [48]. In essence, Westpac that consent because Mrs Kekatos had sworn an affidavit on 26 March 2014 denying that she had signed the mortgage. She subsequently, in an affidavit sworn on 3 September 2015, accepted that her earlier affidavit had been false and that she had signed the mortgage and other documents relating to the Kekatos Facilities.

10 Westpac's application to the primary judge was to set aside the consent order made on 16 April 2014, so as to reinstate the default judgment, and the primary judge dealt with its application on that basis (Judgment at [67], [84]). Having concluded, however, that Westpac was entitled to have the consent order set aside, her Honour proceeded to consider whether "in the interests of justice" Westpac should have judgment for the full amount of the default judgment or for some lesser sum (Judgment at [86]). The primary judge did so by inquiring as to the amount in which Westpac would be entitled to judgment on an application for summary judgment; and was satisfied, assuming for that purpose that Westpac bore the onus, that Mrs Kekatos had no arguable defence to the claim for recovery of the two loans totalling $2.5 million that were part of the Kekatos Facilities (Judgment at [89]).

11 The primary judge also noted that Westpac did not contend that there were no triable issues in relation to the third loan within the Kekatos Facilities (which was unrelated to the refinancing of the two properties) or the Bronte Facility (Judgment at [91]).

12 The correctness of her Honour's conclusion in relation to the loans totalling $2.5 million was not challenged in the argument before this Court. Mrs Kekatos' adoption of that position is consistent with a concession made in her amended cross-claim. In that amended cross-claim, Mrs Kekatos alleges that she signed documents relating to the Kekatos Facilities and Bronte Facility on the same occasion and that her husband misrepresented the effect of those documents. Mrs Kekatos maintains that because of her husband's statements, which she did not question as "she feared rebuke" from him, she did not understand that her property was being offered as security for the Bronte Facility, or "at risk" in relation to any moneys owing under that facility.

13 Her amended cross-claim relevantly includes the following:

> 12 In the circumstances the process by which the Cross-Defendant came to obtain the obligations continued by the Facilities, the Guarantee and Mortgage is unconscionable and unjust in equity, under the Contract Review Act and section 51AA, and 51AC of the Trade Practices Act.
>
> 13 Accordingly the Cross-Claimant should be relieved of any obligations arising from the Facilities, Guarantee and Mortgage;
>
> > **a. On the basis that the Cross-Claimant makes restitution to the Cross-Defendant of any money applied to discharge any previously existing registered mortgage; or alternatively**
> >
> > b. Without restitution on the basis of what is pleaded in paragraphs 14 to 17 below.
>
> 14 At the time the Cross-Claimant believed that the amount secured against the property was approximately $800,000 plus an amount of $1.8 million which was by way of a cross collateralised liability for the mortgage on title to the Burwood Property.
>
> 15 Had the Cross-Claimant been given any legal or financial advice she would have discovered:
>
> > a. **The amount secured on the property was $3 million** plus the amount of the cross collateralised liability on the Burwood Property;
> >
> > b. That some person, most likely her husband, had obtained a loan on the Property for $2.5 million and to obtain the loan had signed a mortgage in favour of Perpetual Limited in registrable form which became registered.
>
> 16 Upon finding this out, the Cross-Claimant would have refused to allow her husband to proceed with the Wallace Street Bronte Development and would not have signed any documents.
>
> 17 Further she would have insisted that the Burwood Property be sold and that her Husband **use the proceeds and other money available to him to discharge the mortgage in favour of Perpetual Limited**. [emphasis added]

14 It will be seen that par 13(a) of the amended cross-claim concedes that the matters pleaded in pars 1-12 cannot relieve Mrs Kekatos of the obligation to make restitution for the funds required to discharge the Perpetual mortgage.

15 The facts pleaded in par 15, which are essential to the alternative claim that Mrs Kekatos was entitled to relief without taking account of the benefit she received from the discharge of the Perpetual mortgage, are inconsistent with the primary judge's findings. Those findings are not sought to be challenged on appeal.

16 The relevant findings were that at the time the Westpac mortgage was granted there was an amount of about $3 million due to Perpetual and no additional liability, either actual or contingent, in respect of any moneys advanced in relation to the Burwood property. On the primary judge's findings those moneys were included within the $3 million (Judgment at [7], [15], [16], [17]).

17 It followed, as was ultimately and rightly conceded by counsel appearing for Mrs Kekatos, that the primary judge could not be shown to have erred in concluding that she had no arguable defence to Westpac's claim to recovery of the amount of $2.5 million and interest. That meant that Mrs Kekatos' appeal against the entry of judgment for that amount and for possession had no prospects of success. Subject to one matter, it followed that the application for leave to appeal should be refused.

18 There remained a question concerning orders 1 and 2 made by the primary judge on 5 November 2015. Those orders were made to accommodate her Honour's conclusion that Westpac was entitled to have the consent order of 16 April 2014 set aside. It was unnecessary however to make either order to give effect to her Honour's further conclusion that Westpac was entitled to summary judgment in accordance with orders 3, 4 and 5 as made. Furthermore on examination orders 1 and 2 are inconsistent in their intended operation and effect.

19 The consent order (Judgment at [35]) was that the "default judgment entered in favour of the plaintiff on 31 January 2014 be set aside". The effect of setting aside that order was that the judgment entered on 31 January 2014 was reinstated. That judgment was for $15,780,893 and for possession.

20 Order 1 set aside the consent "so far as it is necessary to give effect" to orders 2, 3, 4 and 5. Orders 3, 4 and 5 gave judgment in favour of Westpac for possession and for a significantly lower amount than the default judgment. They also give leave for the issue of a writ of possession. It was not necessary that the consent order be set aside to make or give effect to any of those orders, because as at November 2015 there was no existing judgment in favour of Westpac. Accordingly, considering the terms of order 1 alone (and disregarding the reference to order 2), it would not operate to set the consent order aside.

21 However, order 2 proceeds on the basis that the default judgment is "reinstated in part". For that to occur, the consent order must be set aside with the consequence that the whole of the default judgment is reinstated. Because order 2 provides that the default judgment only be "reinstated in part" it is inconsistent with that operation of order 1. That inconsistency would not have arisen if order 2 in terms had varied the amount of the default judgment reinstated as a result of the operation of order 1. Order 5 would then have been unnecessary. On any view orders 1 and 2 give rise to confusion: for example, if they remained it would be unclear whether interest ran on the judgment debt, or whether Westpac was entitled to interest calculated under the mortgage until November 2015.

22 In circumstances where the making of orders 1 and 2 was unnecessary and they are inconsistent in their intended operation or effect, neither party argued against the proposition that they should be set aside. To enable that outcome, Mrs Kekatos was given leave to appeal in respect of those orders and they were set aside.

23 That grant of leave and the setting aside of those orders did not at all advance Mrs Kekatos' position in relation to the proposed appeal or make any difference to the outcome of the proceedings being that Westpac was successful in opposing the application and proposed appeal. For that reason the Court ordered that the applicant pay Westpac's costs.

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