
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : CLAYBEK INVESTMENTS PTY LTD as trustee of
the CLAYTON AND REBEKAH BLACK
SUPERANNUATION -v- ARMSTRONG WAY
INVESTMENTS (WA) PTY LTD [No 2] [2025]
WASC 184

CORAM : GETHING J

HEARD : 5 MAY 2025

DELIVERED : 19 MAY 2025

FILE NO/S : CIV 1067 of 2025

BETWEEN : CLAYBEK INVESTMENTS PTY LTD as trustee of
the CLAYTON AND REBEKAH BLACK
SUPERANNUATION
Plaintiff

AND

ARMSTRONG WAY INVESTMENTS (WA) PTY
LTD
Defendant

Catchwords:

Practice and procedure - Application by plaintiff for summary judgment - Loan secured by equitable charge - Whether plaintiff is able to enforce the equitable charge by an order for sale of the charged property

Legislation:

Rules of the Supreme Court 1971 (WA) O 14

Result:

Summary judgment given

Order for the sale of property subject to an equitable charge

Representation:

Counsel:

Plaintiff : Mr J C Yeldon

Defendant : No appearance

Solicitors:

Plaintiff : Appius Lawyers

Defendant : Not yet served

Case(s) referred to in decision(s):

Bunnings Group Limited v Hanson Construction Materials Pty Ltd [2017]
WASC 132

Charge Card Services Ltd, Re [1987] Ch 150

Claybek Investments Pty Ltd v Armstrong Way Investments (WA) Pty Ltd
[2025] WASC 29

Field Camp Services Pty Ltd v Site Accommodation Pty Ltd [No 2] [2012]
WASCA 27

Hart v Milne [2024] WASC 229

Hewett v Court (1983) 149 CLR 639

Kounis v Westpac Banking Corporation [2023] WASCA 185

Mattingly v Cosh [2025] WASC 70

Naaman v Jaken Properties Australia Pty Ltd Limited [2025] HCA 1

National Provincial and Union Bank of England v Charnley [1924] 1KB 431

Patten v Burke Publishing Co Ltd [1991] 2 All ER 821

Southern Wine Corporation Pty Ltd (in liq) v Frankland River Olive Co Ltd
[2005] WASCA 236

Trevy Jay Assets Pty Ltd v Armstrong Way Investments (WA) Pty Ltd [2025]
WASC 37

GETHING J:

(This judgment was delivered extemporaneously on 5 May 2025 and has been edited to correct grammar and infelicities of language and to include full references to relevant evidence and authorities).

1 By writ filed 23 January 2025 (**Writ**), the plaintiff, Claybek Investments Pty Ltd, as trustee for the Clayton and Rebecca Black Superannuation Trust (**Claybek**) seeks to enforce a loan agreement it entered into with Armstrong Way Investments (WA) Pty Ltd (**Armstrong**). The loan agreement was entered into in or about June 2022 (**Loan Agreement**). Claybek asserts that the Loan Agreement empowered it to lodge a caveat over land of which Armstrong is a registered proprietor, at 30A and 30B Armstrong Way in Newman, Western Australia (**Property**). Claybek lodged caveat P938771 (**Caveat**) over the Property. By orders made on 24 January 2025, I extended the operation of the caveat until further order of the court, publishing reasons.¹ The caveat remains in effect.

2 By application filed 3 February 2025, Claybek now seeks summary judgment on its claim (**Application**).

3 Armstrong has been served with the Writ,² court documents for the application to extend the Caveat,³ the statement of claim,⁴ the court documents for the Application⁵ and the programming orders I made in the Application on 3 April 2025.⁶ In each case, these documents were served by leaving them at, or posting them to, the registered office of Armstrong which is a firm of accountants in Osborne Park.⁷ Service in this manner is permitted by *Corporations Acts 2001* s 109Z(1)(a). Armstrong has not entered an appearance, nor filed any affidavits or submissions in opposition to the Application.

4 In both the statement of claim and the Application, Claybek seeks a declaration that it has an equitable charge over the property, securing performance by Armstrong of its obligations under the loan agreement. Accordingly, it has quite properly sought summary judgment, and not

¹ *Claybek Investments Pty Ltd v Armstrong Way Investments (WA) Pty Ltd* [2025] WASC 29.

² Affidavit of Ario Bahmani, sworn 28 March 2025.

³ Affidavit of Ario Bahmani, sworn 30 January 2025.

⁴ Affidavit of Morgan Riley sworn 12 March 2025.

⁵ Two affidavits of Affidavit of Ario Bahmani, sworn 29 April 2025.

⁶ Affidavit of Ario Bahmani, sworn 10 April 2025.

⁷ Affidavit of Clayton Black sworn 23 January 2025 (**Black First Affidavit**), page 9.

default judgment.⁸ This is because, before making a declaration, the court must be satisfied as to the evidential basis for doing so.⁹

5 RSC O 14 r 1 permits a plaintiff to make an application for summary judgment, as of right, within 21 days after an appearance has been filed. So in this case, no appearance having been filed, Claybek does not require leave to bring the application.

6 In addition to the affidavits of service, counsel for Claybek read two affidavits in support of the Application:

- (a) the Black First Affidavit, Mr Black being a director of Claybek; and
- (b) a second affidavit of Mr Black, sworn 3 April 2025 (**Black Second Affidavit**).

The factual basis of Claybek's claim

7 I find the following facts established from the Black First Affidavit and the Black Second Affidavit.

8 The Loan Agreement was entered into in or about June 2022. A copy of the executed Loan Agreement is annexed to the Black First Affidavit.¹⁰

9 Pursuant to the Loan Agreement, Claybek agreed to, and did, lend \$173,000 to Armstrong. The term was 84 months from the date on which the loan was dispersed. The rate of interest was 3.5%, calculated monthly and paid three months in arrears.

10 The Loan Agreement empowered Claybek to lodge a caveat over the Property. The relevant clause is cl 5, which is as follows:

5 SECURITY

5.1 Subject to Claim Caveat

For the purposes of the Lender securing their interest under the Loan Documents the Borrower hereby irrevocably consents to the Lender lodging a 'Subject to Claim' Caveat ONLY against the Property.

⁸ Though it could also have filed a motion for default judgment pursuant to *Rules of the Supreme Court 1971* (WA) (RSC) O 13 r 9, see for example: *Hart v Milne* [2024] WASC 229 [46] - [52] (Russell M).

⁹ *Mattingly v Cosh* [2025] WASC 70 [53] (Gething J); *Patten v Burke Publishing Co Ltd* [1991] 2 All ER 821, 822 - 823; [1991] 1 WLR 541, 543 - 544 (Millett J).

¹⁰ Black First Affidavit, pages 11 - 23.

5.2 No 'Absolutely' Caveat

The Lender acknowledges that they have no right to lodge a caveat 'Absolutely' and irrevocably appoints the Borrower to remove any caveat 'Absolutely' lodged by the Lender with all costs and expenses incurred by the Borrower in connection with the removal of the offending caveat will be paid for by the Lender.

5.3 Costs

The costs and expenses incurred by the Lender in connection with the preparation registration, lodgement and subsequent removal of the Caveat will be paid for by the Borrower capped at the value of \$330 inc GST plus Landgate/Electronic Lodgement Fees for the lodgement and subsequent removal event.

11 The Loan Agreement in cl 6.2 provides that upon an event of default occurring, Claybek may, by notice to Armstrong, make the amounts owing (as defined) immediately due and payable, exercise its rights under the caveat, and any other provisions of the Loan Agreement or exercise any rights under law.

12 Mr Black deposes that:

- (a) the sum of \$173,000 was advanced to Armstrong on 30 June 2022;
- (b) Armstrong made some repayments to the loan;
- (c) Armstrong defaulted on the Loan Agreement by missing the payment for the quarter ending on 30 December 2023;
- (d) on 9 April 2024, Claybek through its solicitors issued a notice of default to Armstrong;
- (e) there were some further payments made after 9 April 2024;
- (f) Armstrong has further defaulted on the Loan Agreement by missing the payments due on 1 October 2024, 1 January 2024, and 1 April 2025;
- (g) as at the date on which Mr Black swore the Black Second Affidavit, being 3 April 2025, Armstrong was still in breach of the loan agreement; and

(h) as at 3 April 2025, the total amount outstanding was \$203,291.59.

13 In the Black First Affidavit, Mr Black deposes that there have been some negotiations between representatives of Claybek and Armstrong for the repayment of the loan, removal of the caveat and/or substitution of security for the loan. However, those negotiations did not result in a resolution of the dispute.

14 In the Black Second Affidavit, Mr Black deposes that he believes that Armstrong has no defence to Claybek's claim.

Is Claybek entitled to summary judgment?

15 The principles by which an application for summary judgment is determined were recently summarised by the Court of Appeal in *Kounis v Westpac Banking Corporation* in the following terms:¹¹

Summary judgment is a procedure designed to deal with cases that are not fit for trial. The power to determine a proceeding summarily must be attended with great care - sometimes expressed in terms of 'exceptional caution'. It is only in the clearest of cases, when there is a high degree of certainty about the ultimate outcome of the proceedings if they went to trial, that summary judgment ought properly to be granted. The claimant carries the burden of persuading the court that the claim is a good one, that there is no defence to it, that leave to defend should not be granted and that judgment should be given for the claimant. If the claimant can establish a prima facie right to summary judgment, the burden then shifts to the defendant to satisfy the court why judgment should not be given against him or her. In this respect the defendant has an evidentiary burden. However, the overall burden of persuasion remains on the party moving for summary judgment.

16 I find that the preconditions to the exercise of the court's power in RSC O 14 have been satisfied in that:

- (a) the action is one to which RSC O 14 applies; and
- (b) Claybek has served a statement of claim on Armstrong.

17 Further, as required by RSC O 14 r 2(1), I am satisfied that Claybek has filed affidavits verifying the facts on which the claim is based and deposed a belief that Armstrong has no defence to Claybek's claim. Accordingly, Claybek has satisfied all the requirements of O 14 RSC, so as to give it a prima facie right to judgment.

¹¹ *Kounis v Westpac Banking Corporation* [2023] WASC 185 [8] (reasons of the court) (*Kounis*).

18 The burden then shifts to Armstrong to satisfy the court as to why judgment should not be given against it. This is an evidentiary burden, the overall legal burden of persuasion remaining on Claybek as the applicant.¹² Specifically, Armstrong must satisfy the court 'with respect to the claim ... that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason to be a trial of that claim'.¹³ It does not have to show a defence on the balance of probabilities, but it must at least show cause why there is an arguable defence.¹⁴

19 As Armstrong has filed no affidavit in opposition to the application, it has not displaced Claybek's prima facie right to summary judgment.

20 For completeness' sake, I add that there is nothing in the evidence before the court suggesting that there is some other reason why there ought to be a trial of the claim.¹⁵

21 Even exercising the great care I am required to, Claybek has readily persuaded me that it is clear that there is no real question to be tried. I have a high degree of certainty that, if this matter were to go to trial, Claybek would be entitled to judgment.

In what terms is Claybek entitled to judgment?

22 The issue then becomes on what terms Claybek should be given judgment. It seeks a declaration that the amount owing under the Loan Agreement is \$203,291.59. The appropriate form of final order is to enter judgment in this amount.

23 Claybek then seeks the following orders:

- (a) a declaration that under clause 5.1 of the Loan Agreement, that it is entitled to an equitable charge over the Property;
- (b) an order permitting the plaintiff to appoint receivers to take possession of the Property, and to sell the Property, and after deducting the costs of sale, to pay the sale proceeds into the trust account of the plaintiff's solicitors, pending further dispersal conditional upon and subject to further orders; and

¹² *Kounis* [8].

¹³ RSC O 14 r 3(1).

¹⁴ *Kounis* [9]; *Field Camp Services Pty Ltd v Site Accommodation Pty Ltd [No 2]* [2012] WASCA 27 [4] (reasons of the court).

¹⁵ RSC O 14 r 3(1).

(c) following on from notice to its solicitor from receivers appointed the Property has sold, and within 3 business days of receipt of the funds from the sale into its trust account, its solicitor are to notify my associate, for the purposes of seeking the listing of a directions hearing between competitors to the sale proceeds, including all secured creditors, and caveators.

24 The order in [23](c) is necessary as there is at least one other claimant on the proceeds of the sale of the Property. In *Trevy Jay Assets Pty Ltd v Armstrong Way Investments Pty Ltd*, Hill J extended a second caveat over the Property, again until further order of the court.¹⁶

25 Whether a contract gives rise to an equitable charge depends on the intention of the parties. Intention can be expressed or implied. The intention is to be garnered from the terms and conditions of the contract and its commercial purposes. The court should not adopt a narrow or pedantic approach to construction, particularly in the case of commercial arrangements. No particular form of words is required to create a charge. The language is immaterial if the meaning is plain. An agreement that a person has a right to place a caveat on another's title may demonstrate an intention to create an equitable charge.¹⁷

26 In *National Provincial and Union Bank of England v Charnley*,¹⁸ Lord Justice Atkin declined to say what was meant by a charge, but said:

There can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge.

27 That intention is readily evinced in cl 5 of the Loan Agreement, which I have quoted at [10]. I find that it creates an equitable charge over the Property. Claybek is entitled to a declaration to that effect.

28 As to how it should be enforced, in the words of Millett J in *Charge Card Services Ltd, Re*:¹⁹

¹⁶ *Trevy Jay Assets Pty Ltd v Armstrong Way Investments (WA) Pty Ltd* [2025] WASC 37.

¹⁷ *Southern Wine Corporation Pty Ltd (in liq) v Frankland River Olive Co Ltd* [2005] WASCA 236 [39] - [40] (McLure JA, with whom Wheeler JA agreed), [62] (Pullin JA).

¹⁸ *National Provincial and Union Bank of England v Charnley* [1924] 1KB 431, 449 – 450 (Atkin LJ).

¹⁹ *Charge Card Services Ltd, Re* [1987] Ch 150, 176 (Millett J).

[T]he essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt. The availability of equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged.

29 As the High Court recently observed, an equitable charge over property 'is enforceable by means of a court of equity making an order authorising or requiring sale of the property and payment of the indebtedness out of the proceeds of that sale'.²⁰

30 It follows that Claybek is entitled to an order for the sale of the Property.

31 I agree with the submission of counsel for Claybek that an order for the sale of the Property should be made with the funds from the sale obtainable being held in trust by Claybek's solicitors. Further litigation between the parties who claim security could then be undertaken by joinder to the action, with the parties pleading their entitlement subject to directions. For the assistance of potential claimants, the issue of priority of claims to the proceeds of the sale of a property the subject of an equitable charge was considered by Chaney J in *Bunnings Group Limited v Hanson Construction Materials Pty Ltd*.²¹

32 There should be liberty to apply in the event more specific orders of the court are required.

33 I will hear from counsel on the precise form of the orders.

34 Claybek is at least entitled to an order that Armstrong pays its costs of the action to date, to be taxed, if not agreed.

²⁰ *Naaman v Jaken Properties Australia Pty Ltd Limited* [2025] HCA 1 [18], also [19] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); *Hewett v Court* (1983) 149 CLR 639, 663 (Deane J).

²¹ *Bunnings Group Limited v Hanson Construction Materials Pty Ltd* [2017] WASC 132.

GETHING J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

OB

Associate to the Hon Justice Gething

19 MAY 2025