CITATION: *Nichols v St George Bank Margin Lending* [2009] NTMC *005*

PARTIES:	FILOMENA MANCIA NICHOLS
	v
	ST GEORGE BANK MARGIN LENDING
TITLE OF COURT:	SMALL CLAIMS COURT
JURISDICTION:	Darwin
FILE NO(s):	20815427
DELIVERED ON:	9 March 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	19 December 2008
JUDGMENT OF:	Ms Melanie Little SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff:	Self
Defendant:	Mr David Alderman

Solicitors:

Plaintiff:	Self
Defendant:	Kelly & Co Lawyers

Judgment category classification:	C
Judgment ID number:	[2009] NTMC 005
Number of paragraphs:	14

IN THE SMALL CLAIMS COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20815427

[2009] NTMC 005

BETWEEN:

FILOMENA MANCIA NICHOLS
Plaintiff

AND:

ST GEORGE BANK MARGIN LENDING
Defendant

REASONS FOR DECISION

(Delivered 9 March 2009)

Ms Melanie Little SM:

1. The plaintiff is claiming the sum of $8,435.00 being $1,330.00 in transaction fees and $7,055.00 in losses on shares sold. The claim is made in the Small Claims Court against the defendant company. The plaintiff conducted her own case. The defendant was represented by Counsel. A hearing was conducted on 19 December 2008 and I reserved decision. This is now the decision in the matter.

2. The plaintiff bears the onus of proof and the burden of proof is on the balance of probabilities. The matter was conducted by way of both oral and documentary evidence. I have taken all admitted relevant evidence into account.

3. The plaintiff's statement of claim was filed on 3 June 2008. On 26 September 2008 the plaintiff set out particulars of the calculations of damages claimed. The defendant had filed a defence on 27 June 2008.

4. The plaintiff was a client of the defendant company St George Bank Margin Lending from 2007. That matter is not disputed. A business relationship between the plaintiff and defendant commenced on 19 February 2007 when the plaintiff had made an application to the defendant pursuant to the bank's Margin Lending Application Form (Exhibit D7). A signed copy of the application is Exhibit D8 and it is agreed that is it extremely difficult to read that document. Nonetheless, as stated, there is no dispute as to the relationship between the parties. Exhibit D9 sets out the terms and conditions of the facility. The plaintiff gave evidence that she undertook transactions using her email access. The Margin Lending Application Form is signed at the end of the declaration section of the form. The declaration includes conditions acknowledging that the plaintiff had read the St George Margin Lending terms and conditions in the brochure, the risk disclosure statement, the power of attorney conditions and background on CHESS (Clearing House Electronic Subregister System). The plaintiff also acknowledged understanding the risks of margin lending and her obligations. In evidence, the plaintiff acknowledged that she had read and understood those parts of Exhibit D9 which she considered were relevant to her. She indicated that some parts were not relevant to her. She accepted that she had read the material and in particular, with respect to margin calls and risk disclosure. She had read the sections concerning mortgages over shares and paragraph 25 with respect to default.

5. On 2 April 2007 the plaintiff faxed to the defendant a document entitled "Share Transfer" (P1-save and except the hand written notes dated 15/8/07). The document sets out "Complete this form to transfer shares to your St George Margin Lending Facility". This related to shares for Horizon Oil Limited (HZN) 2,375 shares, Citigold Corporation (CTO) 500 shares, Quantum Resources Limited (QUR) 20,000 shares and Lakes Oil NL (LKO) 12,400 shares. P1 was faxed to the defendant by the plaintiff for the shares

to be security. The plaintiff is named as the Shareholder. Berndale Securities Ltd is named as the current CHESS participant.

6. Exhibit D13 are the account notes prepared by the defendant with respect to the plaintiffs' dealings with the defendant. The document sets out that on 3 April 2007, a share transfer was received from the plaintiff in accordance with Exhibit P1. The account note says that this document was passed to settlements.

7. A margin call was received by the plaintiff. Clause 7 of Exhibit D9 then comes into play, which sets out in part:

> 7 MARGIN CALLS
>
> 7.1 Subject to clause 7.5, if the amount outstanding exceeds the sum of:
>
> (a) the borrowing limit; and
>
> (b) the buffer,
>
> at any time, you must take the action referred to in clause 7.2 by 2 pm (EST) on the next business day after the event occurs.
>
> 7.2 The action you must take if the amount outstanding exceeds the sum of the borrowing limit and the buffer is to:
>
> (a) repay some or all of the amount outstanding;
>
> (b) provide us with additional security interests which are acceptable to us;
>
> (c) arrange to, or give us irrevocable instructions to, sell, dispose of or redeem some or all of the mortgaged property (with the proceeds being used to reduce the amount outstanding or being deposited to the credit of the Cash Management Trust Account); or
>
> (d) take any other steps we consider necessary,
>
> so that the amount outstanding no longer exceeds the borrowing limit.

7.3 You are responsible for being in a position to receive any communications from us in relation to this clause and to act within the time limits specified in this clause.

8. The Plaintiff asserts that a transfer of the shares occurred following her faxing P1 to the defendant. The plaintiff has not provided any evidence to the Court that the shares were transferred in accordance with her request in P1. The defendant says the shares were never transferred, as Berndale Securities Ltd had refused the transfer. I accept the evidence of Mr David Bagot, the Manager of St George Margin Lending, that Berndale Securities rejected the request for the transfer. While the reason for the rejection of the request is not directly relevant to the case, the material before the Court suggests that the rejection was due to outstanding monies owed to Berndale Security by the plaintiff. It is asserted by the defendant that the plaintiff would have been aware of this fact as she was the one who had a business relationship with Berndale Security. The reason given for the rejection of the transfer was not linked to the defendant. Exhibit D13 is also relied upon by the defendant with respect to this issue. Notification was received by the defendant on 5 April 2007 as follows "client still owes money at Berndale – they won't tfr stock until debts paid". I take 'tfr' to mean transfer. There is no evidence that the shares were ever transferred to the defendant. I find that the shares set out in P1 were not transferred to the defendant.

9. This finding affects the entire premise of the plaintiff's case. Paragraph 2 of the statement of claim sets out that 'on 2 April 2007 the plaintiff transferred her shares from 5 small companies, namely Lakes Oil, Horizon Oil, Citigold Corporation, Regis Resources and Quantum Resources Limited'. The assertion made in the statement of claim is not proven on the facts before the Court. What is proven is that the plaintiff completed the share transfer application form applying for the shares to be transferred and she transmitted that form to the defendant. This process does not (and can not) ensure that the shares are transferred. There are a myriad of reasons why a transfer request may not occur. In this case I find the transfer did not

occur as the plaintiff owed monies to Berndale Security and they declined to transfer the shares.

10. The defendant's position is that the plaintiff did not receive any notification that the shares were transferred. The plaintiff did not provide the court with any evidence that would have lead her to believe that the shares had been transferred. In fact the contrary evidence was apparent. The plaintiff made further requests for the transfer to be undertaken. From this fact, it is clear that the plaintiff was aware the share transfer may not have been carried out in accordance with her request of 2 April 2007. These follow up requests were part of the plaintiff's case and she does not deny she made further requests. It is unclear as to why the plaintiff asserted in her statement of claim that the transfer had taken place. There may be some confusion as between applying for a transfer and the transfer taking affect. I find that at no stage were the shares transferred to the defendant. I find that enquiries continued with respect to these shares as between the plaintiff and the defendant on an on-going basis and in particular, in April and August 2007.

11. On 15 August 2007, Exhibit P1 was faxed once again to the defendant. P1 contains handwritten notes by the plaintiff as follows:

> 15/8/07 – Please confirm receipt of these shares transferred to your office through Value Nominees Pty Ltd. No information received as of this date – 15 August 2007 whether St George accepted these shares transferred on 2 April 2007. Signed F Nichols Shareholder

12. Exhibit D13 confirms that on 15 August 2007 the share transfer form was received by the defendant. It was passed to the settlement section. This was the document as P1 which by this stage had the handwritten notes on it as set out above. A notation in D13 dated 16 August 2007 sets out as follows:

> "Share transfer has been rejected by Berndale. Client is owing Berndale money".

13. Exhibit D7 sets out that on 25 January 2008 and 4 March 2008 the plaintiff was advised of a margin call. On 6 March 2008 the plaintiff was advised that there would be a force sell after 12.00pm if she did not respond to the bank with respect to the question of the margin call. There were discussions during the day and at some stage during that day, the plaintiff faxed the defendant a share transfer form with respect to the same shares as set out in Exhibit P1. This document was passed to the settlement section of the defendant. On 10 March 2008, there is a notation on Exhibit D13 that the "client is short funds with Berndale so stock cannot be released". On 10 and 13 March 2008 there were conversations between the defendant and the plaintiff with respect to the unavailability of shares for the transfer to the defendant. A further conversation occurred on 18 March 2008 and I accept the evidence of Mr Bagot that he spoke directly with the plaintiff. I accept that he advised the plaintiff that Berndale were not transferring any of the additional shares to the defendant as money owed on them to Berndale by the plaintiff. D13 sets out a history of the contact between the Plaintiff and the Defendant on that day and I accept that the Plaintiff was told that the shares had not been transferred onto her loan, as they had not been transferred by Berndale to the Defendant. An entry from 18 March 2008 in D13 sets out "force sell whole portfolio". The list of shares sold is then set out as follows: 1,200 AIA, 48 MAP, 4,000 MOF, 1,000 QAN, 800 TLS, and 1,500 TLSCA. None of these shares are the shares set out in P1. I find on 18 March 2008, the Defendant sold shares held by the Defendant as security.

14. The facts of this case became complicated when the defendant entered a contract to sell the shares set out in P1 despite the fact that the Defendant was not in a position to enter such a contract. I find that at no stage did the Defendant have the Plaintiff's shares to sell. It appears that they had failed to undertake the necessary checks. I find that this was a mistake and that the defendant honoured its sale to the third party by purchasing shares to meet the contract for sale. I find there were no costs borne by the Plaintiff as a

consequence of this mistake. These facts may have led the Plaintiff to believe that the shares had been transferred to the defendant. The statement of claim refers to the sale and it is apparent from that document that the Plaintiff alleged that the Defendant had sold the shares belonging to the Plaintiff. It is also alleged that "the Plaintiff incurred tremendous losses from the defendants action in selling the shares" – see paragraph 10 of the Statement of Claim. I find that the Plaintiff's shares set out in P1 were never sold by the Defendant. I find that there were no monies lost by the plaintiff which can be attributed to the Defendant.

15. I find that the Plaintiff has not discharged the onus of proof in this matter. The claim by the Plaintiff is dismissed. As this is the small claims jurisdiction there will be no orders as to costs.

16. These reasons will be published.

Dated this 9th day of March 2009.

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Melanie Little
STIPENDIARY MAGISTRATE