SUPREME COURT OF QUEENSLAND

CITATION:	*Pomitix Pty Ltd v Rees Law* [2017] QSC 44
PARTIES:	**POMITIX PTY LTD (ACN 008 108 441)** (plaintiff) **v** **REES LAW** (defendant)
FILE NO/S:	No BS 4300 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application for summary judgment
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	28 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2017
JUDGE:	Boddice J
ORDER:	**The application is dismissed.** **The applicant is to pay the respondent's costs of and incidental to the application, to be agreed, or otherwise on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiff contracted for the sale of land – where advice pertaining to that contracting and the related matters of mortgage and security interest was provided by the defendant – where the plaintiff contends that the defendant was negligent in providing this advice – where the defendant applies for summary judgement under the UCPR on the grounds that the plaintiff is out of time – where the plaintiff refutes this – where the plaintiff contends the matter constitutes a 'security case' – where the defendant contends the matter constitutes a 'transaction case' – whether the plaintiff has no reasonable prospects of success PROCEDURE — SUPREME COURT PROCEDURE — QUEENSLAND — PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS —

SUMMARY JUDGMENT — Factual issues requiring exploration as to when limitation period accrued — Legal issues — Summary judgment inappropriate — *Uniform Civil Procedure Rules 1999* (Qld) r 293 — *Limitation of Actions Act 1974* (Qld) s 10(1)(a)

Limitation of Actions Act 1974 (Qld) s 10(1)a
Uniform Civil Procedure Rules 1999 (Qld) r 293

Commonwealth v Cornwell (2007) 229 CLR 519; [2007] HCA 16, cited
Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd (2015) 1 Qd R 476; [2014] QCA 233, considered
Wardley Australia Limited v The State of Western Australia (1992) 175 CLR 514; [1992] HCA 55, cited

COUNSEL:	W Sofronoff QC with BF Charrington for the plaintiff DG Clothier QC for the defendant
SOLICITORS:	Bennett & Philp for the plaintiff Barry Nilsson for the defendant

[1] By notice of claim, filed 1 May 2015, the plaintiff claimed damages for loss and damage allegedly occasioned by the defendant's negligence in representing the plaintiff in a transaction for the sale of real property formerly owned by the plaintiff.

[2] By application, filed 29 July 2016, the defendant seeks summary judgment in its favour in respect of the claim. That application is brought pursuant to Rule 293 of the *Uniform Civil Procedure Rules*. At issue is whether the plaintiff cannot succeed in its claim due to the provisions of the *Limitations of Actions Act* 1974 ("the Act").

Background

[3] The defendant is a firm of solicitors. Prior to September 2006, the defendant was retained by the plaintiff to provide advice in relation to the sale of real property owned by the plaintiff.

[4] In September 2006, the plaintiff entered into a contract to sell the real property for $2 million. The contract provided for a deposit of $25,000, with the balance to be paid by a payment of $1 million on completion and the balance within 12 months thereafter by way of instalments on the sale of subdivided lots. Security for the purchase price was to be provided by a second mortgage over the property and directors' guarantees.

[5] In or about August 2007, the plaintiff entered into a replacement contract for the sale of the property. That contract was entered into at the request of the directors of the purchaser under the first contract. The replacement contract was with another entity as

buyer. The price, deposit and payment upon completion remained the same, as did the required security.

[6] On or about 31 January 2008, the plaintiff signed a Deed of Priority with the buyer's financier, Westpac. A first mortgage was granted to the financier. The plaintiff was given a second mortgage. The plaintiff also received the requisite directors' guarantees.

[7] The date for completion of the replacement contract was set at 14 February 2008. The terms of the contract were met insofar as the deposit and the completion payment were made by the buyers. Further funds were also paid towards the post-completion balance. However, an outstanding balance of $715,000 remained. There was also an entitlement to interest under the contract in respect of that balance.

[8] Ultimately, Westpac issued a notice of power of sale on 9 May 2011. The plaintiff demanded payment from the guarantors and subsequently received judgment in its favour. The plaintiff has not, however, been able to recover the outstanding sum.

Pleadings

[9] The plaintiff alleges that before entering into the first contract it received a cash offer to buy the property for $2.1 million. The plaintiff alleges the defendant negligently failed to advise it as to the risks associated with the vendor finance, including the insufficiency of a second mortgage and directors' guarantees as security; as to the priority of Westpac and that the cash offer was a better offer and ought to be accepted in the circumstances. The negligence is pleaded to have occurred over varying periods, the last of which ends 21 February 2008.

[10] The plaintiff alleges that if it had been given appropriate advice as to those matters it would not have entered into the first contract or the replacement contract and would not have suffered loss. The plaintiff pleads the loss as being the difference between the cash offer or, alternatively, the market value of the property at the date of the first contract and the amounts received by it from the buyers under the contract.

[11] The defendant denies it was negligent. The defendant further alleges the plaintiff, if it suffered the loss alleged, suffered that loss upon entry into the first contract or the replacement contract or, alternatively, upon settlement of the replacement contract. The defendant alleges that whichever date, the loss was suffered more than six years before the commencement of the filing of the claim. The defendant pleads the limitation period under s 10(1)(a) of the Act.

[12] In its reply, the plaintiff denies the cause of action is statute barred. The plaintiff alleges the cause of action accrued when damage was sustained and damage was not sustained until default by the guarantors on 28 August 2013.

Defendant's submissions

[13] The defendant submits the plaintiff's case as pleaded is a "transaction case". It alleges the defendant's conduct caused the plaintiff to sell its property for a price less than its

then market value. That loss was sustained when the plaintiff entered into the contract. A measurable loss was sustained even if the buyers and guarantors performed their obligations in full as the buyer could never recover the extent to which the market value exceeded the price. The loss was not contingent on default by the buyers or default by the guarantors of the buyer's obligations.

[14] The defendant submits that whilst default by the buyers and guarantors added to the loss, that additional loss was not the first occasion for loss. Any cause of action in negligence accrued when a loss was first sustained, not when any final loss was sustained by the plaintiff.

[15] The defendant submits that whilst the authorities urge caution in the exercise of the summary judgment jurisdiction when reliance is had on a limitation plea, r 293 expressly gives the Court power to grant summary judgment where it is established that the plaintiff's claim has no reasonable prospects of success and there is no issue requiring a trial. Both requirements are met as there can be no doubt as to when the loss was first sustained by the plaintiff.

Plaintiff's submissions

[16] The plaintiff submits the defendant mischaracterises the nature of its claim. The claim is not a transaction case. The plaintiff's claim does not assert a negligent failure to advise that the sale price was too low or that it sustained damages as a consequence of the sale as an undervalue. The pleaded case is that the defendant was negligent in failing to advise the plaintiff of the inadequacy of the security associated with the obligations under the first contract and the replacement contract. As such, the claim for negligence is in respect of the economic interest of the plaintiff as lender in the sale of its property.

[17] The plaintiff submits its claim is that because of the defendant's negligence it accepted inadequate security and a risk of non-payment which it would not have accepted had the defendant given appropriate advice. In that event, the plaintiff would not have entered into the first contract or the replacement contract. It was only as a result of the risk of non-payment having eventuated that the plaintiff suffered loss. No loss was sustained merely upon entering into the contract and acceptance of the security.

[18] The plaintiff submits that in a security case such as its claim, a loss is not sustained at the date of the making of the loan and no action could be brought for a possible future loss at that time. A lender only suffers loss when the borrower fails to pay. It is when until actual loss is sustained as a consequence of non-payment that the cause of action accrues in favour of the lender.

[19] The plaintiff submits the defendant's application for summary judgment should be dismissed as the defendant cannot establish that the plaintiff has no real prospects of success in its claim or that there is no issue requiring a trial.

Discussion

[20] In *Wardley Australia Limited v The State of Western Australia*[1] the High Court cautioned in the strongest terms against limitations of actions issues being decided summarily. The majority said:

> "We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question."[2]

The need for a cautionary approach has been expressly adopted in Queensland.[3]

[21] In undertaking an assessment of whether a case falls into the category of "the clearest of cases" it is necessary to identify precisely the nature of the loss alleged so as to identify the likely accrual of the cause of action. It is the identification of the loss alleged that has given rise to the distinction between a "transaction case" and a "security case". In the former case, the entry into the contract exposes the plaintiff to the loss. In the latter case, the entry into the contract exposes the plaintiff to a contingent loss. The plaintiff only suffers that contingent loss when the contingency is fulfilled and the loss becomes actual.[4]

[22] A constituted cause of action in negligence arises when the plaintiff is able to establish duty, breach and damage caused by that breach. Ordinarily, that cause of action "first accrues" when damage is sustained by the plaintiff,[5] whether or not the plaintiff has discovered that damage has been sustained as a consequence of that negligence.

[23] In the present case, whilst the plaintiff's reliance upon the existence of an earlier cash offer suggests the claim is a "transaction case", a consideration of the plaintiff's pleading supports a conclusion that the plaintiff is in fact pleading loss based on a "security case".

[24] Relevantly, the amended statement of claim pleads:

(a) that the defendant did not provide the plaintiff with any advice or warning as to the risks associated with providing vendor finance or being a second mortgagee or of the risks associated with personal guarantees by the directors in respect of either the first contract or the replacement contract;

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1 (1992) 175 CLR 514.

2 At 533.

3 *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* (2015) 1 Qd R 476.

4 *Wardley* at 532.

5 *Commonwealth v Cornwell* (2007) 229 CLR 519 at [5].

(b) that the plaintiff would not have entered into the contracts of sale had the defendant so advised or if advised of the difference between "the cash offer for the purchase of the said land … namely that the plaintiff would have obtained a better purchase price for the said land in circumstances where it would have no financial risk associated with vendor finance to the purchaser and a second mortgage over the land" or if it had been advised as to the relevance of the priority of the plaintiff as against the purchaser's financier/lender and the financial position of the guarantors;

(c) the loss suffered by the plaintiff is to be calculated either as being the difference between the sum received by the plaintiff under the contracts and the amount of the cash offer or, alternatively, the value of the land.

[25] Whilst the loss suffered is framed in a manner more akin to the nature of a loss sustained in a "transaction case", the allegations of negligence relied upon are reasonably open to an interpretation of the loss being due to the entry into the contract as a lender. On that basis, the loss is quantified by the monies advanced which, in this case, is the value of the property the subject of the vendor finance. That loss is only suffered on the default of the borrower. That date was less than six years prior to the commencement of the proceeding.

Conclusions

[26] Summary judgment is only to be given where a court is satisfied that the plaintiff's claim has no reasonable prospects of success and there is no issue requiring a trial. The defendant has not established that a consideration of the pleading as a whole clearly establishes that the pleaded cause of action could only have accrued at a time more than six years prior to the commencement of the proceeding.

[27] The defendant has not established that the plaintiff's claim has no reasonable prospects of success. The pleading, in its present form, whilst somewhat ambiguous, raises issues which are properly to be determined at trial.

Orders

[28] The application is dismissed.

[29] I shall hear the parties as to any other orders and costs.