[2004] QSC 110

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ATKINSON J

No 2097 of 2003

NATIONAL AUSTRALIA BANK LIMITED (ACN 004 044 937)	Applicant/Plaintiff
and	
JOHN DOUGLAS BOND	First Respondent/ First Defendant
and	
RUSSELL BENNETT	Second Respondent/ Second Defendant

BRISBANE

..DATE 05/02/2004

JUDGMENT

1 Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HER HONOUR: This is an application by the National Australia Bank Limited for summary judgment pursuant to rule 292 of the Uniform Civil Procedure Rules 1999 for the plaintiff against the first and second defendants in the sum of $318,234.66 together with further interest from 6 January 2004 to the date of judgment.

Rule 292 of the Uniform Civil Procedure Rules provides that:

> "(1) a plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court for judgment against the defendant.
>
> (2) If the court is satisfied that -
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and make any other order that the court considers appropriate."

This rule is a departure from the rules that applied under the previous rules of court which, in essence, merely required a defendant to raise a triable issue in order for the matter to go to trial. Rule 292 is consonant with rule 5 of the Uniform Civil Procedure Rules which provide that, "The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."

If it is apparent to the Court that a defendant has no real prospect of succeeding, then it would be expensive to require the parties to go to trial with the inevitable conclusion.

This Court, both in the trial division and the Court of Appeal, Foodco Management Pty Ltd v Go My Travel Pty Ltd [2001] QSC 291; McPhee v Zarb [2002] QSC 004; CSR Ltd v Casaron Pty Ltd [2002] QSC 021; has referred to this rule on a number of occasions and remarked upon its similarity to an English rule and referred with approval to a decision of the Court of Appeal in the United Kingdom in Swain v. Hillman [2001] 1 All ER 91, in particular, to the decision of Lord Wolfe at 92.

There his Lordship said that the words "no real prospect of succeeding" did not need any amplification. Here, the words "the defendant has no real prospect of successfully defending all or part of the claim" in my view need no amplification. That is the test and no other ought to be applied. It implies a common sense and realistic approach to the prospects of the litigation and not merely the raising of the faintest triable issue by a defendant.

Nevertheless, it is important that the facts be looked at at their highest for the defendants to see if they do raise any real prospect of successfully defending the claim. The claim in this case is based on five indemnity agreements signed by

each of the defendants. The circumstances are set out in full in the affidavits filed for and on behalf of the plaintiff and those matters in dispute are set out, also in some detail, in affidavits filed by each of the defendants. The documents in question are annexed to an affidavit of Phillip John Tice, collections and support manager of the plaintiff.

The proceedings in which summary judgment is sought were commenced on 6 March 2003 and the defence was filed on 30 April 2003. It is, in its terms, clearly inadequate as a defence, but I have assumed that the true and particularised defence is to be found in the affidavits of each of the defendants, so I say no more about the nature of the defence which has been filed except to note that, if this application is unsuccessful, then the defence would require substantial amendment to be in the terms required under the Uniform Civil Procedure Rules.

In brief, the factual circumstances are that an Australian company, called Gearhouse Group Australia Pty Ltd ("Gearhouse Australia") which was a subsidiary of a UK public company with a similar name, Gearhouse Group PLC ("Gearhouse UK") wished to obtain finance to lease various items of equipment, which, as I understand, it would, itself, then on-lease to other persons or hire to other persons.

There had been some dealings between Gearhouse Australia and the National Australia Bank, as exemplified by a lease

purchase agreement for an amount of $329,017.20 entered into on the 8th of December 1999.

That lease purchase agreement ("LPA") was signed for and on behalf of Gearhouse Australia under seal by its directors, the two defendants. It appears from Mr Bennett's affidavit that on that, or a similar occasion, indemnities were provided by the directors of Gearhouse UK.

On 8 November 1999 an approval was given by the plaintiff bank for leasing finance up to $1 million. It was said that that was based on the bank's usual terms and conditions for leasing finance as well as those contained in this letter. A number of terms were set out, including in the first clause that correctly executed documents and securities together with Gearhouse Australia's cheque for the initial amount was required to be paid pursuant to those documents.

Clause 6 required Gearhouse UK to execute a guarantee in favour of Gearhouse Australia for the total amount of the leasing facilities available. That letter was sent to Mr Peter O'Rielly who was said to be the financial controller of Gearhouse Australia. Both defendants have sworn that they sighted that letter, however it appears, as I have said, that when the first LPA was signed, LPAI, or lease purchase agreement indemnity, was signed by the UK directors.

It appears that the bank grew somewhat concerned about the financial capacity of Gearhouse UK and flagged that in a

letter to the directors of Gearhouse Australia, that is, the two defendants, on 28 June 2000.

On 31 March 2000 Mr Crighton from the bank had written to Mr O'Rielly stating that they enclosed for his attention a lease purchase agreement Queensland indemnity and a schedule from the Hire Purchase Act 1959. The defendants deny ever seeing that letter. But the fact is that it cannot be said that the bank had never communicated to Gearhouse Australia that indemnities would be required with LPAs, even though the indemnity was not referred to in the first letter of 8 November 1999.

The bank is in no position to know which letters it sent to Gearhouse Australia that the financial controller may decide not to show to the directors. The fact that the directors had notice of one letter would surely have suggested to any reasonable person that they would have notice of any letter about those matters sent to the company.

That is interesting, but it is not essential to the determination of this case, because what in fact happened was that Mr Bennett and Mr Bond, the two defendants, did, in fact, sign on several occasions lease purchase agreement indemnities.

The documents are set out, as I have said, in the affidavit of Mr Tice. They show-----

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-----that on 14 July 2000 Gearhouse Australia entered into a lease purchase agreement with the plaintiff. That document was signed under the common seal of Gearhouse Australia by the two defendants and witnessed on 14 July 2000.

Attached to that is another document entitled Lease Purchase Agreement Queensland Indemnity. It is signed by Mr Bond. That document makes it absolutely clear that what he was signing was a document which made him personally responsible for paying to the bank the liabilities referred to in clauses 1 and 2 of the indemnity.

The document is in plain English. That warning is clearly on the front page of this quite short document and could have left a business person like Mr Bond in no doubt as to what he was signing. There is no suggestion that he was under any special disadvantage of the type referred to in Amadio's case or even of the type referred to in Garcia's case. That was not, as the form enables it to be, witnessed, but nevertheless it was signed by Mr Bond.

Mr Bennett signed an indemnity which was witnessed by a bank officer on the 19th of July 2000. In addition Mr Bennett signed a one page document which says:

> "The bank has drawn my attention to the importance of the indemnity document which is an annexure to the lease purchase agreement and has recommended that legal and

> financial advice should be obtained before signing the indemnity document.
>
> I am satisfied that I am fully aware of the indemnity document and of the risks associated with signing it.
>
> I do not regard the obtaining of legal or financial advice necessary and I prefer to proceed without it. I declare that I am executing the indemnity document voluntarily."

It was signed on the 19th of July 2000 and witnessed, as I have said, by a bank officer.

Thereafter there were four more lease purchase agreements. In each case Mr Bennett and Mr Bond signed a lease purchase agreement indemnity. In each case their signatures were witnessed by bank officers and in each or almost every case, the date on which the indemnity was signed by each indemnifier was different - showing that it happened on separate occasions - and a certificate was signed and witnessed by each indemnifier.

Notwithstanding the terms of the letter of 8 November 1999, it appears to me clear that no person of ordinary intelligence reading those documents could fail to have realised what they were signing. If the letter of 8 November 1999 was misleading in that it failed to refer to the indemnities, the indemnities themselves are perfectly clear and it can not realistically be suggested that Mr Bond or Mr Bennett could convince a court

that they did not know what they were signing or that they should not be bound by them.

Mr Bennett, in his affidavit, says that he did not know what the word "indemnifier" meant, but that is no excuse for not being bound by a document which he has signed.

Even if he did not know what that word meant, the document itself says that the indemnifier becomes personally responsible for paying the bank with reference to two clauses of the indemnity that make it perfectly clear what an obligation to indemnify means.

There is a dispute between the parties as to what occurred when the signatures were affixed. The bank officers who gave affidavits swear to explaining what the documents were and meant. The defendants deny that those explanations were given. As I have said, one must decide this case on the best view of the facts for the defendants.

Both Gearhouse UK and Gearhouse Australia have gone into receivership and the bank is now looking, predictably, to enforce the indemnities signed by the defendants. The usual rule is of course that when a person of full age and understanding signs documents which it is apparent, on their face, are intended to have legal consequences, then, with certain exceptions, the person is bound by what is in the

documents they have signed and cannot escape that by saying they did not understand, or they did not intend to be bound by, or they did not read the document. (See for example L'Estrange v. Graucob Limited [1934] 2 KB 394; Wilton v. Farnworth (1948) 76 CLR 646 at 649; Perpetual Trustees Victoria Limited v. Banton Supreme Court of Western Australia in Chambers, Bredmeyer M [2002] WASC 6.)

The exceptions found in L'Estrange v. Graucob were fraud or misrepresentation and that points to the defences relied upon in this case.

In argument, counsel for the defendants said that there were four defences relied on. I will take them in reverse order.

The first was an extension of Garcia to apply to the circumstances of this case. Although counsel, in his thorough submissions, pointed to a decision of the Court of Appeal of the Supreme Court of Victoria, Kranz v. NAB [2003] VSCA 92, which expressed some support for a wider application of the test in Garcia, for my part, I can see no justification for extending the Garcia principles to a case such as this.

The facts that are said to support the extension of Garcia to this case are that the defendants were employees of the company and became directors because it was convenient to have Australian directors. Whatever the reason for the defendants becoming directors, they had significant roles within the company and they were its directors.

I see no reason in fact or in principle to extend the scope of the Garcia exception to the contracts signed by Mr Bond or Mr Bennett.

The next argument was that Mr Bond and Mr Bennett are entitled to apply to the Supreme Court of New South Wales for relief under section 7 of the Contracts Review Act 1980 (NSW) in respect of these being unjust contracts. This is said to be based on the fact that the bank carries on business in New South Wales and Bennett signed the first two lease agreements in New South Wales.

For my part, I cannot see that the contracts are unjust but the fact remains that, had Mr Bond and Mr Bennett wished to make application to the Supreme Court of New South Wales for relief under section 7, they have had some time to do it and I do not think that this matter should be delayed even if they undertook, as has been said they would, to commence those proceedings promptly. The fact they have not done so already, together with what appear to me to be thin prospects of success, militates against that proposal.

The third ground of defence is that the conduct of the bank contravened section 51AC of the Trade Practices Act in that the action of the bank was unconscionable. In particular, reliance was placed on section 51AC(3)(b) that the personal guarantees were not reasonably necessary for the protection of the legitimate interests of the supplier. In my view, that is a commercial decision for the bank and it cannot be said that

these indemnities by directors of the company were not such that a bank might consider it commercially necessary and therefore reasonably necessary to protect their legitimate interests. This was a commercial transaction between parties who suffered from no particular disadvantage. In my view to introduce the equitable concept or even the statutory concept of unconscionability into such a transaction would be to throw the commercial practice of banking into uncertainty and disarray.

The last and most troublesome from the point of view of granting summary judgment is a defence under section 52 of the Trade Practices Act. It is said that the bank has engaged in misleading and deceptive conduct because the letter of the 8th of November 1999 does not refer to any requirement from the bank for indemnities and on the defendant's case they were never explicitly told that what they were signing were indemnities.

As against this on any view of the facts the documents they signed were clearly indemnities. Mr Bennett and Mr Bond give evidence of what they thought they were signing, but their subjective view of what they were signing, which was clearly incorrect, cannot bind the bank.

In my view the defendants have no real prospect of convincing the Judge at trial that they either did not or should not have known that what they were signing were personal indemnities. The documents really could not be more clear and there is no

suggestion that anyone said to them at the time or immediately prior to their signature that they were not signing indemnities which would make them personally bound.

If this came to be decided under the old Supreme Court rules and it was merely a question of whether or not there was a triable issue, this question of section 52 might just get over the line. But in my view, under the new rules, I am satisfied that the defendants have no real prospect of successfully defending the plaintiff's claim and therefore the just and expeditious resolution of this case requires the giving of summary judgment in favour of the plaintiff against both defendants.

...

HER HONOUR: I will make the order as per draft, which I will initial and place with the papers.
