SUPREME COURT OF QUEENSLAND

CITATION:	*CFI Rentals Pty Ltd v Roussos & Anor* [2017] QCA 308
PARTIES:	**CFI RENTALS PTY LTD** **ACN 166 603 578** (appellant) **v** **MICHAEL IVON ROUSSOS** (first respondent) **JULIA KATHERINE GARDINER** (second respondent)
FILE NO/S:	Appeal No 5951 of 2017 DC No 4837 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application to adduce further evidence
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 128 (Farr SC DCJ)
DELIVERED ON:	15 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2017
JUDGES:	Fraser and Philippides and McMurdo JJA
ORDERS:	**1. The appeal is allowed.** **2. The orders made on 17 May 2017 are set aside.** **3. The costs of the hearing below are reserved.** **4. The respondents are to pay the appellant's costs of the appeal.** **5. The respondents are granted a certificate under the *Appeal Costs Fund Act* 1974 (Qld) confined to the costs payable by the respondents to the appellant as the costs of the appeal.**
CATCHWORDS:	GUARANTEE AND INDEMNITY – ACTIONS AGAINST SURETY – GENERALLY – OTHER CASES – where the appellant and the first respondent entered into a guarantee in relation to a lease and an associated loan agreement – where the first and second respondents were joint tenants and tenants in common over two parcels of land – where the appellant alleged that the first respondent was in default and sought a declaration that it held an equitable charge over the first respondent's interest in the land – where the primary judge found that it was a necessary precondition for the

creation of an equitable charge that a demand had been made – where the primary judge found that no demand had been made – where the respondents had not sought an order dismissing the originating application – whether there was a denial of procedural fairness – whether the primary judge erred in dismissing the originating application on the basis that no demand had been made

GUARANTEE AND INDEMNITY – ACTIONS AGAINST SURETY – GENERALLY – OTHER CASES – where the respondents contended that circumstances arose following the making of orders by the primary judge which justified the dismissal of the originating application – where the first respondent sought leave to adduce affidavit evidence that he had been served with New South Wales District Court proceedings in the name of a different company but which related to the guarantee – where those proceedings were discontinued within weeks after service – where the parties assumed that the guarantee and loan agreement were entered into with the actual authority of that other company as an undisclosed principal – whether the commencement of the other proceedings by the company to enforce its rights as an undisclosed principal amounted to an election that permanently brought to an end the rights of the appellant to prosecute its appeal – whether the respondents were prejudiced by the existence of two proceedings against them

Appeal Costs Fund Act 1973 (Qld), s 15

Atkinson v Cotesworth (1825) 3 B & C 647; 107 ER 873; [1825] EngR 389, considered
CFI Rentals Pty Ltd v Roussos & Anor [2017] QDC 128, reversed
Goldsmith v Macquarie Leasing Pty Ltd [2013] VSC 332, considered
IVI Pty Ltd v Baycrown Pty Ltd [2007] 1 Qd R 428; [2006] QCA 461, considered
Maynegrain Pty Ltd v Compafina Bank [1982] 2 NSWLR 141, considered
Sadler v Leigh (1815) 4 Camp 195; 171 ER 63; [1815] EngR 761, considered

COUNSEL: D D Keane for the appellant
P E O'Brien for the respondents

SOLICITORS: SLF Lawyers for the appellant
Shand Taylor for the respondents

[1] **THE COURT:** The appellant brought an originating application seeking a declaration that it had an equitable charge over the interest of the first respondent in land and improvements at Westlake and at Surfers Paradise, pursuant to a signed Secured Guarantee between the appellant and the first respondent dated 13 May 2016 (the guarantee). It also sought orders for the appointment of statutory trustees under the

Property Law Act 1974 (Qld) and other ancillary orders. The first and second respondents are the registered owners as joint tenants of the land and improvements at Westlake and as tenants in common of the land and improvements at Surfers Paradise. The guarantee was given concerning the obligations of Zetland Fitness Management Pty Ltd (Zetland) under a loan agreement with the appellant and an associated agreement for the lease of gym equipment from the appellant.

[2] The primary judge held that, upon the proper construction of the guarantee, no amount could be due and owing by the first respondent to the appellant until it had been demanded from the first respondent. As there had been no demand which was proved by the appellant's evidence, his Honour concluded that the appellant had not established an entitlement to any of the relief which it had sought. His Honour ordered that the appellant's proceeding in its entirety be dismissed, although the respondents had submitted only that the case should go to trial in the usual way. The appellant was ordered to pay the respondents' costs of the proceeding.

[3] By this appeal, the appellant challenged the primary judge's construction of the guarantee, arguing that no demand was required. Further, it argued, in effect, that it was denied procedural fairness by the dismissal of its proceeding after a hearing in which no such order had been sought by the respondents.

[4] In considering the guarantee, the primary judge referred to cl 7 which provided that the guarantor:

> "(a) must pay to Cashflow IT all amounts which are actually or contingently owing to Cashflow IT now or in the future, by any persons specified in the Details as Guarantor; and …
>
> (c) as beneficial owner, charges in favour of Cashflow IT, by way of fixed charge, all real and personal property at any time held by the Guarantor with the payment of the amounts referred to in clause 7(a)."

[5] The primary judge also had regard to cl 2 of the guarantee which provided:

> "**2. Indemnity**
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> 2.1 The guarantor unconditionally and irrevocably indemnifies Cashflow IT against any liability or loss Cashflow IT suffers or Costs Cashflow IT-incurs in connection with the whole or any-part of the amounts guaranteed by the guarantor not being recoverable from the Debtor, or from the guarantor under cl 1, for any reason, including, because of any legal limitation, disability or incapacity affecting the Debtor, or any other fact or circumstance.
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> 2.2 This indemnity applies irrespective of whether the transactions relating to the amounts guaranteed or any of them are void, voidable, avoided, released, disclaimed or whether or not any of the matters referred to in this cl 2 were or ought to have been within Cashflow IT's knowledge.
>
> 2.3 The guarantor as principal debtor agrees to pay Cashflow IT on demand a sum equal to the liability or loss or Costs described in this cl 2.

[6] His Honour found that, by virtue of cl 2.3, it was a precondition to any equitable charge arising under cl 7 that "demand being made for the sum equal to the liability or loss".[1] On the basis of his Honour's finding that a demand for payment from the first respondent had not been made, as required by cl 2.3, the primary judge found that the appellant had failed to establish an equitable charge over the interest of the first respondent in respect of each property. His Honour also found that, before the appellant could have the benefit of the equitable charge pursuant to cl 7(c), it was required to show that there was an amount which was actually or contingently owing to it by any persons specified in the Details as Guarantor and, pursuant to cl 7(d) and cl 7.2, the appellant was required to prove default.[2] The primary judge referred to the evidence of default; however, given his Honour's finding that a demand had not been made as required, his Honour dismissed the originating application.

[7] On the hearing of the appeal, the respondents correctly accepted that the primary judge had erred in construing the guarantee as requiring that a demand be made before an equitable charge was created pursuant to cl 7. This followed from clause 1, which stated:

> "**1**. **Guarantee**
>
> 1.1 The guarantor unconditionally and irrevocably guarantees to Cashflow IT that the Debtor will pay to Cashflow IT all amounts payable by the Debtor to Cashflow IT and the due and punctual performance by the Debtor of all its obligations to Cashflow IT under the Transactions.
>
> 1.2 The liability of the guarantor is a principal liability."

[8] Clause 2, to which the primary judge referred, provided for a separate indemnity, additional to and independent of the guarantee in cl 1.[3] The terms of cl 1 of the guarantee, properly construed, provide that the first respondent's obligations were primary obligations. The terms of cl 1, as the appellant argued, admitted no ambiguity and secured all payments pursuant to the lease at the time for making the payments. Clause 1.2 was explicit that the liability was a principal liability. Accordingly, on its terms, no demand is required by the appellant prior to the first respondent incurring liability.

[9] Consequently, the order for the dismissal of the appellant's proceeding should not have been made, at least because it was based upon that incorrect construction of the guarantee. Further, the order ought not to have been made because the respondents had not sought such an order for the summary dismissal of the entire proceeding and the appellant had had no occasion to address the judge about why such an order should not be made. Subject to what was raised in a Notice of Contention, the appeal must be allowed. However, as the appellant's counsel correctly acknowledged, it is not sufficiently clear from the evidence which was before the primary judge, that there was an actual indebtedness of the debtor (Zetland), and therefore an indebtedness of the first respondent, as at the date of the hearing. Relevant to that question would be a consideration of what had happened to the equipment, the subject of the lease agreement, which, by then, had been

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1 *CFI Rentals Pty Ltd v Roussos & Anor* [2017] QDC 128 at [18]-[20].
2 *CFI Rentals Pty Ltd v Roussos & Anor* [2017] QDC 128 at [18].
3 AB at 50.

repossessed by the appellant. Consequently, this Court could not grant the appellant the final relief which it had sought.

[10] The respondents contended that the order dismissing the appellant's proceeding was supported by a ground arising after that order was made. The respondents applied for leave to adduce affidavit evidence in the appeal. The first respondent deposed that he had since been served with a statement of claim in the New South Wales District Court, in which Thorn Australia Pty Ltd (Thorn) alleged that the appellant entered into the agreement and the guarantee as agent for Thorn. Upon that basis, Thorn claimed a debt of $130,111.039 against Zetland and against the first and second respondents as guarantors. In response to that evidence, the appellant applied for leave to adduce as evidence in the appeal an affidavit sworn by a solicitor who has carriage of the appellant's appeal. That affidavit reveals that Thorn discontinued the New South Wales proceeding within weeks after it was served upon the first respondent and Thorn authorised and directed the appellant to continue prosecuting this appeal as agent for Thorn.

[11] The parties' arguments upon this topic assumed that although the appellant entered into the agreement and guarantee in his own name, it did so with the actual authority of and as agent for Thorn as an undisclosed principal. The High Court[4] and the Privy Council[5] have held it to be settled law that in a case of that kind each of the agent and the undisclosed principal may sue and be sued upon the contract, but in those cases there was no issue about the effect of the commencement of proceedings by the principal upon the agent's right to sue. The respondents contended that Thorn's commencement of proceedings to enforce its alleged rights as undisclosed principal amounted to an election that permanently brought to an end the right of the appellant to prosecute its appeal.

[12] The doctrine of election is not applicable. Given that Thorn claimed a remedy that differed from the remedy claimed by the appellant and that it is not suggested that the appellant knew of or acquiesced in Thorn's conduct in commencing its proceeding, it cannot be concluded that the appellant made any election between or amongst inconsistent rights or remedies.

[13] The respondents also relied upon the following passage concerning the rights of an agent and undisclosed principal in Hope JA's reasons in *Maynegrain Pty Ltd v Compafina Bank*:[6]

> "Either principal or agent may sue or be sued, although the "general rule is that the right of the principal prevails over that of his agent" and the "right of the agent to enforce the contract is destroyed by the intervention of the principal in the exercise of his own right": *Salmond & Williams on Contracts*, 2nd ed (1945), p 423. The rights and obligations of principal and agent are not joint, but, subject to the superior right of the principal, alternative."

[14] The present issue was not in issue or the subject of analysis in *Maynegrain* or in *IVI Pty Ltd v Baycrown Pty Ltd*,[7] in which the quoted passage was cited with approval.

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4 *Mooney v Williams* (1905) 3 CLR 1 at 8.
5 *Siu v Eastern Insurance Co Ltd* [1994] 2 AC 199 at 207.
6 [1982] 2 NSWLR 141 at 150.
7 [2007] 1 Qd R 428 at 442, 443 and 456.

It is therefore necessary to examine the cases cited in *Salmond & Williams*. In *Atkinson v Cotesworth*[8] Abbott CJ held that under a charter party made between the charterer and the ship's commander, the charterer was not liable to pay the freight charges claimed by the ship's commander after the ship's owner had given the charterer notice that the commander had contracted as agent for the owner and the owner required the freight to be paid directly to him. In *Sadler v Leigh*[9] an owner of goods sold by a factor, who had not been paid by the buyer, obtained the factor's agreement to treat the buyer as the owner's debtor and took steps to recover the debt directly from him. One issue in the case was whether the buyer owed the debt to the factor when the factor subsequently sued out a commission of bankruptcy. Lord Ellenborough decided the case upon a different issue but expressed the opinion that "after the intervention of the principal, the right of the factor to sue was gone" and the "debt was then due to the principal in the same manner as if the sale had been made personally by him in the first instance." The respondents also cited *Goldsmith v Macquarie Leasing Pty Ltd*[10] in which the Supreme Court of Victoria set aside a judgment a magistrate had entered in favour of both an agent and an undisclosed principal notwithstanding that they made alternative claims for a single loss alleged to have been suffered by either one of them.

[15] In each case the decision was to the effect that the agent was not entitled to an order giving it a remedy against the other party to the contract where that other party was on notice of an extant claim by the undisclosed principal that it sought the same remedy. The decisions in those cases do not support a principle in the very wide terms expressed in *Salmond & Williams*. They are explicable by the uncontroversial principle articulated by Hope JA in *Maynegrain* that the concurrent rights of the agent and the undisclosed principal are alternative, with the rights of the principal being superior to those of the agent. That principle does not exclude the claim in this appeal. Here, soon after the undisclosed principal commenced proceedings seeking to enforce a contractual right (recovery of a debt) that differed from the remedy claimed by the agent (a declaration that it holds an equitable charge over the alleged debtor's property, and consequential orders), the principal discontinued those proceedings and confirmed the authority of the agent to prosecute its proceedings on behalf of the principal. The respondents contended that they were prejudiced by the existence of two sets of proceedings against them. The only prejudice asserted was that they were faced with both proceedings. Any such prejudice had disappeared by the time the matter came before the court, when there was no extant claim and no reasons to fear the revival of any claim by Thorn against the respondents. There was nothing to justify a conclusion that there was any abuse of process that might justify a judicial remedy. The respondents' arguments upon these topics cannot be accepted.

[16] Consequently, apart from the questions of the costs of the hearing in the District Court and the costs of this appeal, the orders should be that the appeal is allowed and the orders made on 17 May 2017 be set aside. It will then be for the District Court to manage and determine the proceeding consistently with these reasons for judgment.

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8 (1825) 3 B & C 647; 107 ER 873.
9 (1815) 4 Camp 195; 171 ER 63.
10 [2013] VSC 332.

[17] The respondents opposed the appellant's submission that the costs of the hearing in the District Court should be reserved. The basis of the opposition was that before that hearing the respondents had offered to agree to sensible directions about pleadings and that the appellant had failed to address necessary evidence to support the orders it sought. Those arguments do not justify a costs order in the respondents' favour, given that the respondents did not take the point about the evidence in the District Court and did not advance any argument that could support the order made by the primary judge. The costs of the hearing in the District Court should be reserved.

[18] The respondents opposed the order sought by the appellant that the respondents pay the appellant's costs of its appeal. The respondents argued that the appellant should pay the respondents' costs of the appeal because the respondents opposed (successfully) the orders sought in the notice of appeal that had been sought in the originating application. It must be accepted that the appellant has not been entirely successful. However this appeal was necessary because the appellant's proceeding had been dismissed in its entirety. The orders for the disposition of the appeal, to which we have just referred, were necessary. The appellant should have its costs of the appeal against the respondents.

[19] At the hearing, the respondents made an application pursuant to the *Appeal Costs Fund Act* 1974 (Qld). There are two grounds upon which the appeal has succeeded, each involving an error of law on the part of the primary judge. The second of those grounds, being that the proceeding was dismissed rather than being sent to trial, was an error of law in denying procedural fairness to the appellant. In our conclusion, it is appropriate to order a certificate under the Act but confined to the costs payable by the respondents to the appellant as the costs of the appeal.

[20] We order as follows:

1. The appeal is allowed.
2. The orders made on 17 May 2017 are set aside.
3. The costs of the hearing below are reserved.
4. The respondents are to pay the appellant's costs of the appeal.
5. The respondents are granted a certificate under the *Appeal Costs Fund Act* 1974 (Qld) confined to the costs payable by the respondents to the appellant as the costs of the appeal.