SUPREME COURT OF QUEENSLAND

CITATION:	*Karam v Varga* [2019] QCA 82
PARTIES:	**GEORGIANA KARAM** **(appellant)** **v** **AURORA VARGA** (respondent)
FILE NO/S:	Appeal No 13987 of 2018 SC No 4030 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2018] QDC 242 (Rosengren DCJ)
DELIVERED ON:	10 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2019
JUDGES:	Sofronoff P and Morrison JA and Douglas J
ORDERS:	**1. Appeal dismissed.** **2. Cross-appeal dismissed.** **3. The appellant pay the respondent's costs of the appeal.** **4. The respondent pay the appellant's costs of the cross-appeal.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the appellant was loaned money by the respondent through entry into two transactions – where the transactions were characterised by the appellant as the Secured Loan Agreement and the replacement further agreement – where the transactions were characterised by the respondent as the Secured Loan Agreement and the variation to the Secured Loan Agreement – where the principal amount and a component of the interest owing was never repaid – where the respondent commenced proceedings against the appellant seeking recovery of the principal amount and the accrued interest – where the learned trial judge gave judgment for the respondent – where the learned trial judge found the terms of the two agreements were not inconsistent and could be performed together – whether the evidence showed either an

express or implied intention to terminate the Secured Loan Agreement – whether the learned trial judge erred in failing to find that the second transaction replaced the Secured Loan Agreement

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the appellant (in her personal capacity or alternatively in her capacity as co-director of Waves Medical Pty Ltd) was loaned money by the respondent through entry into two transactions – where the appellant personally guaranteed the first, but not the second, transaction – where the guarantee did not contain an "all monies" clause – where the transactions were characterised by the appellant as the Secured Loan Agreement and the replacement further agreement – where the transactions were characterised by the respondent as the Secured Loan Agreement and the variation to the Secured Loan Agreement – where the principal amount and a component of the interest owing was never repaid – where the respondent commenced proceedings against the appellant seeking recovery of the principal amount and the accrued interest – where the learned trial judge found for the respondent holding that the terms of the two agreements were not inconsistent and could be performed together – where the learned trial judge found the guarantee contained in the Secured Loan Agreement applied only in respect of the first, and not the second, transaction – where the respondent cross-appeals the learned trial judge's finding in respect of the guarantee – whether the guarantee in the Secured Loan Agreement extends to the second transaction

Coghlan v Pyoanee Pty Ltd [2003] 2 Qd R 636; [2003] QCA 146, cited
Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd (1957) 98 CLR 93; [1957] HCA 10, cited
Steadman v Steadman [1976] AC 536, cited

COUNSEL: M D Martin QC for the appellant
P W Hackett for the respondent

SOLICITORS: Mills Oakley for the appellant
Go To Court Lawyers for the respondent

[1] **SOFRONOFF P:** This appeal arises out of two transactions entered into by the respondent involving a loan of money.

[2] By a document styled "Secured Loan Agreement" the respondent agreed to lend to Waves Medical Pty Ltd the sum of $250,000.00. Waves Medical was a company, the directors of which were the appellant and her husband, Dr Karam. In its final

form the document provided for repayment of the loan to be made by 30 March 2013, the document having been executed on 25 October 2012.

[3] The Secured Loan Agreement contained a guarantee in the following terms:

> "8. GUARANTEE
>
> The Guarantors in consideration of the lender advancing or agreeing to advance the amount of the advance stated in paragraphs 2.1 and 2.2 to the borrower at their request hereby covenant with the lender that if at any time default shall be made in the payment of any monies payable in accordance with the provisions of this agreement by the borrower to the lender, or in the observance of any term or condition to be observed by the borrower, the guarantors will forthwith on demand by the lender pay to the lender the whole of such money which shall then be payable to the lender and will keep the lender indemnified against all loss of the advance interest and other monies payable and all losses costs and expenses whatsoever which the lender may incur by reason of any default by the borrower. This guarantee shall be a continuing guarantee and will not be released by any neglect or forbearance on the part of the lender in enforcing this Agreement."

[4] Waves Medical was going to use the money to erect a child care centre on land that it owned. By clause 4 of the Secured Loan Agreement, Waves Medical charged the property on which the child care centre was to be built as security for the repayment of the debt. The charge was not registered.

[5] In early 2013 the appellant, the respondent and the respondent's mother-in-law met. The respondent gave the following evidence about that meeting:

> "Right. Could you tell her Honour what was discussed and agreed at that meeting?---She said that if we don't give her money to finish her business she won't be able to give us the money back and she said if we give her the 350,000 she'll give us a mortgage on her property and a 10 per cent interest on the 600,000, but she won't give us interest on the 50,000.
>
> I see.
>
> HER HONOUR: So she said that she would give you a mortgage over her house?---Over her house, yes.
>
> And what else did she say?---And 10 per cent interest till she will pay us the money back.
>
> Thank you.
>
> MR HACKETT: And was the interest explained any further?---Well, she calculated it at $6000 a month.
>
> At that meeting did you agree to make that further advance?---Yes.
>
> Thank you. Now, we know from the documents that you made that advance on the 8th of February 2013, but before that date was

> a mortgage prepared, to your knowledge?---No. I didn't know. My mother-in-law organised everything so I didn't see the document until the day I signed it."

[6] The appellant did not give evidence. Dr Karam was called in the plaintiff respondent's case. He had taken no part in the negotiations leading towards any of the transactions in dispute in this appeal. He had delegated authority to his wife, the appellant, to negotiate and to enter into agreements with the respondent. He had nothing to say about the terms of any agreement. As a result, the only oral evidence about the agreement reached in 2013 was the evidence of the respondent that I have quoted.

[7] After the meeting, the appellant and the respondent's mother went to the office of the appellant's solicitor. The appellant had prepared a mortgage document and she executed it on behalf of her husband at her solicitor's office. Later the respondent also executed the mortgage. In due course the appellant's husband applied his own signature to the document.

[8] The mortgage was over the appellant and Dr Karam's matrimonial home of which Dr Karam was the registered proprietor.

[9] The mortgage provided that the "description of debt or liability secured" was $650.000.00. Clause 6 provided as follows:

> "Covenant/Execution. The Mortgagor covenants with the Mortgagee in terms of: to pay 10% of $600,000 each month on the 29th into the nominated account, which is the sum of $6,000 and to repay all sums of money by no later than 5 Jun 2013 and charges the estate or interest described in item 1 with the repayment/payment to the Mortgagee of all sums of money referred to in item 5."

[10] The mortgage was not registered. The inconsistency between the references to payment of "10% of $600,000 each month" and the "sum of $6,000" was not raised in the litigation. The parties proceeded on the basis that the obligation was to pay simply $6,000 per month rather than $60,000.

[11] Waves Medical made some payments but the principal was never repaid. Dr Karam was declared bankrupt and Waves Medical was placed into liquidation. The respondent sued as plaintiff in the District Court claiming repayment of the sum of $600,000.00 from the appellant pursuant to the guarantee contained in the Secured Loan Agreement. She also claimed other sums by way of interest.

[12] The appellant's solicitor, as I have said, prepared the Secured Loan Agreement. Although it contained the guarantee it did not contain any of the usual clauses that might protect a lender where there is said to be a variation to the original contract that gave rise to the guaranteed liability. The appellant herself prepared the mortgage document although the appellant's lawyer attended upon the execution of the document.

[13] The appellant's statement that led to the execution of the mortgage was in general terms. That can be expected when lay persons are discussing business transactions because the precise legal status of the various parties, whether they are companies or natural persons, are not as significant as the relationship between the natural persons who are, in fact although perhaps not in law, parties to the deal. For this

reason, it is necessary to pay particular attention to the parties' pleaded cases, to the contents of the documents and to the surrounding circumstances known to all parties.

[14] The basis for the agreement expressed in the mortgage was pleaded as follows:

> "6G. In January 2013 the plaintiff, Waves Medical Pty Ltd and the defendant orally agreed to further vary the Secured Loan Agreement as follows (**Second Variation**):
>
> (a) the plaintiff would advance the further sum of $350,000.00 to Waves Medical Pty Ltd so as to make the principal amount owing under the Secured Loan Agreement $600,000.00;
>
> (b) the interest rate would be altered to the rate of 10% per month ($6,000.00) commencing on 1 March 2013;
>
> (c) the principal sum and interest would be repaid by 5 June 2013; and
>
> (d) Thamir Taha Karam would provide further security for the obligations of Waves Medical Pty Ltd ~~and the defendant~~ to the plaintiff pursuant to the Secured Loan Agreement as varied by way of mortgage in the sum of $650,000.00 over the property described as Lot 817 on SP 162518, County of Stanley, Parish of Yeerongpilly and Title Reference 50496368.
>
> Particulars
>
> The Second Variation was agreed between the plaintiff and the defendant acting on her own behalf and on behalf of Waves Medical Pty Ltd."

[15] There are two matters to be noticed in that plea. First, it was alleged that the respondent would lend the further sum of money to Waves Medical and not to Dr Karam himself. Second, it was alleged that it was Dr Karam who would provide further security for the obligations of Waves Medical "pursuant to the Secured Loan Agreement as varied by way of mortgage in the sum of $650,000.00". In short, the allegation that was made was that the parties had agreed to vary the Secured Loan Agreement by way of providing for a further advance of money and by way of the provision by Dr Karam to the company of further security to secure the obligations of the company.

[16] As will appear, the appellant put that plea in issue. However, the plaintiff respondent made some other significant allegations. She alleged that the further loan was paid to "Waves Medical Pty Ltd" pursuant to the agreement reached on 8 February 2013. The appellant admitted that allegation. The respondent alleged that Waves Medical paid interest pursuant to its obligation on four occasions. The appellant admitted that allegation also. The respondent also alleged that Waves Medical had failed to repay any amount of the principal sum lent. The appellant did not admit this allegation because she "remains uncertain as to the truth or falsity" of it. She raised no positive case to the contrary.

[17] The appellant denied the respondent's allegation that she had agreed to vary the Secured Loan Agreement. She alleged, relevantly, as follows:

> "9 …
>
> a) on or about 8 February 2013, Thamir Karam had agreed to borrow $350,000 from the plaintiff (the **Second Loan**)
>
> b) the Second Loan and the Secured Loan Agreement would be consolidated into one (1) personal loan from the plaintiff to Thamir Karam for the sum of $600,000 plus $50,000 interest (the **New Agreement**); and
>
> c) the New Agreement was in writing and secured by way of an unregistered mortgage granted to the plaintiff by Thamir Karam over his property described as Lot 817 on SP 162518, County of Stanley, Parish of Yeerongpilly and Title Reference 50496368."

[18] She further alleged that, as a consequence of the entry into this further agreement, the Secured Loan Agreement had been terminated and replaced by the further agreement which had been entered into.

[19] The effect of this plea was that the liability of Waves Medical ceased to exist and a new liability arose, namely that of Dr Karam, for both the original loan and the new loan.

[20] The dispute between the parties was, therefore, whether the agreement entered into in February 2013 was a variation to the Secured Loan Agreement which left the terms of the guarantee intact and applicable to the larger sum owed, or whether the agreement reached in February 2013 resulted in an entirely new agreement pursuant to which Dr Karam himself became the borrower and the Secured Loan Agreement, including the liability of Waves Medical, the security constituted by the charge and the security constituted by the guarantee, had been entirely swept away.

[21] The learned trial judge, Rosengren DCJ, found for the respondent. Relevantly, her Honour observed that there was no evidence that the parties had ever discussed a new contract to replace the Secured Loan Agreement. Her Honour concluded that the terms entered into in February 2013 were "not so substantial to be inconsistent with the Loan Agreement with the consequence that the parties must necessarily have intended for the Loan Agreement to be discharged." Her Honour was of the view that the two agreements could be performed together.

[22] Her Honour also observed, as a matter relevant to her interpretation of the facts, that it was highly improbable that the plaintiff should be taken to have implicitly relinquished her rights under the Secured Loan Agreement against Waves Medical, and against the appellant as a guarantor, and her rights pursuant to the charge.

[23] The law surrounding contracts that are said to vary or replace an earlier contract is not in doubt. The parties to a contract may vary its terms by a subsequent agreement or may terminate it altogether. These results may be achieved expressly or by implication but the determining factor is always the intention of the parties as

disclosed by the later agreement.[1] The identification of this "determining factor" is achieved by a comparison of the earlier and later contracts, and an assessment of the significance, if any, of the differences between them in light of the circumstances surrounding the contracts.[2] To establish that the earlier contract had been terminated and replaced by the later contract, the later contract must be entirely inconsistent with the former contract or, at least, inconsistent with it to an extent that goes to the root of it.[3]

[24] As I have said, the only evidence about the oral agreement reached between the parties in February 2013 was the evidence of the respondent about what the appellant had said to her. It is convenient to repeat the essence of that evidence:

> "She said that if we don't give her money … she said if we give her the 350,000 she'll give us a mortgage on her property and a 10 per cent interest on the 600,000, but she won't give us interest on the 50,000."

[25] I am unable to read that statement as involving, either expressly or implicitly, a proposal that any of the liabilities imposed by the Secured Loan Agreement were to be extinguished and replaced by some other liabilities. On the contrary, the appellant was seeking a further loan and, in order to induce the respondent to grant that indulgence, she offered a "mortgage on her property". The evidence simply cannot be read as a proposal that the mortgage that was being offered to induce a large loan was to take the place of the rights of the respondent under the Secured Loan Agreement. As Rosengren DCJ said, that is highly implausible. If that had been intended, then one would have expected some reference to it in the discussions. The matter concerns the relinquishment of valuable rights and would involve a comparison of the value of those rights and the value of the proffered security. Nothing like that was discussed. For that reason it is impossible to conclude that the evidence showed either an express or implied intention to terminate the Secured Loan Agreement.

[26] This conclusion is reinforced by the failure of the appellant herself to give evidence in support of the version of the transaction that she advanced. It is true that she relied upon the written document constituted by the mortgage as evidencing the transaction. Nevertheless, that document did not appear out of nothing. On any view it emerged out of discussions which, on the appellant's case, did not result in an anterior verbal agreement, but nevertheless must have had a bearing upon what the agreement was to be. The appellant's failure to give any evidence about that important matter strengthens the respondent's case. Dr Karam, who was called as a witness for the respondent, gave no evidence that he appreciated that the result of the February 2013 transaction was that he alone was responsible for the debt. He was asked not a single question about the transaction.

[27] I respectfully agree with Rosengren DCJ's conclusion that the terms of the two agreements are not inconsistent. They can both be performed, albeit that the repayment date and the interest rate were varied by the second agreement.

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1 *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 144 per Taylor J.

2 *Coghlan v Pyoanee Pty Ltd* [2003] QCA 146 at [5] per McPherson JA.

3 *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 at 62 per Lord Atkinson; cited with approval by Dixon CJ and Fullagar J in *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd*, *supra*, at 113.

[28] In my respectful opinion, Rosengren DCJ was right to conclude that the execution of the mortgage in early 2013 did not result in the termination of the Secured Loan Agreement so that the guarantee was extinguished. I would therefore dismiss the appeal with costs.

[29] The respondent has cross-appealed against the conclusion of the learned trial judge that the guarantee contained in the Secured Loan Agreement was limited in its scope to the original loan.

[30] As Rosengren DCJ observed, the guarantee did not contain the usual "all monies" clause that is invariably found in such documents and that would render it capable of expanding to include within its scope further advances that might be made. The guarantee is only in respect of Waves Medical's obligation to make "the payment of any monies payable in accordance with the provisions of this Agreement". The question is whether the advance of February 2013 constituted such monies.

[31] The learned trial judge concluded that the guarantee was limited in its terms to secure the repayment of the original advance of $250,000.00. Her Honour observed that there was no evidence in the case that suggested that the parties had given consideration to extending the scope of the guarantee to the new obligation evidenced by the mortgage. For that reason her Honour concluded that the appellant's liability under the guarantee was limited to the amount expressly referred to in the Secured Loan Agreement. I respectfully agree with her Honour.

[32] There is no document that states, expressly or implicitly, that the second advance was to be secured by the guarantee. The respondent's case was that the variation was effected by an oral agreement. The variation to the scope of a guarantee must be in writing if it is to be enforceable, but a verbal alteration is not a nullity. A failure to plead that the variation is unenforceable on this ground means that the court will assume that it is enforceable.[4] There was no such plea in this case. However, although a verbal variation to the terms of the Secured Loan Agreement could be effective, there is simply no evidence that there was any such variation.

[33] The appellant, through her counsel, also made it clear expressly that her case was not one that there had been a variation of the principal obligation without her consent which would have the effect of discharging the guarantee. His submission was that there was a new agreement without a guarantee. That does not amount to a concession, however, that, in the absence of rescission, the appellant was bound by her guarantee in respect of this new advance.

[34] The brief discussions concerning the new advance and the conditions under which it was made suggest strongly that the parties regarded the sum that was being sought as a distinct and new liability that would be supported by the mortgage that had been prepared. Although the original advance was to be incorporated into the sum secured by the mortgage, there is no suggestion that the obverse would also be the result: that the new sum would become payable pursuant to the terms of the Secured Loan Agreement. It is a large thing to construe a guarantee as capable of responding to a liability that was not within the parties' contemplation at the time the guarantee was granted. That is why "all monies" clauses were created. In this case, as her Honour rightly observed, there is simply no evidence that the parties

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4 *Steadman v Steadman* [1976] AC 536 at 557, 558.

contemplated that the further advance would become subject to the terms of the Secured Loan Agreement, a document that was expressly limited in its scope.

[35] For these reasons I would dismiss the cross-appeal with costs.

[36] **MORRISON JA:** I have read the reasons of Sofronoff P and agree with those reasons and the orders his Honour proposes.

[37] **DOUGLAS J:** I agree with the President's reasons and proposed orders.