SUPREME COURT OF QUEENSLAND

CITATION:	*Carter-Lannstrom & Anor v Gray & Anor* [2019] QSC 169
PARTIES:	**MARGARET CARTER-LANNSTROM AND ADAM JAMES CARTER-LANNSTROM as trustees for the MARGARET CARTER-LANNSTROM SELF MANAGED SUPERANNUATION FUND** (plaintiffs) **v** **ANTHONY DAVID GRAY** **(**first defendant**)** **JUDITH MARGARET STEVENSON** (second defendant)
FILE NO/S:	SC No 4300 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2019; supplementary submissions on behalf of the plaintiffs dated 31 May 2019; supplementary submissions on behalf of the first defendant dated 3 and 5 June 2019 and received on 11 June 2019
JUDGE:	Burns J
ORDER:	**THE ORDER OF THE COURT IS THAT:** **1. Judgment be entered for the plaintiffs against each of the defendants in the sum of $874,030.25 together with interest in the sum of $113,623.93;** **2. The defendants pay the plaintiffs' costs of the proceeding, including this application, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiffs applied for summary judgment

against the defendants – whether the defendants have no real prospect of successfully defending the plaintiffs' claim – whether there is no need for a trial of the plaintiffs' claim

Uniform Civil Procedure Rules 1999 (Qld), r 17, r 112, r 140, r 292, r 374

Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, followed
Weatherup v Krayem [2018] QCA 247, cited

COUNSEL:	PD Tucker for the plaintiffs The first defendant appeared in person No appearance for the second defendant
SOLICITORS:	Behlau Murakami Grant for the plaintiffs The first defendant appeared in person No appearance for the second defendant

[1] The plaintiffs apply for summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules 1999* (Qld). That relief is also sought in the alternative pursuant to r 374(5) UCPR because, it is contended, the defendants failed to comply with orders of the court made on 13 June 2018, 6 December 2018 and 14 March 2019.

Background

[2] The plaintiffs are the trustees of a self-managed superannuation fund and, in that capacity, carried on business as money lenders. On 18 May 2015, they loaned $500,000 to a corporation known as Lismore South Developments Pty Ltd. The purpose of the loan was to assist the borrower to purchase a property in New South Wales. The transaction was documented in a loan agreement that was executed by the parties when the principal was advanced. At the same time, the defendants (and another corporation[1]) entered into a deed of guarantee and indemnity with the plaintiffs under which they jointly and severally[2] guaranteed the performance by the borrower of its repayment obligations under the loan agreement.

[3] The first defendant is legally qualified. Relevantly, he was a barrister in private practice until, it seems, 2016.[3] The second defendant is his mother.

[4] Interest was payable under the loan agreement at the rate of 6% per month with a higher rate of 10% per month applying if the borrower fell into default.[4] It was also agreed that interest

---

1 Tailor Made Developments Pty Ltd.

2 See Deed of Guarantee and Indemnity, cl 1.3 (exhibit MCL-2 to the affidavit of Ms Carter-Lannstrom filed on 14 November 2016).

3 Affidavit of Ms Carter-Lannstrom, exhibit MCL-11. And see: Transcript, 1-6.

4 See Loan Agreement, cl 5.1(a) (exhibit MCL-1 to the affidavit of Ms Carter-Lannstrom).

would be calculated on a daily basis and capitalised monthly in arrears.[5]

[5] The principal was required to be repaid on 17 August 2015 but the due date was subsequently extended at the request of the borrower on three occasions – to 17 September 2015, 16 October 2015 and, finally, 22 October. No further extensions were granted.

[6] On 26 August 2015, the borrower paid $113,373.24, being the interest then owing under the loan agreement. On 23 and 26 October 2015, further interest payments of $70,000.00 and $30,000.00 respectively were made by the borrower. No further payment has since been made and, almost needless to say, the borrower failed to repay the principal on 22 October 2015. A demand to do so (together with payment of accrued interest in the sum of $374,030.25 calculated to 15 April 2016) was made on the borrower on 8 April 2016 but went unsatisfied.

[7] On the same day (8 April 2016), a demand was made on the defendants to repay the debt ($874,030.25) in accordance with their obligations under the deed. On 12 May 2016, the first defendant telephoned the plaintiffs' solicitors and then forwarded a confirmatory email. In it, he recorded that an "associate" had agreed to assist with the borrower's financial requirements "including repayment of this loan" and that he would "make [himself] available to accept service personally and for [the second defendant] regarding recovery proceedings".[6]

[8] This proceeding was commenced on 29 April 2016 and defences were filed on behalf of both defendants on 16 June 2016. On 14 November 2016, the plaintiff filed an application for summary judgment. It was subsequently adjourned by consent, but not before notices of address for service for both defendants were filed. These specified the first defendant's chambers as their address for service.

[9] On 2 November 2016, the borrower (Lismore South Developments Pty Ltd) was wound up in insolvency due to its failure to comply with a statutory demand issued by the plaintiffs with respect to the debt.[7]

[10] The first defendant filed an amended defence on 11 April 2017 and, although no amended defence was filed on behalf of the second defendant, a pleading that is materially identical to the first defendant's amended defence was served on the solicitors for the plaintiffs.[8] It is unnecessary to examine the content of these amended pleadings in any detail because they were struck out by order of Flanagan J on 14 March 2019. It is sufficient instead to record that, in them, the defendants alleged that the loan agreement was "dependent upon a number of other matters between the parties" including the sourcing of further funding from persons in China and representations to the effect that the female plaintiff had the ability to put the borrower in touch with those persons to facilitate that funding. It was alleged that those representations were untrue, that further funding could not be secured and that, had the

---

5 Ibid, cl 5.1(b).

6 Affidavit of Ms Carter-Lannstrom, exhibit MCL-11.

7 The corporate guarantor (Tailor Made Developments Pty Ltd) was also wound up on the same day, and for the same reason.

8 A copy of that pleading became exhibit 1 at the hearing before Flanagan J on 14 March 2019.

representations not been made, the defendants would not have entered into the deed. It should be recorded, however, that both the loan agreement and the deed are silent as to any of these matters. Indeed, much to the contrary, each contains warranties from the defendants to the effect that they were not executed on account of any promise, representation or statement.[9]

[11] Be that as it may, the plaintiffs filed a reply to each of the amended defences on 20 July 2018 and, five days later, the defendants filed and served new notices of address for service specifying an address in Eagle Street, Brisbane.

[12] The proceeding subsequently became the subject of caseflow management and, on 13 June 2018, Bowskill J made a number of orders including directions that the parties provide a list of documents by 17 August 2018 and participate in a mediation by 19 November 2018. Despite that, although a list of documents was provided by the defendants, they failed to provide the plaintiffs with a copy of the listed documents when requested to do so. Attempts by the plaintiffs' solicitors to arrange a suitable date, venue and mediator to conduct the mediation ordered by Bowskill J also came to nought. Similarly, the plaintiffs' request for further and better particulars of the amended defences were the subject of unsatisfactory responses, necessitating the making of a consent order by Bond J on 6 December 2018, but there was only limited compliance by the defendants with that order.

[13] On 20 February 2019, the plaintiffs filed a further application for summary judgment or, alternatively, an order striking out the amended defences. That application was heard by Flanagan J on 14 March 2019. His Honour ordered that the amended defences be struck out and that the defendants file and serve any further amended defence by 4 April 2019. No further amended defences have since been filed.

[14] A copy of the orders made by Flanagan J was served on the defendants on 20 March 2019 at their address for service in Eagle Street, Brisbane. A copy was also forwarded by express post to the first defendant care of the Brisbane Correctional Centre because, by that time, he was being held in custody on remand in respect of a number of alleged offences. The first defendant acknowledged receipt of the copy of the orders by letter dated 22 March 2019.[10] At a subsequent caseflow management review conducted by Bowskill J on 29 March 2019, Mr Collins of counsel appeared as *amicus curiae* to assist the second defendant.

[15] This application for summary judgment as well as the supporting affidavit[11] were filed on 3 May 2019. A copy of each was subsequently served on the defendants at their address for service at Eagle Street, Brisbane and a copy was also posted to the first defendant at the Brisbane Correctional Centre. The first defendant acknowledged receipt of this material by letter dated 8 May 2019. On the first return of the application on 24 May 2019, there was no appearance for either defendant and it was adjourned to 31 May 2019 for hearing. An

---

9 See cl 10.1(h) of the Loan Agreement (exhibit MCL-1 to the affidavit of Ms Carter-Lannstrom filed) and cl 28 of the Deed (exhibit MCL-2 to the affidavit of Ms Carter-Lannstrom).

10 See affidavit of Mr Grant filed on 3 May 2009, exhibit SPG-3.

11 Ibid.

amended application was filed on the same day and was served on the first defendant by letter dated 24 May 2019 which was received at the Brisbane Correctional Centre three days later. The amendments were not substantial; they merely corrected the reference to the relevant provision of the UCPR under which the plaintiffs sought alternative relief and specified the orders of the court that, they contend, were breached.

The hearing

[16] The application came on for hearing on 31 May 2019. The plaintiffs were represented by solicitors and counsel. The first defendant appeared on his own behalf. Despite being called, there was no appearance by the second defendant. In that regard, it seems that for all previous appearances in the proceeding, or at least those where the defendants appeared, the second defendant represented his mother save for the occasion when Mr Collins appeared as *amicus curiae*.[12] However, at the 31 May hearing, the second defendant said that he was "unable to represent [his] mother, due to [him] being incarcerated".[13]

[17] No affidavit material was advanced on behalf of either defendant, but the first defendant informed the court that he had applied for legal assistance on 15 May 2019 (when an officer from the Legal Aid Office visited him at the Brisbane Correctional Centre) although that he did not expect that his application would be assessed until "approximately the 30th of June".[14] He also asserted that he was unable to access "legal resources" at the Brisbane Correctional Centre, that he had applied for access and was awaiting a decision. The second defendant therefore requested an adjournment until his applications for legal assistance and access were determined. He indicated that, if legal assistance was refused, he "would like to conduct [his] own defence".[15]

[18] This request for an adjournment was refused. The second defendant had been aware of the application since at least 8 May 2019 when he acknowledged service of the material. But, more than that, he was aware of the orders made by Flanagan J since 22 March 2019 and, critically, the need to re-plead his defence by 4 April 2019, but he did nothing to comply with the terms on which leave to re-plead was given until 15 May when he applied for legal assistance. Indeed, I infer that the second defendant only did so because the plaintiffs had been forced to file yet another application for summary judgment which, of course, came to the first defendant's attention (at the latest) a week earlier.

[19] As for the second defendant, her non-appearance cannot stand in the way of judgment. By rr 17 and 140 UCPR, the defendants were required to provide an address for service for the purposes of the proceeding, and they did so. After the subject application was filed, it was served at the address provided by the defendants in their most recent notices of address for service. That was valid service under the rules: rr 112(1)(d) and 112(3)(a) UCPR. Although the second defendant does not appear to have been served with the amended application, she

---

12 Transcript, 1-4.

13 Ibid.

14 Transcript, 1-6.

15 Ibid.

chose not to appear on the first return of the original application (24 May 2019) and, according to the first defendant, was aware that the application would come back before the court on 31 May.[16] As previously observed, the amendments to the application were not substantial. Like the first defendant, the second defendant did nothing to comply with the terms on which leave to re-plead her defence was given by Flanagan J.

Summary judgment?

[20] By r 292 UCPR, the court may give judgment for a plaintiff against the defendant for all or part of the plaintiff's claim if satisfied that: (1) the defendant has no real prospect of successfully defending all or a part of the claim; and (2) there is no need for a trial of the claim or the part of the claim. It is necessary of course that a clear case be made out before a proceeding such as this is summarily terminated.

[21] Here, it was never disputed by the defendants that the deed was executed by them or that the borrower defaulted in repayment of the loan. The only matters of defence appeared in pleadings that were struck out by Flanagan J, the defendants failed to avail themselves of the opportunity to re-plead and the only submissions the first defendant made in response to the application at the hearing were confined to the question of interest. I accept the submission made by counsel for the plaintiffs that, in the period of over three years since this proceeding was commenced, no viable defence has been articulated by either defendant. There have in addition been repeated failures to properly comply with orders of the court including attendance at a court-ordered mediation.

[22] In supplementary written submissions, the first defendant submitted that there were "several triable issues" before attempting to advance five points in support of that submission.[17] Leaving aside the feature that the supplementary submissions sought by the court from the plaintiffs were to be concerned only with an alternative interest calculation with the first defendant having leave to respond regarding that calculation, only one of the points advanced by the first defendant touched on the principal claim and, even then, all that was submitted was this:

> "IT IS NOT JUST THAT THE INTEREST RATE ON THE $500,000 IS UNCONSCIONABLE TO MAKE IT SO; BUT NOBODY WOULD WILLINGLY ENTER INTO SUCH ARRANGEMENTS WITHOUT SOME REASON. THESE ARE THE REPRESENTATIONS RELIED UPON AND THE JOINT VENTURE ARRANGEMENTS WHICH THE PLAINTIFFS COULD CONTEST AT TRIAL."[18] [Capitalisation in original]

[23] Although the onus is on the plaintiffs to make out an entitlement to summary judgment, the determination of that issue necessarily requires a consideration of whether the defendants

---

16 The first defendant submitted that his mother "was aware that there was to be a review today" but was "not aware that judgment is going to be entered … today": Transcript 1-10,11.

17 See paragraphs 7(A) to (E) of the supplementary submissions made by the first defendant by letter dated 3 June 2019.

18 Ibid, paragraph 7(b).

have established some real prospect of succeeding at trial.[19] The submission extracted immediately above hardly does that. To the extent that it was intended by the first defendant to refer back to the contents of the struck out amended defences, it may simply be observed that, if there was a defence to any part of the plaintiffs' claim, it should have been advanced in a proper way well before now.

[24] I am satisfied that the defendants have no real prospect of successfully defending the plaintiffs' claim and, further, that there is no need for a trial of that claim. The plaintiffs are entitled to judgment pursuant to r 292 UCPR on the amount representing the principal advanced under the loan agreement and guaranteed under the deed together with interest and costs. It is therefore unnecessary to consider whether the same entitlement arises under r 374(5) UCPR.

[25] That leaves the question of interest. As part of the plaintiffs' claim, interest was sought at a rate of 10% per month on the principal debt and on a compounding basis. That was the agreed "higher' rate and basis of calculation under the loan agreement. Calculated on that basis, the unpaid accrued interest on the loan as at the effective date of the demand (15 April 2016), amounted to $374,030.25 which, when combined with the principal advanced, gave rise to an overall debt of $874,030.25. I have given consideration to only allowing simple interest on the principal at the rate of 4% but, to do so, would deprive the plaintiffs of the agreed interest under the loan agreement. The better approach is to give full effect to the parties' bargain up to the effective date of the demand and to then exercise the court's discretion against allowing interest at this higher rate and compounding basis from that point on. Instead, from the effective date of the demand, simple interest on the overall debt will be allowed at the rate of 4% to the date of judgment (3.25 years). This amounts to $113,623.93 for interest. The total for which judgment will be entered is therefore $987,654.18.

Costs

[26] The plaintiffs seek an order that the defendants pay their costs on an indemnity basis. Although the plaintiffs submitted by reference to provisions of the deed that such an order was warranted, I cannot agree. The plaintiffs will have their costs, but they will be assessed on the standard basis.

Orders

[27] For these reasons, judgment will be entered in favour of the plaintiffs against each of the defendants in the sum of $874,030.25 together with interest in the sum of $113,623.93 and standard costs.

---

[19] Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, 234-236; *Weatherup v Krayem* [2018] QCA 247, [24].