SUPREME COURT OF QUEENSLAND

CITATION:	*Dempsey Project Pty Ltd & Ors v Perpetual Corporate Trust Limited* [2019] QCA 234
PARTIES:	**DEMPSEY PROJECT PTY LTD** ACN 616 215 073 (first appellant) **DEMPSEY PROFITS PTY LTD** ACN 167 045 427 (second appellant) **JEFFREY RAYMOND WALTERS** (third appellant) **ANDREW KARL SHOFAY** (fourth appellant) **v** **PERPETUAL CORPORATE TRUST LIMITED** ACN 000 341 533 (respondent)
FILE NO/S:	Appeal No 4305 of 2019 SC No 1102 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 18 April 2019 (Dalton J)
DELIVERED ON:	29 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2019
JUDGES:	Sofronoff P and Gotterson JA and Flanagan J
ORDERS:	**1. Appeal dismissed.** **2. The appellants are to pay the respondent's costs of the appeal to be assessed on the indemnity basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – ADMISSION OF EVIDENCE – where the respondent commenced proceedings against the appellants to recover money owed by the appellants under a loan agreement and written guarantees and to recover possession of a property mortgaged to them – where the respondent succeeded in obtaining summary judgment against the appellants – where the appellants contended on appeal that the learned primary judge erred in admitting an affidavit of the respondent which annexed true

copies of the security agreements and the registered mortgage – whether the learned primary judge erred in admitting the affidavit

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – REFUSAL OF ADJOURNMENT – where the respondent commenced proceedings against the appellants to recover money owed by the appellants under a loan agreement and written guarantees and to recover possession of a property mortgaged to them – where the respondent applied for summary judgment against the appellants – where, at the beginning of the hearing of the summary judgment application, counsel for the appellants sought an adjournment to allow them time to obtain further evidence and to amend their pleadings in accordance with the further evidence – where the learned primary judge refused the application – whether the refusal to grant a short adjournment denied justice to the appellants and materially prejudiced them in resisting the application

Hanson Construction Materials Pty Ltd v Davey & Anor [2010] 79 ACSR 668; [2010] QCA 246, distinguished
Maxwell v Keun [1928] 1 KB 645, considered

COUNSEL: A P J Collins for the appellants
M D Martin QC for the respondent

SOLICITORS: Tonio Lawyers for the appellants
Mills Oakley for the respondent

[1] **SOFRONOFF P:** I agree with Gotterson JA.

[2] **GOTTERSON JA:** Perpetual Corporate Trust Limited ("PCTL") is a Custodian for certain funds managed by GPS Investment Fund Limited ("GPS"). Dempsey Profits Pty Ltd ("Profits") is the trustee for the Dempsey Profits Trust and for the Walters Family Trust. Until 9 January 2019, Mr Jeffrey Raymond Walters was the sole director of Profits. Profits, as trustee of the trusts, is the registered proprietor of Lot 3 on Registered Plan 55663 Title Reference 12161192 ("the land"), being land located at 16 Dempsey Street, Annerley in Brisbane.

[3] In 2017, Dempsey Project Pty Ltd ("Project") was a development company. It wished to develop and market five residential townhouses on the land. Its sole director then was Mr Andrew Karl Shofay.

The legal instruments

[4] On 23 August 2017, PCTL and Project entered into an agreement in writing ("Loan Agreement") whereby the former would provide financial accommodation up to $1,825,300 to Project to enable it to undertake the townhouse development.[1] The terms of the loan were contained in a Loan Schedule[2] and a document titled "GPS Commercial Loan Terms".[3]

---

1 Affidavit J Hoare sworn 2 April 2019 Exhibit "JH-1": AB 2 63-128.
2 Ibid AB 2 63-79.

[5] Clause 5 in the Loan Schedule required that the financial accommodation be secured by a first registered mortgage over the land and by guarantees given by Profits and by Mr Shofay and Mr Walters. On 6 September 2017, Profits executed Deeds of Guarantee and Indemnity in its personal capacity and as trustee of each of the two trusts.[4] Deeds of Guarantee and Indemnity were executed by Mr Shofay and by Mr Walters personally.[5]

[6] On the same day, both Profits in its personal capacity and as trustee and Project separately executed a General Security Agreement, as Grantor, with PCTL.[6] Conformably with that agreement, a mortgage, Mortgage No 718269403, was granted by Profits as trustee over the land in favour of PCTL.[7] It was registered on 12 September 2017.[8]

[7] The loan was to be repaid by the date which was 12 months from and including the Settlement Date.[9] By a Deed of Variation[10] executed by the parties on 7 September 2018, the date for repayment of the balance outstanding and all other monies payable to PCTL under the Loan Agreement was varied to 7 December 2018.[11] The Annual Interest Rate was also varied from 15 per cent per annum to 16.95 per cent per annum, effective from 8 September 2018.[12]

The proceeding and the pleaded cases

[8] PCTL began proceedings in the Supreme Court of Queensland on 4 February 2019 against Project, Profits, Mr Walters and Mr Shofay as first, second, third and fourth defendants respectively.[13] In its Statement of Claim,[14] as amended, it pleaded the legal instruments to which I have referred; that PCTL had advanced $1,439,357.30 to Project pursuant to the Loan Agreement; that Project had failed to repay the loan by 7 December 2018; that on 10 December 2018 it had made a demand in writing to all of the defendants for repayment of the amount owing; that the amount owing had not been repaid; and that at 31 January 2019, Project was indebted to PCTL under the Loan Agreement in the amount of $1,676,481.56.[15]

[9] PCTL also pleaded against Profits that on 10 December 2018, it had given written notice to Profits under s 84 of the *Property Law Act* 1984 (Qld) demanding payment of $1,478,363.67, the amount then secured; and that by reason of the default of Profits in making the payment of that amount, it was entitled under clause 14.2 of the Mortgage to take possession of the land.

[10] By way of relief against all defendants, PCTL sought judgment for the amount of $1,676,481.56 and interest thereon at the rate of 16.95 per cent per annum pursuant

---

3 Ibid AB 2 85-128.
4 Exhibit "JH-2": AB 2 129-153 and Exhibit "JH-3": AB 2 154-178.
5 Exhibit "JH-5": AB 2 204-228 and Exhibit "JH-4": AB 2 179-203.
6 Affidavit DF Cliff sworn 4 April 2019 Exhibit "DFC-1": AB 2 285-342 and Exhibit "DFC-2": AB 343-400.
7 Exhibit "DFC-3": AB 2 401-447.
8 Affidavit DF Cliff paragraph 4: AB 283.
9 Loan Schedule clause 4.1.
10 Exhibit "JH-6": AB 2 229-241.
11 Ibid clause 2(b).
12 Ibid clause 2(a).
13 AB 1 10-12.
14 AB 1 31-37 amended by consent order made on 9 April 2019: AB 2 450.
15 This amount included interest and charges payable by Project pursuant to clause 7.10 of the Loan Schedule and clause 13 of the GPS Commercial Loan Terms.

to clause 3.1 of the Loan Schedule. Costs were also sought on an indemnity basis in reliance upon clause 7.11 of the Loan Schedule. As against Profits, recovery of possession of the land was also sought.

[11] The defendants filed a Notice of Intention to Defend on 6 March 2019.[16] In their Defence,[17] they admitted that the legal instruments had been executed by them but did not admit that the Loan Agreement had been breached. That was because PCTL had failed to make timely advances under it "causing the development time to be extended and preventing (Project and Profits) being in a position to sell the townhouses" and because PCTL "appointed an unqualified person as project manager which was not within the contemplation of the agreement, thus extending the building time." They pleaded that "by implication or on equitable grounds, the time for repayment should have been extended."[18] Further, they did not admit that the amount of $1,676,481.56 was owing.[19]

[12] The defendants also pleaded by way of counterclaim that in breach of contract, or in failure to act in good faith, PCTL appointed a project manager who overrode the defendants' project manager. That resulted in delays to the development project causing damage to them in an amount that could not be assessed until the development was finalised.[20] The failure to act in good faith, it was pleaded, discharged the guarantees and indemnities.[21] Damages in an amount to be assessed upon final approval of the development, a declaration that the guarantees and indemnities were void and costs were counterclaimed by way of relief.

[13] A Reply and Answer was filed on 28 March 2019[22] in which clause 8(k) of the GPS Commercial Loan Terms was pleaded. It provided that Project was to make payments due under the Loan Agreement "in cleared funds and free of any set-off or deduction".[23] A provision to similar effect in clause 5.2 of the Deeds of Guarantee and Indemnity was also pleaded.[24]

The summary judgment application and the hearing

[14] PCTL filed and served an application for summary judgment on 2 April 2019.[25] It was listed for hearing on 18 April 2019. PCTL also filed and served a number of affidavits for the purpose of proving the factual matters alleged in its Statement of Claim.

[15] The application came on for hearing before a judge of the Trial Division on 18 April 2019. At the commencement of the hearing counsel for the four defendants indicated that his clients were applying for an adjournment.[26] He filed and read by leave an affidavit sworn by Mr F Dzelalija, solicitor, in support of that application.[27] It was received without objection.

---

16 AB 1 19-20.
17 AB 1 21-24.
18 Ibid paragraph 4.
19 Ibid paragraph 8.
20 Counterclaim paragraphs 4-9.
21 Ibid paragraph 10.
22 AB 1 25-27 subsequently amended on 5 April 2019: AB 1 28-30.
23 Ibid paragraph 10.
24 Ibid paragraph 13.
25 AB 2 55-56.
26 Transcript 1-2 ll9-10: AB 2 520.
27 AB 2 510-512.

[16] Counsel advanced a number of arguments for the adjournment. One of them related to two affidavits sworn by Mr J Hoare, PCTL's Portfolio Manager, sworn respectively on 15 April 2019[28] and 18 April 2019,[29] which the defendants complained had been served less than eight business days before the hearing, thus short of the period stipulated by UCPR r 296(1) for the filing and serving of an applicant's material. A second argument was that PCTL had amended its statement of claim, the amended pleading having been served on 8 April 2018, some seven business days before the day of the hearing. Thirdly, reliance was placed on statements by Mr Dzelalija in his affidavit that he was seeking counsel's advice on filing an amended defence and counterclaim and that preparation of draft affidavits to resist the summary judgment application was substantially advanced. Mr Dzelalija referred to grounds for defending and counterclaiming which, in substance, mirrored those that had already been pleaded.

[17] The learned primary judge refused the application for an adjournment. In reasons given *ex tempore*, her Honour said:

> "Well, I refuse the application for an adjournment. The basis upon which it was sought was, in my view, quite unmeritorious. This application was filed and served on the 2nd of April 2018. The substantive affidavit material was served that day. Another affidavit was filed shortly thereafter, and no complaint was made, but it is late. After that, two affidavits of Mr Hoare were filed and served; one three days ago, and one with leave this morning. The affidavit with leave this morning could not properly have been the subject of complaint, in my view. It is the kind of affidavit that every lender makes on an application such as this, simply giving the judge the up to date amount of monies owing at the time the lender seeks judgment from the court. That leaves the affidavit which is court document 14. It is a document which has six substantive paragraphs. And it simply adds some more details to what has already been sworn.
>
> There was nothing in particular about it that was argued to cause the defendants any particular difficulties. And in circumstances where there's been absolutely no attempt to file a proper defence, file affidavits on this application or explain the reason for not doing so, I really do not think there is any meritorious point at all in the complaint that this affidavit was served late. Rule [296] is, in its terms, mandatory and it has, in my view, most substantially been complied with. And I'd excuse anything else as an irregularity under the rules. The last point was that 13 days ago, a statement of claim – an amended statement of claim was filed and served.
>
> The point is taken that because it was served after 4 o'clock in the afternoon, in fact, it was deemed to be served at a time when there have only been seven clear business days between that service and now. It, again, is a most unmeritorious argument in circumstances where the defendant respondents are aware that a summary judgment application has been made to rely on technical points, such as service

---

28 AB 2 451-497.

29 AB 2 504-506. The learned primary judge granted leave for the filing and reading of this affidavit notwithstanding the respondents' objection: Transcript 1-2 l47.

> being effected after 4 o'clock in the afternoon, really are the type of points made by defendants without any substantive defence. So in – for all of those reasons, I refuse the adjournment."[30]

[18] Counsel for the defendants then indicated that he had additional sworn affidavits with him which he and those instructing him wished "to finalise" with the benefit of consultation with the defendants. Notwithstanding that, he sought leave to file and read those affidavits on the basis that certain paragraphs would be struck from them.[31]

[19] The affidavits in question were one by Mr J Samardzija, a current director of Project and of Profits,[32] and by Mr J Uljarevic, their Project Manager,[33] both sworn on 17 April 2019. Copies of the affidavits were provided to the learned primary judge and to counsel for PCTL. The matter was then stood down to allow for consideration of them.

[20] I mention at this point that the defendants had foreshadowed an objection to the substantive content of an affidavit that Mr DF Cliff had sworn on 4 April 2019[34] which had been filed in support of the application. Mr Cliff is a partner in the firm of solicitors acting for PCTL in the application. The objection was to paragraphs 2, 3 and 4 of the affidavit by which true copies of the two General Security Agreements and Mortgage No 718269403 were exhibited to it. The basis of the objection was a proposition that the affidavit did not conform with UCPR r 295(2) because relevant sources of information and reasons for belief in it were not stated by Mr Cliff.

[21] The hearing of the application resumed a little over an hour later. The learned primary judge at that point said that in the intervening period, she had considered the merits of the opposition to Mr Cliff's affidavit and was "inclined to overrule" it.[35]

[22] Counsel for the defendants requested short reasons for overruling the objection. Her Honour than gave the following reasons *ex tempore*:

> "The point was taken that court document eight which in this matter, which exhibits the document, which are Guarantees (sic) and Mortgage, relied upon by the plaintiff:
>
> *Must (implicitly) be sworn on information and belief*
>
> And so therefore that the documents had not be (sic) proved in this application for summary judgment, i.e. for summary relief. The documents are, in my opinion, within section 1305 of the *Corporations Law* evidence of what they purport to be. The court rules allow information belief on a summary application, and if there were still problems I would be inclined to exercise my discretion under section 129A of the *Evidence Act* to allow the affidavit, which is court document eight, as proof of the documents in question. The documents in question are admitted on the pleadings in this

30 Transcript 1-9 l29 – 1-10 l11.
31 Transcript 1-14 ll1-17.
32 AB 2 513-515.
33 AB 2 516-518.
34 AB 2 282-283.
35 Transcript 1-19 l29 – 1-30 l3.

> proceeding and there is no serious or meritorious dispute about them. As I say, the point is simply a tactical point which counsel for the respondents has chosen to take."[36]

[23] Counsel for PCTL then indicated that he had no objection to the receipt of the affidavit sworn by Mr Samardzija and Mr Uljarevic. Submissions ensued. Their content and scope are sufficiently reflected in the following reasons which the learned primary judge gave *ex tempore* for granting summary judgment:

> "I am satisfied that the defendants had no real prospect of defending the plaintiff's claim. The defence filed on behalf of the defendants does not, in my opinion, raise any proper defence known to the law. In fact, so much was conceded by the defendants' counsel. There is no explanation for why a proper defence was not filed originally. There is no explanation for why a proper defence had not been filed by the date – or by – by today's date.
>
> The defendants raise various matters by counter-claim. They are pleaded in a most sketchy manner. There are no proper particulars. The pleading does not comply with the UCPR. But assuming that there is something in the counter-claim, there is a no set-off clause in the financial documents and it cannot go to the plaintiff's claim. The order that I make today will not prevent the defendants running their counterclaim should they see fit to do so.
>
> Late in the hearing of the application, affidavits were filed on behalf of the defendants. They are – well – and there was also – at the beginning of the application, an affidavit was filed which was sworn by the solicitor who acted for the defendants. Again, the quality of those affidavits is below what one would normally expect to see in an application in this Court, in that no attention has been paid to proving things properly or to being specific or particular about the matters deposed to. Some of the matters allege mala fides on the part of the plaintiff. One would have to have concerns about those allegations. Nonetheless, the point with which I am concerned is that all of the matters raised in those affidavits could only go to establishing a counter-claim on the part of the defendants, which, as explained, cannot avail them on this application.
>
> The affidavit of Mr Uljarevic, filed today with leave, explains that he is the project manager for an unnamed builder which was engaged – or is said to be engaged by the defendants. He swears that, in his opinion, the plaintiff's conduct during the course of building work led to delay – paragraphs 6 and 16 of the affidavit. This led to claims by the subcontractors against the builders (not the defendant respondents) – paragraph 6 and 8 of the affidavit. He deposes to the fact that the defendant respondents have not paid the builder the last payment due to the builder – paragraph 7 of the affidavit. As I say, some of that is just irrelevant, but, at most, it goes to whether or not there is a counter-claim which cannot avail the defendant respondents on this application.

---

36 Transcript 1-20 l16-31.

> Then there is an affidavit of Mr Samardzija. He is a director of some of the defendant respondent companies. He deposes to the fact that the plaintiff caused the building project to be delayed – paragraph 6, 7 and 10 – and that the defendants incurred cost because of that – paragraph 10. But, in my opinion, the affidavit deposes to no more than that.
>
> It was submitted on behalf of the defendants that these matters went to a Mackay v Dick-type obligation and really showed that the plaintiffs had prevented the defendants having the benefit of this contract. In my opinion, there is nothing in this point. The defendants did receive the money they were entitled to receive under the lending contracts.
>
> Despite the submission of counsel for the defendant respondents, their – the affidavit material did not actually swear that the plaintiff's action caused the defendants not to be able to repay the money they received from the plaintiff. At most, what the affidavit material does is show that perhaps there is a counter-claim. Because of the no set-off clause, this is irrelevant to whether or not I ought to grant judgment."[37]

[24] I note that this appeal does not put in issue the correctness of these reasons on the material before the learned primary judge. It is apparent also that her Honour accepted a submission for PCTL that it was contractually entitled to costs on an indemnity basis.

Orders made

[25] Conformably with these reasons, the learned primary judge made orders on 18 April 2019 that Profits deliver up possession of the land; that there be judgment for PCTL against the respondent defendants for $1,719,041.99;[38] and that the respondent defendants pay PCTL's costs of the proceeding including the application, to be assessed on the indemnity basis.[39]

The appeal

[26] On 24 April 2019, the respondent defendants, whom I shall hereafter refer to as the appellants, filed a notice of appeal against the summary judgment.[40] Some six grounds of appeal are set out in that document. They are underpinned by two separate propositions. These propositions are that the learned primary judge erred in admitting Mr Cliff's affidavit and that her Honour erred in refusing the adjournment. The appellants seek orders that include a setting aside of the summary judgment.

[27] In their respective written and oral submissions, the parties addressed the two propositions rather than the individual grounds of appeal. It is convenient to adopt a similar approach to consideration of the appeal.

---

37 AB 1 7-8.

38 This was the amount certified as owing at that date by Mr Hoare in his affidavit sworn 18 April 2019.

39 AB 1 9.

40 AB 1 1-5.

The admission of Mr Cliff's affidavit

[28] **Appellants' submissions:** The appellants submitted that Mr Cliff could not have had personal knowledge of the General Security Agreements and the registered mortgage. Any statement he made verifying them must therefore have been based on information supplied to him by others and his belief in it. His affidavit did not state the sources of the information or his reasons for belief in it as required by UCPR r 295(2). Hence it was not eligible in proof of PCTL's claim.

[29] Reference was made to the decision of this Court in *Hanson Construction Materials Pty Ltd v Davey & Anor*[41] for the proposition that an affidavit in support of a summary judgment application that does not state sources of information and reasons for belief in it is objectionable. As well, the appellants submitted that reliance by her Honour on s 1305 of the *Corporations Act* 2001 (Cth) was misplaced. That was because there was no evidence that any of the three documents was a book of account kept by PCTL or purported to be so.[42]

[30] **PCTL's submissions:** PCTL submitted that the learned primary judge had correctly applied s 129A of the *Evidence Act* 1997 (Qld). It does not require that sources of information or reasons for belief be deposed to in the circumstances in which it may apply. The provision allows the court to admit a document to which it applies in any way the court sees fit. It was further submitted that this was a strong case for admitting the documents in question under the section because they had been admitted on the pleadings.

[31] **Discussion:** I would hesitate to accept the appellants' proposition that Mr Cliff must have relied on information in order to swear that what was exhibited to his affidavit were true copies of the General Security Agreements and the registered mortgage. It is not apparent that he need have relied on information to swear that. He was not cross examined. Thus, any reliance that he may have placed on information was not established by that route.

[32] The present circumstances are distinguishable from those in *Hanson*. In that case, there was good reason for concluding that it was likely that the deponent did not have personal knowledge that certain invoices were unpaid and that she must have relied on other unidentified business records in order to swear that they were unpaid. I am therefore unpersuaded that Mr Cliff's affidavit was one to which the requirements in r 295(2) necessarily applied.

[33] In any event, it was open to her Honour to have relied on s 129A in order to admit these documents. Relevantly, that provision applies where a fact in issue in civil proceedings is the proof of documents[43] and the court considers that the fact in issue is not seriously in dispute.[44] In such circumstances, the court may order that evidence of the fact be given "in any way the court directs".

[34] Here, the relevant fact in issue was proof of the General Security Agreements and the registered mortgage. Further, those documents were not seriously in dispute. The former were pleaded in paragraph 4 of the Amended Statement of Claim and

---

41 [2010] QCA 246 at [31].
42 Appellants' Outline of Submissions ("AOS") paragraph 22, citing ss 1305(1), (2).
43 ss (1)(a)(ii).
44 ss (1)(b)(i).

the latter in paragraph 5(c)(1) thereof.[45] In paragraph 1 of their Defence, the appellants admitted paragraphs 4 and 5.[46] It was therefore open to direct, as her Honour in effect did, that evidence of those documents be given by admission of Mr Cliff's affidavit to which they were exhibited as true copies.

[35] It is therefore unnecessary to consider whether the documents are ones to which s 1305 applied. The appellants have not established that the learned primary judge erred in admitting Mr Cliff's affidavit.

The refusal of the adjournment application

[36] **Appellants' submissions:** The appellants submitted that the learned primary judge erred in not granting a short adjournment to allow them time to obtain further evidence and to amend their pleadings in accordance with it. As well, two of Mr Hoare's affidavits and the amended statement of claim had been served less than eight business days before the hearing. A short adjournment would not have prejudiced PCTL, it was submitted.

[37] Reference was made to the observations of Brennan, Deane and McHugh JJ in *Sali v SPC Ltd*[47] that the proposition enunciated by the English Court of Appeal in *Maxwell v Keun*[48] had become firmly established and had been applied by appellate courts on many occasions. It is to the effect that although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to the other party.

[38] **PCTL's submissions:** PCTL submitted that, at best, any further evidence that the appellants would seek to obtain would be to further the broad allegations they had made that PCTL had engaged in conduct that was "designed to prevent (them) from having the full benefit of the commercial contract which had been entered into" and that it had deliberately delayed loan draw-downs "to cause considerable delay in respect of completion of the project".[49] Such evidence would ground, at the most, a counterclaim. It would not ground a defence.[50]

[39] Further, the amendments to the statement of claim were to plead contractual provisions in the Loan Schedule (clause 7.1) and the General Security Agreements (clause 1.1) as a basis for the claim for indemnity costs. The two affidavits of Mr Hoare deposed to uncontroversial matters. Thus, the appellants were not prejudiced by service of the Amended Statement of Claim or those affidavits less than eight business days before the hearing of the application.[51]

[40] **Discussion:** The principle in *Maxwell v Keun* is one that is activated when a refusal to grant an adjournment will result in a denial of justice to the applicant for it. Thus, a critical issue for determination here is whether the refusal of the short adjournment denied justice to the appellants. That issue turns upon whether or not the refusal materially prejudiced them in resisting the application.

---

45 AB 1 32.
46 AB 1 21.
47 (1993) 116 ALR 625 at 628.
48 [1928] 1 KB 645 at 650, 657, 658.
49 Affidavit F Dzelalija paragraph 9: AB 2 511.
50 PCTL's Outline of Submissions ("POS") paragraph 4.
51 POS paragraphs 5-8.

[41] In my view, the service of the Amended Statement of Claim and Mr Hoare's two affidavits within the eight business day period did not have that effect. As PCTL submitted, the amendments to the pleading concerned, in substance, contractual terms within admitted documents. The earlier of Mr Hoare's affidavits exhibited two agreements and a registered mortgage all of which were admitted on the pleadings. The other affidavit swore to the amount outstanding at the date of the hearing. It did not open some new area of potentially controversial fact.

[42] I now turn to the further evidence that the appellants intimated they wished to pursue. I preface a consideration of it with the observation that PCTL had pleaded and proved the advances made under the Loan Agreement[52] which the appellants did not positively deny.[53] The original repayment date and the variation of it to 7 December 2018 were also pleaded and admitted.[54] The Defence did not challenge that the monies advanced had not been repaid by that date.

[43] The learned primary judge in her reasons for granting summary judgment observed that all of the matters raised in the appellants' three affidavits could only go to establishing a counterclaim for damages. In my view, her Honour was correct for the following reasons.

[44] Firstly, the pleading in paragraph 4 of the Defence that the time for repayment should have been extended beyond 7 December 2018 to some other unspecified date was not a pleading that the parties had agreed to extend it, either expressly or impliedly. At most, it might be regarded as an allegation that PCTL had been contractually obliged to extend the repayment date further but had failed to do so. So regarded, it could only ground a claim for damages.

[45] Secondly, the other matters pleaded as breaches of contract or of equitable obligations in the appellants' counterclaim could only have grounded relief by way of damages. They did not directly impugn the integrity of PCTL's debt claim or claim to possession as such.

[46] Her Honour was also correct in her view of the operation of clause 8(k)[55] of the GPS Commercial Loan Terms and its counterpart in clause 5.2 of the Deeds of Guarantee and Indemnity.[56] As noted, those clauses required repayments to be made "in clear funds and free from any set-off or deduction". Thus, by agreement, the appellants were precluded from relying on unliquidated damages claims by way of set-off as a defence.

[47] It remains to note that the adjournment sought was to obtain further details of the already made broad allegations; that is to say, further details of conduct attributed to PCTL which might give rise to claims for damages against it. No additional matter was identified as warranting investigation which arguably might have grounded a viable defence to PCTL's claims.

---

52 Amended Statement of Claim paragraph 11: AB 1 34 and affidavit of J Hoare sworn 2 April 2019 paragraph 3(f): AB 2 58-60.

53 Defence paragraph 3: AB 1 21.

54 Amended Statement of Claim paragraphs 5(b) and 7: AB 1 32, 33 and Defence paragraph 1: AB 1 21.

55 AB 2 104.

56 AB 2 139, 189.

[48] For these reasons, I conclude that the appellants were not prejudiced in their defence of the summary judgment application by the refusal of the adjournment. They have not established a basis for appellate interference with the decision to refuse it.

Disposition

[49] The appellants have not established a viable ground of appeal. It follows that their appeal must be dismissed. They must pay PCTL's costs of the appeal. As to the basis on which those costs should be assessed, PCTL's submission is that they should be assessed on an indemnity basis. I agree.

[50] Clause 2 of the General Security Agreements obliges the Grantor to pay PCTL "the Secured Moneys".[57] The definition of "Secured Moneys" in clause 1 of these agreements includes, in item (d)(ix), legal fees incurred in the exercise of any right of a Secured Party, as PCTL is, on a solicitor and own client basis. It was by these proceedings that PCTL sought to enforce its right to possession of the land. Hence the legal fees incurred by it in responding to an appeal in those proceedings are Secured Moneys which are payable by Project and Profits. I would accept that it is arguable that they are not also recoverable as additional legal fees within the meaning of clause 7.11 of the Loan Schedule. However, in view of the operation of clause 2 of the General Security Agreements, it is not necessary to resolve that issue.

Orders

[51] I would propose the following orders:

1. Appeal dismissed.

2. The appellants are to pay the respondent's costs of the appeal to be assessed on the indemnity basis.

[52] **FLANAGAN J:** I agree with the reasons of Gotterson JA and the orders that his Honour proposes.

---

57 AB 2 298, 356.