SUPREME COURT OF QUEENSLAND

CITATION:	*CSR Limited v Casaron Pty Ltd & Ors* [2002] QSC 021
PARTIES:	**CSR LIMITED (ACN 000 001 276)** (plaintiff) **v** **CASARON PTY LTD (ACN 077 155 429)** (first defendant) **PETER JOHN DANCE** (second defendant) **ELIZABETH ANN DANCE** (third defendan)
FILE NO/S:	S 6708 of 2001
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	15 February 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2002
JUDGE:	Holmes J
ORDER:	**Judgment for the plaintiff against the first defendant in the amount of $298,664.22.** **Application for judgment against the second defendant dismissed.**
CATCHWORDS:	PROCEDURE – QUEENSLAND – SUMMARY JUDGMENT Where plaintiff seeks summary judgment against the defendants for a liquidated debt arising out of the supply of building material – whether the defendant had a real prospect of successfully defending all or a part of the plaintiff's claim. SALE OF GOODS – PASSING OF PROPERTY AND RISK – *ROMALPA* CLAUSE Whether a *Romalpa* clause could be regarded as effective to retain title in goods where they are absorbed into a construction or manufacturing process – whether a liquidated debt could be claimed where property had not yet passed. GUARANTEE AND INDEMNITY – CONTRACT OF GUARANTEE

where guarantee, for any moneys then or in the future payable, was executed by defendant – whether consideration for guarantee was past –whether guarantee given under duress

Civil Procedure Rules (UK), r 24(4)
Supreme Court Rules
Uniform Civil Procedure Rules, r 292,

Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (2000) 202 CLR 588.
Borden (UK) Ltd v Scottish Timber Products Ltd [1981] 1 Ch 25
Foodco Management Pty Ltd & Anor v Go My Travel Pty Ltd [2001] QSC 291
Ledger v Cleveland Nominees Pty Ltd [2001] WASCA 269.
McPhee v Zarb [2002] QSC 004.
Style Finnish (Qld) Pty Ltd v Abloy Security Pty Limited [1994] 2 Qd R 203.
Swain v Hillman [2001] 1 All ER 91
Three Rivers District Council v Bank of England (No. 3) [2001] 2 All ER 513

COUNSEL:	Mr Linklater-Steele for the plaintiff Mr Byrne for the first and second defendants Mr Roney for the third defendant
SOLICITORS:	Carter Newell Lawyers for the applicant Hawthorn Cuppaidge and Badgery for the first and second defendants Gadens Lawyers for the third defendant

Application for summary judgment

[1] The applicant plaintiff seeks judgment against the first and second defendants under r 292 of the *Uniform Civil Procedure Rules* for what it says is a liquidated debt in the amount of $265,231.37 arising out of the supply of building materials. The second defendant, Peter Dance, is a director of the first defendant Casaron Pty Ltd, the name of which was previously PPP (Qld) Pty Ltd. On 12 March 1998 Mr Dance, on behalf of the company, completed an application for commercial credit which was furnished to the plaintiff. In consideration of the plaintiff's agreement to supply goods on credit to the first defendant he also executed a deed of guarantee dated 18 December 1998 for any moneys then or in the future payable. Documents setting out the plaintiff's terms of credit and terms of sale were provided to the first defendant. The terms of credit contain the following condition:

> "By applying for credit with CSR, you agree that … we own the goods until they are paid for. Goods supplied to you remain our property until we receive payment for all amounts you owe to us. If your account is in default we have the right to enter your premises

> (or the premises of any associated company or agent) to retake possession of the goods, without liability for trespass or damage. If you resell the goods, or if you sell products manufactured using the goods, then you must keep the proceeds of the sale in a separate, identifiable account until we have been paid in full."

The plaintiff claims the value of goods said to have been delivered pursuant to the agreement for supply on credit, less payments made by the defendants.

The pleadings

[2] The plaintiff's amended statement of claim alleges that between August 1999 and 23 March 2000 it supplied goods to the first defendant to the value of $554,820.74 and up until December 2000 had received payments totalling $288,864.77. The relief claimed is for judgment for the balance of $265,955.97 against the first defendant as a liquidated debt for breach of the agreement and, as against the second defendant, judgment in that amount as a liquidated debt for breach of guarantee.

[3] The first and second defendants' defence admits supply of goods by the first defendant but alleges that the goods were supplied through the plaintiff's agent, Abdo Pty Ltd trading as Central Gyprock, which was a supplier in its own right to the first defendant. In some instances the plaintiff had invoiced the first defendant for goods supplied and invoiced by Central Gyprock so that there had been a duplication of invoicing; and it was impossible without actual delivery evidence to ascertain the value of the goods actually supplied. The defence asserts an inability to admit the amount of payments made to the plaintiff because of the loss of the first defendant's records in a flood on 9 March 2001. It admits the execution of the guarantee by the second defendant and relies on its terms.

[4] It is pleaded in the defence that there was a compromise of the parties' rights in relation to moneys owed by the first defendant to the plaintiff as a result of a series of meetings in February 2000. At those meetings, it is alleged, it was agreed between the defendants and the plaintiff that some $300,000 worth of retention moneys would be collected by it from its various debtors and used to pay out, in the first instance, small creditors, and subsequently three major creditors of the second defendant, including the plaintiff. The agreement was, it is pleaded, that such payment would be in full and final satisfaction of any amounts owing and that no legal action would be taken against the first or second defendant for any amounts outstanding. The consideration is said to be an agreement by a secured creditor of the first defendant to waive its rights to payment ahead of unsecured creditors.

The defendants' grounds for resisting the application

[5] The written submissions provided on behalf of the first and second defendants seek to resist summary judgment on three bases. Firstly, it is said that there is some doubt as to what goods were delivered, with at least one demonstrated instance of double invoicing. The application, it is pointed out, varies in the amount sought from the figure claimed in the amended statement of claim. Secondly, the alleged

agreement by the plaintiff to desist from attempting to recover the amount outstanding is relied on. Thirdly, as to the guarantee, it is said that it was entered without consideration being given so far as any existing debt was concerned. That being so, it is argued that payments made after the date of entry of the guarantee ought to be debited against orders delivered after that date. It is also suggested that there was an element of duress in the entering of the guarantee. Finally, in oral submissions, an argument was advanced to the effect that the existence of the *Romalpa* clause precludes the plaintiff from seeking to recover the price of the goods as a liquidated debt.

The evidence on the application

[6] In support of the application for summary judgment the plaintiff relies on affidavits from its credit manager, Peter English, and the general manager of Abdo Pty Ltd, Mr O'Donovan. Mr English says that the plaintiff relies on monthly statements provided to the first defendant listing the relevant invoices and associated debits for each delivery and any credits. Goods were sold and delivered as set out in the invoices, and he has cross-referenced those statements with Central Gyprock invoices. As a result, he says, he is in a position to swear that there was only one duplication of invoices involving an amount of $724.60. It is, presumably, in recognition of that error that the amount sought by summary judgment is reduced from the figure of $265,955.97 in the amended statement of claim to that nominated in the application, $265,231.37.

[7] Mr O'Donovan says that Central Gyprock acted as distributor for the plaintiff. Deliveries to the first defendant and other customers were recorded in a delivery book. There was no instance that he could recall in which anyone on behalf of the first defendant complained of a delivery not having been received.

[8] On the issue of delivery, Mr Dance complains of an absence of signed delivery dockets. He says in his affidavit that there had in the past been difficulties reconciling invoices because both Central Gyprock and the plaintiff had invoiced and that on occasions invoices were sent for goods not delivered. He provides no support for either of those propositions; although he refers to Mr O'Donovan as conceding that goods were invoiced but not delivered. (The relevant paragraph of Mr O'Donovan's affidavit, in fact, does nothing of the sort but, rather, says that on occasions orders were received but not delivered.)

[9] As to the alleged compromise, Mr Dance swears that four major creditors, including the plaintiff and Abdo Pty Ltd, agreed in consideration of the secured creditor not exercising its rights and their being given the right "to collect and share pro rata all the collectable amounts of the first defendant" that they would give up any rights to sue the first defendant and its guarantors. (This is at odds with what is pleaded in the defence which alleges an agreement between three, not four creditors, that they would share pro rata after payments to small creditors; and it is noteworthy that it does not go so far as the allegation in the defence that "the plaintiff and other major creditors agreed that the payments to them of the retention moneys would be in full and final satisfaction of any amounts owing to them".)

[10] Mr Dance points to statements from a Mr Patterson, the national sales manager of one of the other four creditors and from Mr O'Donovan on behalf of Central Gyprock evidencing the agreement. Mr Patterson's statement says that it was agreed that the first defendant would collect outstanding moneys and pay, first its small creditors, and then the major creditors on a pro rata basis in exchange for the secured creditor abstaining from exercise of its rights. He concludes by saying,

> "The above agreement was agreed to by all those attending the meetings as the best course of action to take, as legal action would be of no benefit and we also agreed that any independent legal action would not be contemplated".

Mr O'Donovan's letter says similarly that the small creditors were to be paid first and then the major creditors paid pro rata in consideration of the secured creditor's giving up its rights. He says,

> "It was agreed that the major creditors would hold all legal actions against the company and its guarantors as it was clear to all involved that a wind-up action against the company … would jeopardise the situation."

[11] In his affidavit Mr O'Donovan asserts, however, that the intention was not to compromise but simply to allow time to the first defendant with the intention that it pay the entirety of its debt. Mr English, on the other hand, says that no agreement was finalised in February, but what was proposed was an arrangement by which the first defendant would repay the amount outstanding by 30 payments over three years at $20,000 per month distributed pro rata between the three major creditors. That proposal is reflected in a letter in evidence from the second defendant. What the plaintiff finally agreed, Mr English asserts, was to hold off commencing proceedings on the basis that it would receive $10,000 per calendar month until full repayment was achieved.

[12] Mr English exhibits to his affidavit a letter of 18 August 2000 containing a commitment by Mr Dance to repay the debt in full in less than 30 months. It contains the following statement:

> "I understand that there is likely to be a shortfall from the Casaron receivables and that I will have to arrange for payments from other sources in my control".

Another letter bearing the same date, on the letterhead of Casaron Pty Ltd, makes these statements:

> "This company is committed to fully repay CSR outstanding monies. The approximate quantum of the debt is acknowledged with only some of those late delivered "pro forma" type invoices to be reconciled".

After reference to "the agreement made" appears the following:

> "It was acknowledged by all present that there would be a shortfall and at that time Peter Dance as guarantor of the account would put into place a series of payments to continue to pay to extinguish the debt."

A letter received from Mr Dance in early June 2001, undertaking to pay the outstanding debt by 15 June, is also in evidence.

[13] In relation to the guarantee, Mr Dance says in his affidavit that it was signed following threats by the plaintiff to cease supply at a time when the first defendant was under contract on major works requiring use of the plaintiff's goods, with the plaintiff being aware of that position of jeopardy. The suggestion appears to be one of duress.

Summary judgment under the UCPR

[14] Rule 292 of the *Uniform Civil Procedure Rules* permits the court to give summary judgment for the plaintiff if it

> "is satisfied that –
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
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> (b) there is no need for a trial of the claim or the part of the claim."

As Wilson J pointed out in *McPhee v Zarb*[1], the wording of the summary judgment provisions in the *Uniform Civil Procedure Rules* together with the expressed purpose of the rules suggest that a more robust approach is envisaged than that which applied under O 18 r 1 of the *Supreme Court Rules*. There is, as her Honour observed in *Foodco Management Pty Ltd & Anor v Go My Travel Pty Ltd*[2] some assistance to be gained from the English authorities in relation to r 24(4) of the *Civil Procedure Rules (UK)*. In *Swain v Hillman*[3] Lord Woolf MR observed that the expression "no real prospect of succeeding" directed the court to "the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success".[4] His Lordship also cautioned in the following terms:

> "Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial … The proper disposal of an issue under Pt 24 does not involve the judge conducting a mini trial, that is not the objection of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

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1 [2002] QSC 004.

2 [2001] QSC 291.

3 [2001] 1 All ER 91.

4 At 92.

[15] In *Three Rivers DC v Bank of England (No. 3)*[5] Lord Hope elaborated on the nature of the inquiry where a defendant sought summary judgment. To some extent his observations can be applied to the consideration of whether a defendant resisting summary judgment has prospects of successfully defending:

> "It may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be [to] take that view and resort to what is properly called summary judgment but more complex cases are unlikely to be capable of being resolved in that way without conducting a mini trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in *Swain's* case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

The double invoicing/ non-delivery argument

[16] In the present case there exists an unparticularised allegation in the defence that credits in respect of duplicate invoices are outstanding. It is not supported by any evidence. Mr Dance expresses, on the basis of past difficulties, a concern that there may be errors not taken into account. The plaintiff swears to there being only one instance of duplication. Although the defendants, both by their defence and by the affidavit of the second defendant, complain of the absence of evidence of delivery, in circumstances where there is no specific complaint of non-delivery and the history of the matter has been one of acceptance by the defendants in their correspondence with the plaintiff of the amount owing, I do not think there is any real prospect of a successful defence of the claim on this basis.

The compromise argument

[17] In relation to the allegation of compromise, none of the material supports the allegation in the defence that the plaintiff and the other major creditors agreed to accept what could be retrieved of the retention moneys in full and final satisfaction of what was owed to them. The highest matters stand for the defence, on the evidence, is the bald assertion by Mr Dance that "it was agreed that they would give up their rights to sue the first defendant and the alleged guarantors". He goes on,

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5 [2001] 2 All ER 513.

however, to say that the statements from Mr Patterson and Mr O'Donovan evidence the agreement; and that certain parts of the affidavits of Mr O'Donovan and Mr English confirm its existence.

[18] Examining the material which is said to evidence the agreement, one sees in Mr Armstrong's statement an agreement to repayment over time, the rationale of which appears to have been a mutual view that legal action would not assist and would not therefore be contemplated. Mr O'Donovan in his statement refers to an agreement that the major creditors would "hold" legal action. Neither of those statements seems to me to amount to evidence that the creditors would forever abandon their rights to sue for the amounts outstanding. The affidavits of Mr English and Mr O'Donovan speak of a temporary reprieve from legal action; and the correspondence passing between the defendants and the plaintiff is not consistent with any abandonment of rights to pursue the balance of what was owing. The evidence points one way: to an agreement to hold back from legal action as long as an agreed level of payment was forthcoming. I do not, therefore, consider that the defendant has a real prospect of successfully defending the plaintiff's claim on this ground.

The Romalpa clause

[19] There remains for consideration the argument advanced in oral submissions as to the effect of the *Romalpa* clause in the credit agreement. Mr Byrne, for the defendants, argued that the claim was wrongly brought for a liquidated debt, being the price of the goods delivered. He relied on *Style Finish (Qld) Pty Ltd v Abloy Security Pty Limited*[6] and *Ledger v Cleveland Nominees Pty Ltd*[7] for the proposition that the plaintiff was restricted to the recovery of damages because property had not passed and hence the consideration for the price had not passed.

[20] The difficulty with that argument, it seems to me, lies in the nature of the goods sold which were building materials intended, on Mr Dance's account, to be used, to the plaintiff's knowledge, on "major jobs". This was not, therefore a circumstance – unlike those in *Style Finish* and *Ledger* – in which goods were preserved in an identifiable form. The situation is more akin to that in *Borden (UK) v Scottish Timber Products Ltd*[8] in which it was held that once resin supplied by the vendor had been used in the manufacture of chipboard, the vendor's title to it under a title retention clause ceased to exist, so that no interest in the finished product could be traced by the vendor.

[21] Also illustrative of the distinction between the position where identifiable goods are retained and where goods are absorbed into a construction or manufacturing process

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6 [1994] 2 Qd R 203.

7 [2001] WASCA 269.

8 [1981] 1 Ch. 25.

is illustrated by the majority of the High Court in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd*[9]. The clause under consideration reserved title of the goods to the buyer until payment of the purchase price but contained a further condition that if the goods were used in some manufacturing or construction process, the purchaser was to hold the relevant part of the proceeds in trust for the vendor. The court contrasted the position between steel sold for manufacturing purposes and steel which was retained by the purchaser intact:

> "No question arises as to the seller retaining any proprietary interest in the steel it supplied under the invoices to the buyer. This is because the steel supplied by the seller was no longer capable of being ascertained in the steel products manufactured by the buyer. This loss of ascertainability may be contrasted with the circumstances in which the first paragraph of the reservation of title clause applies. This paragraph has an operation where the steel supplied by the seller remains intact in the hands of the buyer or is otherwise dealt with by the buyer in such a way that the steel supplied does not lose its ascertainability. In such a case the goods would remain the property of the seller."[10]

[22] In the present circumstance, in which the goods were sold for use in building works it seems improbable that the *Romalpa* clause could be regarded as effective to retain title in them. At best, property must have passed once the materials were incorporated into building works. There is no suggestion that any of the materials supplied were preserved intact by the defendant. Consequently, it seems to me that there was a passing of property and that the plaintiff is entitled to sue for the price of the goods.[11] Even if that were not so, r 292, unlike its predecessor O 19, does not restrict the plaintiff to seeking judgment in respect of a liquidated debt. Its terms leave it open to an applicant to seek summary judgment for damages. In the present case there is no reason to suppose that damages would be in any amount other than that of the price of the goods supplied. I conclude therefore, that the plaintiff is entitled to judgment against the first defendant for the debt in the amount of $265,231.37.

The guarantee

[23] As against the second defendant, the application for judgment is based on the guarantee. On the face of the document, there is some support for the second defendant's argument that the consideration for the guarantee was past. The guarantee is expressed as being given "in consideration of CSR having agreed to supply goods or services from time to time on credit to PPP (Qld) Pty Ltd". The

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9 (2000) 202 CLR 588.

10 At 598.

11 Unlike the *Associated Alloys* situation, it seems unlikely that an argument could be mounted that any funds derived from their use were subject to a trust, since the clause specifically refers to reselling of the goods or products manufactured from them, but not to profits derived from their use in construction. In any event, that is not an issue here.

only evidence of an agreement to that effect is of one made in June 1998. It is apparent from the amended statement of claim that as originally drawn, it was premised on the supposition that the execution of the application for credit and the guarantee were contemporaneous.

[24] Mr Linklater-Steele, in argument, suggested that the guarantee was given at a time when an increase in the first defendant's credit limit was sought; but there was no evidence to that effect. Mr English's affidavit (at paragraph 10) speaks of the sale and delivery of goods being made "pursuant to the application, terms of credit and the conditions of sale". He does not suggest the entering of any fresh or supplementary credit agreement. It may well be that there was some discussion at the time the guarantee was signed as to increase or continuation of the credit line already given; but the document of itself does not indicate anything beyond the existing agreement and there is no evidence which would throw any light on that aspect. I consider therefore that there is here a live issue requiring investigation, and that the second defendant should not be deprived of his opportunity to advance his argument in this respect at a trial.

[25] As to the argument of duress, on the evidence before me I would not consider there to be any substance in this suggested line of defence. It is to be noted that it is not pleaded in the defence; and at its highest while it might be said that the plaintiff sought the guarantee with the knowledge that the first defendant had a pressing need for its goods, there is nothing whatever to suggest any threat or pressure applied by the plaintiff.

[26] The defendant's counsel in submissions forwarded after the hearing also sought to raise an argument that, in circumstances where the creditors were alleged to have agreed to forebear from suing the first defendant, the second defendant's guarantee should be regarded as discharged. Since I do not think there is evidence to support the existence of any such agreement on the part of the creditors I do not find much to recommend this argument. There might, instead, be an argument on the basis that there was an agreement to extend time for payment; but I do not, in view of the conclusion I have reached that the action as against the second defendant should go to trial, find it necessary to consider this matter or to seek submissions on it from the plaintiff's counsel.

Orders

[27] For the reasons given, the plaintiff is entitled to judgment against the first defendant for the sum of $265,231.37. Interest is sought from 5 December 2000, a date apparently selected by reference to the fact that the defendants made the last of their payments then. It seems reasonable to suppose that the cause of action arose earlier. Interest at 10.5 percent from that date to the date of judgment gives a figure of $33,342.85. Accordingly, I give judgment for the plaintiff against the first defendant in the amount of $298,664.22. I dismiss the application for judgment against the second defendant.

[28] Subject to the parties' submissions I would expect that the plaintiff should have its costs of the application as against the first defendant, to be assessed on a standard basis, and that the costs of the application as against the second defendant should be costs in the cause.