SUPREME COURT OF QUEENSLAND

CITATION:	*H M Arnold v Australasian Trade Exchange (Management) Limited & Ors* [2002] QSC 050
PARTIES:	**HEATHER MARGARET ARNOLD** (respondent/plaintiff) **v** **AUSTRALASIAN TRADE EXCHANGE (MANAGEMENT) LIMITED ACN 069 801 921** (first defendant) **PAUL JURIC and BRIDGET JACKIE JURIC** (second defendants) **KARL MARZINI** (third defendant) **KEITH SAMUEL BEVERLEY and CLAUDIA AUGUSTE BEVERLEY** (applicant/fourth defendants)
FILE NO/S:	No. S 9543 of 1996
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	12 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2002
JUDGE:	White J
ORDER:	**Dismiss the application.**
CATCHWORDS:	DEFAULT JUDGMENT – Setting aside GUARANTEE AND INDEMNITY – Liability of guarantors – Sufficient Memorandum in writing – Compromise MORTGAGES – Remedies of mortgagee *Property Law Act* 1974, s 56 *Amalgamated Investment & Property Co. Ltd (In liq) v Texas Commerce International Bank* [1982] QB 84 *Ballantine v Harold* (1893) 19 VLR 465 *Brisbane South Regional Health Authority v Taylor* (1986) 186 CLR 541 *Eslea Holdings Limited v Butts* [1986] NSWLR 175 *Green v Rozen* [1955] 1 WLR 741 *In Re Hoyle v Hoyle* [1893] 1 Ch 84

McKenzie v Coulson (1860) LR 8 Eq 368
National Mutual Life Association of Australasia Ltd v Oasis Development Pty Ltd [1983] 2 Qd R 441
R v Lawrence (1982) AC 510
South Coast Oils (QLD & NSW) Pty Ltd v Look Enterprises Pty Ltd [1988] 1 Qd R 680
Tonkin v Johnson [1999] 2 Qd R 318

COUNSEL: Mr R. I. Lilley for the applicant/fourth defendants
Mr M. Drysale for the respondent/plaintiff

SOLICITORS: Barry Nilsson for the applicant/fourth defendants
Nicol Robinson Hallets for the respondent/plaintiff

[1] The fourth defendants, Mr and Mrs Beverley, have applied to the court to have the judgment entered in favour of the plaintiff against them set aside and for other orders.

[2] The specially endorsed writ dated 11 November 1996 was served on the fourth defendants on 15 November 1996. An entry of appearance on behalf of the fourth defendants dated 29 November 1996 was filed on 6 December 1996. Judgment was entered in default of defence on 6 February 1997 against the fourth defendants in the sum of $73,590.28. A writ of *fieri facias* was sealed for that amount plus interest from the date of judgment on 12 February 1997.

[3] This application was filed in the registry on 27 (and 28) August 2001 and given a hearing date in early September 2001 but for some reason, not explained, was not heard until 27 February this year.

[4] The fourth defendants (and the second and third defendants) were sued as the guarantors of the first defendant, the principal debtor. It is the identity of the principal debtor in the guarantee instrument which is at the heart of this application to set aside the default judgment. Because the "incorrect" company is named the fourth defendants maintain that there is insufficient memorandum in writing for the purposes of s 56 of the *Property Law Act* 1974.

[5] In early November 1995 the plaintiff agreed to lend $66,000 to the first defendant, Australasian Trade Exchange (Management) Limited ("the Management company"), to assist with the purchase of land at Caboolture. The loan was secured by a mortgage over the land. As at the date of the loan Mr and Mrs Beverley were both directors of the Management company and Mrs Beverley was also a director of Australasian Trade Exchange Limited ("the Trade company"). The second and third defendants were also directors of the Management company.

[6] The plaintiff's solicitor, Mr K.J. O'Reilly, (whose firm was MacGregor Robson then MacGregor O'Reilly) understood from the mortgage broker for the loan that Mr D. Bundesen of Bundesen & Associates was to be the solicitor on the loan transaction for all the defendants. Mr and Mrs Beverley now deny that that was so. Mr O'Reilly prepared the necessary documentation for the loan including the guarantee (which did not initially include Mr and Mrs Beverley) which was sent to Mr Bundesen under cover of letter dated 6 November 1995.

[7] Mr Bundesen notified Mr O'Reilly by fax the following day:

> "Please be advised our client has now advised the original contract was incorrectly stated as Australasian Trade Exchange Limited rather than the correct Australasian Trade Exchange (Management) Limited ACN 069 801 949. If you would correct the form 2 and the Guarantee we shall have the documents returned to you tomorrow."

[8] On 7 November 1995 Mr O'Reilly forwarded an amended mortgage with the necessary name change. Due, however, to an oversight, as Mr O'Reilly deposes, the guarantee which now included Mr and Mrs Beverley together with the second and third defendants as guarantors, continued to describe Australasian Trade Exchange Limited as the borrower although the schedule to the guarantee describes the mortgage as being granted by Australasian Trade Exchange (Management) Limited to secure the sum of $66,000. This appears immediately above the signatures of the guarantors which are through the stamp of the common seal of Australasian Trade Exchange (Management) Limited. The document is dated 9 November 1995.

[9] A further guarantee was signed by the guarantors including Mr and Mrs Beverley on 13 November 1995 without the common seal of Australasian Trade Exchange (Management) Limited. That is the instrument which was stamped for duty on 14 November 1995. In it, however, the schedule refers to the mortgagor as Australasian Trade Exchange Limited as does the description of the mortgagor on the first page.

[10] Amongst the bundle of documents which Mr O'Reilly deposes he received from Mr Bundesen was a "Statement of Particulars of Proposed Loan". The plaintiff is described as the lender, the Management company is described as the borrower/mortgagor, the second, third and fourth defendants are described as the guarantor, the loan is $66,000. Below on the same page is an acknowledgement by, *inter alia*, Mr and Mrs Beverley that they had received that information prior to execution of the security documents. It is dated 9 November 1995.

[11] Mr O'Reilly deposes that prior to settlement of the loan he became aware that the executed guarantee described the mortgagor as the Trade company instead of the Management company. On 13 November 1995 he received a facsimile transmission from Mr Bundesen in the following terms:

> "RE: AUSTRALIAN TRADE (MANAGEMENT) LTD
>
> DEED OF GUARANTEE
>
> We refer to the above and would advise that whilst on the face of the page 1 thereof it refers to Australasian Trade Exchange Limited it is agreed by the Directors that it refers to Australasian Trade Exchange (Management) Limited and was executed by each director of the latter company on that understanding." ("KJO 17" to the affidavit of Kevin John O'Reilly filed 26 February 2002.)

The loan transaction was settled on 14 November 1995.

[12] Mr Beverley deposes that at no time has Mr Bundesen acted for him or for Mrs Beverley and in particular:

- neither gave instructions directly or indirectly acknowledging that they were aware that the guarantee referred to the Trade company rather than to the Management company;

- neither gave instructions authorising the letter of 13 November 1995;

- neither attended at the office of Bundesen & Associates.

[13] Mr Beverley deposes that he and Mrs Beverley first became aware that the guarantee referred to the Trade company rather than to the Management company when informed by their present solicitors. He does not depose when that occurred.

[14] On about 28 August 1996 Mr and Mrs Beverley requested copies of the mortgage, guarantee, epitome of mortgage and registration confirmation statement. Mr O'Reilly deposes that although copy documents had been provided for Mr and Mrs Beverley to Bundesen & Associates he caused copies to be sent to them under cover of letter dated 28 August 1996.

[15] The Management company defaulted under the mortgage and was served with a notice of exercise of power of sale and notice to tenant pursuant to the *Property Law Act*. On 11 October 1996 Mr and Mrs Beverley attended at Mr O'Reilly's office to discuss the payment of the loan by the Management company and to ask for more time. This was unsuccessful and notices pursuant to the *Property Law Act* were served on the Management company with copies, *inter alia,* to Mr and Mrs Beverley at their residential address, dated 16 October 1996. This was followed by correspondence to the guarantors demanding payment of the principal and interest. They failed to remedy the default.

[16] The specially endorsed writ was issued on 11 November 1996. Correspondence ensued between Mr and Mrs Beverely's solicitors, Connolly Lawyers, and Mr O'Reilly about the forthcoming auction of the mortgaged land and negotiations for settlement. As these were not fruitful Mr O'Reilly informed Connolly Lawyers by letter dated 22 January 1997 that judgment would be entered. Judgment was entered on 6 February 1997, a writ of *fieri facias* was issued on 12 February 1997 and a request for registration of the writ lodged in the Department of Natural Resources over Mr and Mrs Beverley's property on 17 February 1997.

[17] Further correspondence to settle the matter on terms more favourable than the immediate execution of the judgment occurred between Mr O'Reilly's firm and Mr and Mrs Beverley's solicitors.

[18] Payment was received on behalf of the plaintiff in settlement of the judgment over some months in 1997, save for the costs and outlays recoverable under the mortgage, which eventually resulted in a settlement whereby Mr O'Reilly's firm refunded $2,000 to Mr and Mrs Beverley.

[19] Mr Bundesen has deposed that he acted as solicitor for each of the defendants in relation to the loan and guarantee but has been unable to locate his file although he has inspected the plaintiff's solicitors' file. He has no specific recollection of the entire transaction but does recall a meeting which occurred in the office at Coopers Plains of Mr Paul Juric, one of the second defendants. He recalls that the second defendants were present as well as a finance broker, another couple and another man. Mr Bundesen deposes:

> "I hesitate to specifically nominate that it was Keith Samuel Beverley, Claudia Auguste Beverley and Karl Marzini [the third defendant] but I believe it was those persons, given that I signed the Certificate being exhibit 'DSV 5' and given what I say as set out below regarding the procedure I followed when giving such Certificates." Para 5(b) to the affidavit of Donald Stewart Bundesen filed 26 February 2002.

[20] Mr Bundesen deposes that when he was asked to sign the solicitor's certificate for both the mortgage and guarantee those instruments had been signed by the relevant parties prior to his attendance at that office and that is reflected in paragraph 4 of his certificate.

[21] He deposes that he is unable specifically to recall what was said to him by the parties or what advice was given by him to the parties on that occasion but he sets out the procedure which he "invariably followed" in relation to guarantee documents. He deposes that it was not his practise to sign such a certificate without each guarantor having been present. He further deposes that the letter of 13 November 1995, referring to the basis upon which the directors signed the guarantee, is his signature but he cannot recall the correspondence.

[22] Mr Griffith was the solicitor at Connolly Lawyers on whom Mr and Mrs Beverley attended in November 1996 shortly after being served with the specially endorsed writ in these proceedings. They instructed that they wished to defend the proceedings. Mr Griffith, who no longer practises as a solicitor, entered an appearance to the writ on their behalf and deposes that he did not appreciate that since the statement of claim was specially endorsed a defence needed to be filed to avoid judgment in default.

[23] After being served with the writ of *fieri facias* at about the end of February 1997 Mr and Mrs Beverley again consulted with Mr Griffith. Mr Beverley deposes (but Mr Griffith does not) that Mr Griffith advised that since nothing could be done they should pay as soon as possible to avoid penalties. According to Mr Beverley they were not advised that an application to set aside the judgment could be made.

[24] In due course Mr and Mrs Beverley instructed new solicitors, Stockley Furlong, to issue proceedings in the District Court against Connolly Lawyers.

[25] The ground of defence in the draft defence exhibited to Mr Beverley's affidavit is that the Management company was not the debtor whose debts Mr and Mrs Beverley guaranteed in the guarantee.

General principles on an application to set aside default judgment regularly entered

[26] When considering an application to set aside default judgment regularly entered the court will generally consider the following matters:

- whether the defendant has given a satisfactory explanation of its failure to defend;

- if there has been delay, whether the defendant has given a satisfactory explanation of its failure to defend and/or make the application to set aside; and

- whether or not the defendant can show a *prima facie* defence on the merits of the claim on which the judgment is founded.

[27] McPherson JA in *Tonkin v Johnson* [1999] 2 Qd R 318 at 320, with whom Williams J (as his Honour then was) and Cullinane J agreed, observed:

> "It may be accepted that, as a general rule, a defendant against whom a default judgment has been regularly entered in conformity with the Rules of Court can, on showing a defence on the merits, ordinarily expect to have it set aside even after a lengthy period of time has elapsed from the date of judgment. There are reported cases of judgment being set aside many years after the event. Success on such an application, is, however, not a matter or right but of discretion."

See also his Honour's observations to similar effect in *National Mutual Life Association of Australasia Ltd v Oasis Development Pty Ltd* [1983] 2 Qd R 441 at 449.

[28] If it be accepted that Mr and Mrs Beverley were not advised by Mr Griffith that they could apply to have the defence set aside, nonetheless they retained new solicitors, Stockley Furlong, by December 1997 and engaged in negotiations about legal costs owing under the mortgage. All of the relevant documents had been in Mr and Mrs Beverley's possession since August 1996 if not earlier. There was no suggestion at any time that the judgment which had been entered against them was in any way deficient. According to Mr Drysdale's written submissions (which was not objected to) it was some ten months after Mr and Mrs Beverley brought their claim against Connolly Lawyers before this application was filed in August 2001.

[29] Mr Lilley for Mr and Mrs Beverley submits that there is no suggestion of prejudice in the material filed on behalf of the plaintiff. It is clear that there is comprehensive documentary evidence concerning the loan and guarantee transactions. However, Mr Bundesen's affidavit makes clear that time has significantly eroded his recollection. He is now unable to locate his file although he does not depose why. Of significance would be his understanding as to who had instructed him to act as solicitor and to send the letter of 13 November 1995. Mr Beverley's affidavit is carefully composed in so far as he deposes that he and Mrs Beverley had not attended at Bundesen & Associates' offices but fails to deal with the circumstances in which they came to execute the guarantee which, Mr Bundesen deposes, occurred at Mr Juric's office.

[30] Mr Bundesen is no longer able to recall the conversations between the parties on that day and is unable to recall precisely who was present apart from those whom he described as Mr and Mrs Juric and the finance broker. Had the application been brought within a reasonable time it is more than likely that the file with its notes of attendances would have been available and Mr Bundesen may well have had more detailed recollection of the transaction. He may particularly have recorded these details since there were problems with the names of the parties in the instruments.

[31] There is, of course, prejudice which is inherent in delay without identifying particular prejudice. In the well-known passage of McHugh J in *Brisbane South*

Regional Health Authority v Taylor (1996) 186 CLR 541 at 551 he quotes from the judgment of Lord Hailsham LC in *R v Lawrence* [1982] AC 510 at 517 '[w]here there is delay the whole quality of justice deteriorates'. His Honour noted:

> "But sometimes, perhaps more often that we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo* (1972) 407 US 514 at 532 'What has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive evidence has disappeared without anybody now 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose."

[32] As his Honour observed at 552, people should be able to arrange their affairs and utilise their resources on the basis that claims will no longer be made against them, so to, plaintiffs might expect that a matter long since settled might conveniently be relegated to the past. There is no affidavit from the plaintiff but it is clear from the court file that she did not proceed against the other defendants. Without leave, unlikely to be given, she will be precluded from doing so.

Defence on the merits

[33] Issues of delay and prejudice will need to be balanced against any defence on the merits raised by the defendants. Mr and Mrs Beverley's defence, in essence, is want of sufficient memorandum in writing of their promise to guarantee the liability of the Management company as required by s 56 of the *Property Law Act* 1974.

[34] Mr Lilley submitted that any application for rectification of the guarantee to substitute the Management company's name as borrower/mortgagor in the guarantee is no answer because when the action was commenced by the plaintiff and when judgment was entered there was insufficient memorandum in writing. He relied on *South Coast Oils (QLD and NSW) Pty Ltd v Look Enterprises Pty Ltd* [1988] 1 Qd R 680 at 690 per Macrossan J. Courts rectify instruments and not contracts, *McKenzie v Coulson* (1869) LR 8 Eq 368 per James VC at 375 and until that occurs there may be no sufficient memorandum. As Bowen LJ observed in *In Re Hoyle v Hoyle* [1893] 1 Ch 84 at 99 the question is not one of intention of the party who signed the instrument but simply one of evidence against him.

[35] Mr Drysdale submitted that the many documents executed by Mr and Mrs Beverley in and about the loan and guarantee would, if read together, constitute sufficient written evidence of the guarantee, see *Ballantime v Harold* (1893) 19 VLR 465, apart from the letter from Mr Bundesen of 13 November 1995. It is conceded by Mr Lilley that if it were free from doubt that Mr Bundesen was acting for Mr and Mrs Beverley when he sent that letter there would be sufficient memorandum in writing to satisfy the requirements of s 56 of the *Property Law Act*. Because I am of the view that this matter can readily be disposed of on other grounds I do not propose to investigate those writings more closely but Mr Drysdale's submission is not without force.

[36] Mr Drysdale, however, advances two further reasons why there is no defence on the merits. On the material before the court it is clear that when Mr and Mrs Beverley executed the guarantee they believed they were guaranteeing the liability of the Management company in respect of the loan from the plaintiff. They knew the plaintiff was advancing money to that company, the security for which was a mortgage over the land, the purchase of which was assisted by the loan, and by the guarantees of the first, second and fourth defendants.

[37] This state of affairs falls clearly within the doctrine of estoppel by convention as enunciated in *Spencer Bower and Turner, Estoppel by Representation*, 3rd ed (1977) at 157. That passage was quoted with approval by Samuels JA in *Coghlan v SH Lock (Australia) Ltd* with whom Hope JA agreed. A statement of the doctrine taken by his Honour from the reasons for judgment of Brandon LJ in *Amalgamated Investment & Property Co. Ltd (In Liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 130 appeared in the following terms:

> "… This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed."

See also *Elsea Holdings Limited v Butts* 1986] NSWLR 175 at 185. These were guarantee cases.

[38] That the misdescription arose in the office of the plaintiff's solicitors is no defence. The transaction took place on the basis of the assumption that Mr and Mrs Beverley were guaranteeing the due performance of the repayment of the loan by the Management company. They were not acting on any representation from the plaintiff, *Coghlan* at 166.

[39] However, the primary basis upon which the plaintiff resists Mr and Mrs Beverley's application is that the proceedings between them have been compromised.

[40] As has been mentioned, negotiations extending over many months took place after judgment was entered on 6 February 1997. The plaintiff agreed to place execution of the writ of *fieri facias* in abeyance until 4 June 1997 by letter dated 27 March 1997 on the basis that $40,000 was paid by 4 April 1997 and the balance mortgage debt including interest and costs be paid on 4 June 1997; Mr and Mrs Beverley were at liberty to arrange the auction of the mortgaged property themselves.

[41] The $40,000 was received on 4 April 1997. Connollys Lawyers requested an extension of time for payment of the final amount until 14 July 1997 which would have allowed for a 30 day settlement period on any contract of sale at the auction on 14 June. This was refused. However, on 3 June an extension to 21 July on the basis that Mr and Mrs Beverley would pay $10,000 by 4 June 1997 was agreed to.

[42] Connollys Lawyers requested a bill of costs in taxable form in respect of the costs and outlays which Mr O'Reilly's firm was seeking to recover under the terms of the

mortgage in June 1997. It was provided on 8 April 1998 to Stockley Furlong and after further correspondence the sum was compromised and costs reduced by some $2,000.

[43] Mr Lilley submitted that Mr and Mrs Beverley did not pay any less than the judgment sum which was entered on 6 February 1997 so that the proceedings were not compromised. That cannot be so. The writ of *fieri facias* was adjourned in order to allow Mr and Mrs Beverley to market the mortgaged land and to pay payment of the judgment sum over a lengthy period by instalments, *Green v Rozen* [1955] 1 WLR 741.

[44] When all of these matters are considered, that is, that there has been lengthy delay in bringing this application which, to a large extent, is unexplained, and that delay has the potential to prejudice the plaintiff together with no *prima facie* case on the merits then the discretion should be exercised to dismiss the application.

[45] Unless there are submissions to the contrary the applicant/fourth defendants should pay the respondent/plaintiff's costs of and incidental to the application to be assessed.