SUPREME COURT OF QUEENSLAND

CITATION:	*National Australia Bank Limited v Troiani and Anor* [2002] QCA 196
PARTIES:	**NATIONAL AUSTRALIA BANK LIMITED** ACN 004 044 937 (plaintiff/respondent) **v** **SANTE TROIANI** (first defendant/appellant) **RITA CESARINA TROIANI** (second defendant/appellant)
FILE NO/S:	Appeal No 3447 of 2001 SC No 7759 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	10 April 2002
JUDGES:	McPherson JA, Fryberg and Helman JJ Separate reasons for judgment of each member of the Court; McPherson JA and Fryberg J concurring as to the orders made, Helman J dissenting.
ORDER:	**1. Appeal allowed. Judgment for the plaintiff varied by reducing amount to $3, 451, 599.24.** **2. The appellants pay half the respondent's costs of the appeal to be assessed.**
CATCHWORDS:	CORPORATIONS – Receivers, Managers and Controllers – Appointment – By creditor – Whether agent for creditor PROCEDURE – Supreme Court procedure – Queensland – Practice under Rules of Court – Summary judgment – Whether inappropriate exercise of discretion – Whether respondents had delayed in bringing the application for summary judgment REAL PROPERTY – Valuation of Land – Methods of Valuation – Expert Opinion – Qualifications of Expert – Owner – Reliance on limited sales data *Property Law Act* 1974 (Qld), s 85 *Corporations Law* (Cth), s 420A

Uniform Civil Procedure Rules 1999 (Qld), r 292, r 766(1)(c)

Miles v Bull [1969] 1 QB 258, considered
Talbot-Butt v National Australia Bank [2001] QSC 249, referred to

COUNSEL: The appellants appeared on their own behalf.
D J S Jackson QC, with I Perkins, for the respondent.

SOLICITORS: The appellants appeared on their own behalf.
Mallesons Stephen Jaques for the respondent.

[1] **McPHERSON JA**: I have read and agree with the reasons of Fryberg J. The appeal must be allowed to the extent stated in those reasons. The appellants should pay half of the respondent's costs of appeal to be assessed.

[2] **FRYBERG J:** The appellants were the first two defendants in an action brought by the plaintiff ("the bank") to enforce a guarantee of the indebtedness of a company called Wide Bay Brickworks Pty Ltd ("the company"). The first defendant was the managing director and major shareholder (over 60 per cent) of the company. Default judgment was entered against the third, fourth and fifth defendants and on 22 March last year, subsequent to the delivery of pleadings and particulars, the Chief Justice gave judgment against the appellants summarily for $5,333,452.24 with costs to be assessed on an indemnity basis. The appellants now challenge both the judgment and its amount. They were represented by senior counsel before the Chief Justice, but were unrepresented in this division.

[3] The company carried on business as a brick and tile maker at Bundaberg. It employed more than 140 people. In 1993, it received an Ethnic Business Award in a national competition. Shortly thereafter, the bank invited it to become a customer. After discussions, the bank provided the company with three financing facilities: an overdraft account; a "multi-option facility" to refinance existing lending and provide additional capital funding; and certain lease facilities, including in particular for the acquisition of a new roller kiln for $8.4 million.

[4] On 26 April 1995 the appellants executed a guarantee in the bank's favour securing the whole of the company's indebtedness. Clause 6 of the guarantee provided as follows:

> "6.1 You guarantee that the customer will pay us all the amounts which the customer owes us at any time. You agree to pay us any amounts which the customer owes us up to the basic liability as at that time we demand that you pay them to us.
>
> 6.2 The amounts which the customer owes us at any time are:
> (a) all amounts which at that time we have advanced or paid ...
> (i) to or on behalf of the customer;
> ...
> (b) all amounts for which at that time the customer is or may become actually or contingently liable to us for any reason ...."

[5] On its face, that wording made the appellants liable upon demand for the whole amount lent to the company, regardless of whether the company defaulted or the debt was due. The Chief Justice decided the application on that basis, holding: "It was not necessary for the company to have been in default". By affidavit, the asset structuring manager of the bank swore that the amount owing by the company to the bank as at 28 February 2001 was $5,305,964.44. The Chief Justice held that these matters were sufficient to establish the "apparent" obligation of the appellants to pay that amount, and went on to deal with the matters raised by way of defence.

[6] In this division, the appellants did not challenge this interpretation of cl 6, either orally or in the outline of argument prepared by their solicitor. Its correctness depends upon concluding that "owes" refers simply to the amount advanced to the company and to other amounts for which it is liable to the bank, regardless of whether any of those amounts is due. Superficially, a construction which (to take an extreme case) would permit the bank to advance a sum to a debtor for a fixed term and the following month (or day) demand repayment of the sum from a guarantor notwithstanding that the debtor was not in default seems commercially dysfunctional. However the appellants did not argue for any other construction, nor did they make any allegation of unconscionability in relation to the clause. Notwithstanding that they are unrepresented, I am not disposed to go behind the *prima facie* meaning of the clause.

[7] I should add that the bank's approach (which it maintained on this appeal) was to plead and attempt to prove the loan to the company, default by the company under the registered charge securing that loan, acceleration of and demand to the company for the repayment of the total amount owing, and demand for that amount made to the guarantors.[1] Were it not for my acceptance of the *prima facie* interpretation referred to above, I would have proposed that the appeal be re-listed for further argument. As far as I can see, there was no evidence before the Chief Justice that the bank had given a notice in writing to the company under cl 14.1 of the charge exercising its option to treat the secured amounts as payable immediately. But for the terms of cl 6, it would seem that the application should have been dismissed.

[8] By their notice of defence, the appellants raised a number of issues. They were helpfully grouped in the argument for the bank presented by Mr Jackson QC, a grouping which was similar to that adopted by the Chief Justice and followed in the outline of submissions prepared on behalf of the appellants. I shall follow the same approach.

Sale of company property at an undervalue

[9] On 6 August 1999, the bank appointed receivers to the company. The receivers sold all of the company's assets. The defendants pleaded that the bank was under a statutory duty to take reasonable care to sell the company's property at market value, and that it did not do so. They relied upon s 85 of the *Property Law Act* 1974 and s 420A of the *Corporations Law*. The first difficulty with this defence is that it was not the bank which sold the company's property: it was the receivers. The appellants sought to overcome this difficulty by arguing that there was evidence from which it could be inferred that the receivers were acting as agents for the bank. They accepted that the receivers were acting as agents for the company, but submitted that they were *also* acting as agents for the bank.

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1 It even amended its statement of claim on the day the application was filed to plead new facts necessary to support this approach.

[10] The only evidence to support this conclusion of fact was that the same firm of solicitors acted on behalf of the bank and the receivers and prepared a deed which was the subject of one of the particularised allegations of a lack of reasonable care by the receivers; and that the receivers had an indemnity from the bank. The bank chose not to lead any evidence on this point. It is of course a matter which would be peculiarly within the knowledge of the bank and the receivers. Since the application was made before the disclosure process was undertaken, the appellants did not have access to any internal documents held by any of those persons. In these circumstances, it is not difficult to draw the inference that nothing which the bank could have said on the point would have advanced its case.[2] The Chief Justice held that the commonality of solicitors was not an unusual circumstance and that the case was insufficiently arguable to justify its going forward.

[11] For a plaintiff to obtain summary judgment, the court must be satisfied that the defendant has no real prospect of successfully defending the claim, and that there is no need for trial of the claim.[3] Although the bank bore the onus of proof on the application,[4] there was an evidentiary onus on the appellants to show some basis for arguing that there was a real prospect within the meaning of the rule. I do not think that they did so. The evidence relied upon is in my view too flimsy foundation for the purpose. However the question whether there is a need for a trial of the claim is more difficult. Before us, the appellants submitted that the examination of the factual circumstances surrounding the relationship between the bank and the receivers was a matter which should have been allowed to proceed to trial. They referred to *Westpac Banking Corporation v Russell*,[5] where Ambrose J adjourned an application pending disclosure on the issue of agency.

[12] Some support for this submission is to be found in the decision of Megarry J in *Miles v Bull.*[6] That was a decision under the English equivalent of the (repealed) *Rules of the Supreme Court of Queensland*. This Court has held: "Subject to the particular requirements of [the *Uniform Civil Procedure Rules*], the principles developed in leading cases concerned with such applications remain relevant."[7] Megarry J said (referring to the words in the previous rule "that there ought for some other reason to be a trial"):

> "These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff."[8]

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2 *Jones v Dunkel* (1959) 101 CLR 298.
3 *Uniform Civil Procedure Rules*, r 292.
4 *Peldan v Romano* [2001] QSC 463; *National Australia Bank Ltd v Hart* [2002] QSC 51.
5 [2000] QSC 339.
6 [1969] 1 QB 258.
7 *Bell's Securities Pty Ltd v Wickham Developments Ltd* [2001] QCA 204 at para [3].
8 [1969] 1 QB 258 at 265.

That passage was recently applied by the Full Court of the Supreme Court of Western Australia in *Wedge v Service Finance Corporation Ltd*[9], where many of the authorities are helpfully collected. Although those words are not the same as the words of r 292 of the *Uniform Civil Procedure Rules* (where the expression is "there is no need for a trial"), as presently advised, I see no significant difference in their effect.

[13] The question is not addressed in the Chief Justice's reasons for judgment. It is unlikely that it would have been ignored had it been argued before him. Certainly there was no complaint before us that the Chief Justice ignored such an argument. The evidence relied upon by the appellants consisted of self-serving assertions buried in a letter from their own solicitors to the bank's solicitors, which one would not have thought was tendered for the purpose of proving agency. Had the issue been squarely raised, the bank might have adduced further evidence or the Chief Justice might have done what the appellants themselves in their written submission suggest as another alternative: he might have adjourned the application pending disclosure on the issue of agency. In all the circumstances, I think that the Chief Justice's conclusion on this aspect should stand.

[14] That being so, it is unnecessary to say anything about whether it was arguable that the company's property was sold at an undervalue nor whether if so, the appellants could have a set off; and since the appellants have commenced third party proceedings against the receivers, it is undesirable to do so.

Sale of the appellants' property at an undervalue

[15] Between 1999 and the making of the application, the bank as mortgagee sold seven parcels of land belonging to the appellants which the appellants argued were also effected at an undervalue. Although not pleaded, this matter was raised in an affidavit on the application and was dealt with by the Chief Justice. He held:

> "In ascribing particular values, [Mr Troiani] again engages in no more than assertion, however, because Mr Troiani is not shown to have any expertise in valuation. This sort of approach cannot avail the respondents in opposing a grant of summary judgment."

[16] Mr Troiani deposed to his opinion of the value of the various properties. He said that the basis for his opinion was "government [sales] records" and a letter from a real estate agent. He exhibited these documents. The government records were computer printouts of sales details from forms VG1, which, as is well known, are filed for every sale of land in Queensland. There was no objection to the tender of this evidence and it was unchallenged by evidence from the bank. In Mr Troiani's opinion, the total value of the seven blocks of land was $1.75 million. The amount obtained for them by the bank was $668,500.

[17] There would be much force in what the Chief Justice said had the bank objected to the tender of this evidence. It is trite to observe that opinion evidence is generally admissible only from persons of appropriate expertise. However the question before the Chief Justice was not one of admissibility. The evidence had been admitted without objection. In the circumstances, the question was how much weight should be given to it. The evidence of the owner of land as to its value is normally more than just a blind guess. Most people have some idea of what their land is worth. In this case, Mr Troiani's estimates were allegedly supported by

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9 [2002] WASCA 54.

evidence of comparable sales, and the bank did not challenge that allegation. More importantly, they were completely unchallenged by contrary evidence from the bank. They should, in my view, have been regarded as sufficient to prevent a finding that in this respect the defendant had no real prospect of successfully demonstrating sales at an undervalue.

[18] That point, however, goes only to the amount of the judgment which it was appropriate to enter. That is because even on Mr Troiani's evidence, the plaintiff's claim exceeded the amount of the undervalue by a large amount. On behalf of the bank it was conceded in argument that this difference was $1,881,853. Unfortunately, despite referring to the parts of the evidence cited on behalf of the bank, I am unable to discern how this figure is derived. The following figures can be derived from the evidence:

Lot	**Sale price**	**Mr Troiani's value**	**Reference**
Lot 11 - Zunker St	$18,000	$50,000	Troiani para 29
Lot 152 - Zunker St	$52,500	$80,000	Troiani para 29
			Waters(1) DW1 pp I7-8
10 Sea Esplanade	$55,000	$80,000	Troiani para 29
			Waters(2) DW1
Lots 12/13 - Hunter St	$18,000	$60,000	Troiani para 29
			Waters(1) DW1 p I10
Lot 2278 - Dowlings Rd	$145,000	$480,000	Troiani para 29
			Waters(1) DW1 p I9
Lot 1 - Byfield Rd	$380,000	$1,000,000	Troiani para 29
			Waters(1) DW1 p I6
Total	$668,500	$1,750,000	

[19] That establishes an alleged undervalue of $1,081,500. As this is less than the amount conceded by the bank in argument, I would adopt the bank's figure. The bank did not argue that a set-off would be unavailable. In my opinion, any summary judgment should not include that amount.

Breach of the bank's obligation to finance the company

[20] The appellants pleaded that it was an implied condition precedent to their liability as sureties that the bank should perform its promise to provide finance to the company. They alleged that this condition was not fulfilled, essentially in three respects. The first was that on or about 29 February 1996 the bank unilaterally redirected maturing bills to a new account. The second was that on or about 3 March 1998, the bank cancelled the overdraft facility. The third was that in the period May to August 1999, the bank refused the company access to the undrawn balance of the bill facility. They pleaded that consequently they were discharged from liability under the guarantee, either by reason of its determination by them or in equity.

[21] The Chief Justice held that it was not possible to find any sufficient factual foundation for such a condition; and that in any event, such a condition would have been inconsistent with the express terms of cl 13.2(f) of the guarantee:

> "13.2 Your obligations under this guarantee and indemnity are not affected by any thing that might otherwise affect them under the law relating to sureties, including:
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> ...

> (f) a variation or extension to, or a stopping, replacement or refusal of any credit, banking facilities or other arrangement (including our granting or increasing any credit or banking facilities above the basic liability) given to the customer alone or with any other person, whether with or without your consent or knowledge;"

His Honour held that the case sought to be raised by the appellants would involve at least a constructive refusal of credit to the company.

[22] These matters were not argued in the written outline of argument filed on behalf of the appellants, but they were referred to, opaquely, but with some vehemence, by Mr Troiani.

[23] The Chief Justice did not spell out what part of the factual foundation for the existence of the alleged condition was missing. However, even if such a foundation be assumed, the material does not demonstrate an arguable case that the condition was breached or not fulfilled. The appellants asserted that redirecting maturing bills to a new account constituted a breach of the implied condition. I fail to see how that is necessarily so. As to the cancellation of the overdraft, there is no evidence that the bank had an obligation to continue to provide the overdraft facility indefinitely. The original facility was for an overdraft with the limit of $500,000, expiring on 31 October 1994. Thereafter it was, subject to a review, to be "at the discretion of the bank". Over the years, the amount of the limit seems to have varied from that figure in both directions. In September 1997, it was agreed that the then limit of $312,000 would be maintained by the bank until 31 December 1997. I can find no evidence of any further agreement.

[24] Nor, finally, does the evidence demonstrate an arguable case that under the circumstances, the bank was not entitled to refuse the company access to the undrawn balance of the bill facility. In fact, it demonstrates the contrary. The letter of offer for the bill facility of 10 November 1993 provided that the availability period for the facility should run to 31 December 1999. However, it also provided[10] that the obligation of the bank to accept bills should be subject to the company's performance of and compliance with its obligations under the facility. Clause 14 provided that if the company, without the prior written consent of the bank, encumbered any part of its assets, an event of default would be constituted. Such an event permitted the bank[11] to serve a notice of termination of the facility on the company. The company did encumber part of its assets on 5 May 1998 by granting a bill of sale to Queensland Rail over "all stock of 310mm x 150mm x 76mm clay blocks of the grantor located at its premises at Enterprise Street, Bundaberg". By letter from its solicitors to the solicitors for the company dated 11 June 1999, the bank terminated the bill facility.

[25] It is true that on the date of termination, the bank was unaware of the grant of the bill of sale. However, it was entitled to rely upon the breach even though it was unaware of it until after the appointment of receivers in August 1999.[12]

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10 By cl 11.

11 Under cl 15

12 *McMahon v State Bank of New South Wales* (1990) 8 ACLC 315; *Canberra Advance Bank Ltd v Benny* (1992) 38 FCR 427; *Australia and New Zealand Banking Group Ltd v Pan Foods Company*

[26] In short, the evidence did not disclose an arguable case of discharge of the guarantee by breach or in equity. In relation to these issues, the bank demonstrated the matters referred to in r 292 of the *Uniform Civil Procedure Rules.*

[27] It is, therefore, unnecessary to deal with the effect of cl 13.2(f) of the guarantee upon the alleged implied clause. Having regard to the terms of the latter as presently pleaded, there is much force in what the Chief Justice held. If, however, the defence were amended to allege an implied term that the bank would not unlawfully or in breach of contract fail to perform its promise to provide finance to the company, the position might well be different. I would not as presently advised be prepared to agree with the Chief Justice's dictum, "The clause is however cast sufficiently widely for [breach of the financing arrangements] not to matter." The cases cited on behalf of the bank[13] do not deal with this point. If such an implied term were found to exist, it would be necessary to determine whether breach of it would entitle the guarantors to determine the guarantee or discharge them from liability.[14] Since no arguable breach of those arrangements has been made out, it is unnecessary to consider the matter further.

Estoppel

[28] In their written outline of argument, the appellants submitted under this heading that it was an inappropriate exercise of the discretion conferred upon the Chief Justice to grant summary judgment for the amount claimed by the bank while triable issues found to exist by Byrne J in action 7395 of 1999 were unresolved. To deal with this submission, it is necessary to relate a little of the history of that action.

[29] On 6 August 1999, the bank appointed receivers to the company. The company did not accept the validity of that appointment, contending that it was not in default under the mortgage debenture pursuant to which the receivers were appointed. Consequently, the bank began proceedings against it for declarations relating to the validity of the appointment, and applied for summary judgment. In that application the question was whether the company was in default. On 3 September 1999, Byrne J granted the declarations sought. He found that, while triable issues existed in relation to a number of the grounds of default alleged by the bank to justify the appointment, there was no prospect that the company could defend against the claim that it committed an act of default by granting the bill of sale. Only one of those issues arose in the present proceedings, viz whether the bank was entitled to refuse the company access to the undrawn balance of the bill facility. The question of the precise amount of the company's indebtedness was not in issue before Byrne J.

[30] Neither of the present appellants was a party to that application. However, after his Honour announced his decision, he acceded to applications by the bank for Mr Troiani to be added as a defendant and to be restrained on an interim basis (in effect) from impeding the receivers. Mrs Troiani has never been a party to that action.

[31] In some circumstances it might be found to be inappropriate to grant summary judgment in circumstances where an alleged triable issue is the same as one which

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Importers and Distributors Pty Ltd [1999] 1 VR 29. (The point was not dealt with when the last of these cases was decided by the High Court: (2000) 74 ALJR 791.)

13 *Fletcher Organisation Pty Ltd v Crocus Investments Pty Ltd* [1988] 2 Qd R 517 and *Bank of Adelaide v Horden* (1972) 127 CLR 185.

14 Compare *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549.

has been sent to trial in other pending proceedings. That is not this case. The proceedings before Byrne J concluded in judgment against the company. There are no pending proceedings in that action raising the same issue. Moreover, the Troianis were not parties to that summary judgment application, nor has it been demonstrated that the evidence before Byrne J was identical to the evidence before the Chief Justice. Despite their use of the heading "Estoppel", no argument pertaining to that doctrine was raised by the appellants. In my judgment, there was nothing inappropriate in the Chief Justice exercising his discretion in the manner in which he did notwithstanding that the triable issues found by Byrne J remained unresolved.

Delay

[32] The appellants submitted that the bank was guilty of a significant delay in bringing the application for summary judgment. They submitted that no cogent explanation for that delay was provided to the court; and that they had been prejudiced by it by reason of the need for them to respond to two amended statement of claim and a request for particulars of the defence.

[33] The steps taken in the proceedings were:

Date	**Step**
5 September 2000	Claim filed (statement of claim attached)
20 October 2000	Notice of intention to defend filed (defence attached)
3 November 2000	Amended claim and statement of claim filed
14 December 2000	Amended defence filed
27 December 2000	Request for further and better particulars sent by solicitors for bank
5 February 2001	Further and better particulars delivered
1 March 2001	Application for summary judgment filed Amended statement of claim filed
9 March 2001	Third party notice filed

[34] The appellants did not argue that the time taken for any one of the steps was excessive having regard to the nature and complexity of the litigation. Their complaint of prejudice implies that the application for summary judgment ought to have been brought after delivery of the first notice of intention to defend on 20 October 2000. They submitted that this was an area in which the principles developed before the coming into force of the *Uniform Civil Procedure Rules* continued to apply. The Chief Justice dealt with their submissions in two sentences:

> "The respondents relied finally on alleged delay on the part of the applicant, based around its having delivered two amended statements of claim and having requested particulars. In view especially of the inclusion in rule 292 of the words 'at any time', this ground of opposition cannot be sustained."

In this division the appellants argued that this was a literal interpretation and a misconstruction of the rule.

[35] There are significant differences between r 292 of the *Uniform Civil Procedure Rules* and the various provisions governing summary judgment in the previous *Rules of the Supreme Court of Queensland*. This is not the occasion to examine these differences in detail. The view that the words "at any time" imply a difference

of emphasis from the position which previously obtained is one which has support in the Trial Division: *Talbot-Butt v National Australia Bank Limited.*[15] Previously there was a view that an application for summary judgment had to be brought (at the latest) as soon as a defence was delivered. Whatever validity that view may once have had, in my judgment it is inconsistent with r 292. The purpose of that rule and of r 293 is to enable summary disposition whenever that course appears appropriate.

[36] To say that is not to say that delay is irrelevant. It remains an important discretionary consideration, particularly in cases where the application could just as easily have been brought at an earlier date. The present is not such a case. The amendments to the defence were substantial and there was a plain need for them to be particularised. It was reasonable for the plaintiff to wait for these particulars before bringing the application. It is entirely appropriate in a complex case to wait until the issues are defined. It may be otherwise in cases where the issues can clearly be discerned from the affidavits filed (or expected to be filed), but that is not this case.

[37] I therefore agree with the decision of the Chief Justice on this point. In any event, whether I agree or not, there is no basis for upsetting the Chief Justice's exercise of discretion.[16] He did not misconstrue the rule.

Supplementary affidavits

[38] Two days before the hearing of the appeal, the appellants filed in the registry and served upon the bank's solicitors a bound bundle of papers. These were headed in the appeal and contained further submissions, photocopied extracts from a number of cases, an affidavit sworn by Mr Troiani that day, a copy of an affidavit by Mr I B Smith, the former general manager of the company sworn for use in the proceedings before Byrne J and miscellaneous other documents which remained unidentified. Insofar as these documents contained evidence not before the Chief Justice, the appellants sought to justify their use on the ground, asserted from the bar table, that the documents and the information in them had only come into the appellants' possession after the hearing before the Chief Justice. For reasons delivered separately, the court refused the appellants permission to refer to the unidentified documents. As I understand it, no objection was taken on behalf of the bank to the use of the affidavit of Mr Smith, nor to the late additional submissions. Objection was taken to the use of the late affidavit on the ground that no basis for the admission of fresh evidence had been shown and to particular parts of the affidavit on various grounds relating to admissibility.

[39] I doubt if the affidavit is admissible. No special grounds within the meaning of r 766(1)(c) of the *Uniform Civil Procedure Rules* have been shown to exist. In any event, the affidavit does not assist the appellants' case. The bank is therefore not prejudiced if regard is had to it. In the circumstances, I consider it preferable to deal with the matters in the affidavit without ruling on its admissibility. Having regard to my conclusions, it is unnecessary to determine whether, if it were admitted, the bank's application to file and read an affidavit in response "which completes the correspondence chain that is partly exhibited to Mr Troiani's affidavit" should be granted.

The amount owing to the bank

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15 [2001] QSC 249.

16 *House v R* (1936) 55 CLR 499.

[40] Before the Chief Justice, the appellants submitted that there was an arguable case that the bank had failed to give credit for the proceeds of certain sales of property. The Chief Justice found not only that these allegations were not established by evidence, but that they were contradicted by material from the bank. In the context he must have meant by this expression that they were conclusively disproved, not that there was evidence each way. In the notice of appeal, that finding was challenged. However, the challenge was not pursued in the appellants' written outline of argument prepared by their solicitor, nor in their oral submissions. Instead, they claimed that inquiries made by them since the decision by the Chief Justice had revealed new evidence. Mrs Troiani expressed it thus:

> "SECOND APPELLANT: We need an explanation, your Honour, because in a matter of days after we became a client of the National Bank, large sums of money were drawn from - from the overdraft account, and to this day we still don't know where the money's gone to. We've asked the bank and they refused to tell us, and this money amounts to millions of dollars that have gone missing.
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> ...
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> SECOND APPELLANT: So when we asked them they said they couldn't answer the question and they virtually didn't give us an answer so we don't know where the money's gone. And it's not just one amount of money. It's millions of dollars that have gone missing. So this is why we have to get to the bottom of it because we just don't know where the money's gone to.
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> The bank has made it look as though the company was running at a loss where it was a rich company. It was making millions of dollars, export everywhere. It was Sante's patents everywhere. He's got personal patents that he designed himself and I believe that the bank was interested in the patents because they're worth millions. And they virtually left us penniless. We've got nothing. And we're not young. We can't start again."

[41] When one examines the affidavit, it is apparent that essentially the appellants allege:

1. unknown to the appellants, the bank kept "secret" accounts in respect of the company;
2. $1,886,000 was taken from the company overdraft account and placed in one such secret account, styled the cash management account, in the period from the outset of the financial arrangements until October 1995;
3. $521,000 and various other amounts were transferred out of the cash management account and the appellants do not know where they went.

[42] The evidence said to support these allegations consists of correspondence between the appellants and the solicitors for the bank between 21 January and 18 March this year. The correspondence was argumentative and Mr Troiani did not exhibit everything which the solicitors sent him. It shows that the bank did indeed establish a so-called cash management account for the company on 18 November 1993. Mr Troiani initially claimed that he was unaware of this account; the solicitors alleged that bank statements were regularly sent to the company. Mr Troiani then demonstrated the falseness of his initial claim by admitting that he was aware of the existence of the account "when I was informed that the sum of $48,000 per week would be transferred from the company account". That occurred in September 1995. The company was a substantial business. It is difficult to understand how its

senior management and directors (of whom Mr Troiani was only one) could have been satisfied of its accounts for 1994 and 1995, or how the auditors could have passed the accounts, without such statements. The correspondence does not show any improper withdrawal or other impropriety on the part of the bank, though it may demonstrate that Mr Troiani paid little attention to the company's financial affairs. It also shows that Mr Troiani's ultimate complaint is that he was asked to contribute private funds to the company when it had a bank account which was in credit.[17] That gives the appellants no arguable defence.

Action against Mori S.p.a.

[43] One of the finance facilities provided by the bank to the company comprised a number of chattel leases. The largest and most important of these was in respect of a new kiln which cost over $8 million. This kiln had been supplied by an Italian company, Mori S.p.a. It started production in December 1994 and difficulties with firing it developed almost immediately. In October 1995 the company decided, due to technical and production problems, not to operate it again until after the end of the year. One problem was that the tiles produced by the kiln had a variance of 4 to 5 mm instead of the 1 mm provided for in the contract. Another (discovered only much later) was that the company was buying the wrong type of gas for the kiln burners.[18] The company consulted solicitors with a view of taking action against Mori S.p.a. and ultimately sought $140,000 from the bank to buy gas storage tanks for the purpose of changing the gas supplier. Due to the company's financial difficulties, the solicitors agreed to act on a "no win no fee" basis. In the end, no action was taken against the supplier and the bank refused to provide the finance for a new gas tank.

[44] Mr Troiani claims that a bank officer prevented the company from bringing such an action on the basis that it had to be brought by the bank, and then failed to have the bank commence the action. He also appears to imply that the bank somehow wrongfully refused to finance the new tank. Presumably he wishes to argue that had the litigation been commenced, the company would have been relieved of its financial difficulties and he would not be liable on his guarantee. He has produced no evidence to verify the existence of a sound action against the supplier; no evidence of the likely amount of any judgment; no evidence that any judgment obtained against the supplier could have been enforced; no evidence of how that would have impacted upon the company's finances at the time; and no evidence that the bank owed him personally a duty to bring such an action. And that is quite apart from the terms of the guarantee, which have been discussed above. These matters provide no foundation for the appellants to resist summary judgment.

The "report" by Mr Arvo Laos

[45] Mr Troiani deposed that prior to the appointment of receivers, he had engaged (presumably on behalf of the company) a chartered accountant, Mr Arvo Laos, to conduct an investigation of the company's financial records. He swore that Mr Laos completed his "report" just prior to the appointment of receivers. No report was exhibited to the affidavit and it seems that Mr Troiani was referring to a

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17 Exhibit ST2.

18 In his oral submissions, Mr Troiani gave the impression that this was the only cause of problems with the kiln, but when one reads his affidavit, it is apparent that this is not his case. I am prepared to assume in the appellants' favour that the impression was due to language difficulties rather than frankness.

letter (which he did exhibit) from Mr Laos to the receivers. That letter simply asserts that the company's general ledger was "out" by more than $125,000 for the 1997/1998 year and by $1.077 million for the 1998/1999 year. It does not even allege that the error lay in the ledger's bank account. Obviously, errors in the company's general ledger cannot provide it or, more importantly, the appellants, with any relief against the bank. The letter raises no triable issue.

Mrs Troiani - independent advice

[46] Mr Troiani deposed that his wife signed the guarantee documents because he asked her to do so, as the bank wanted jointly owned property as security. He swore that Mrs Troiani was not an officer of the company and had no active role within the company until just prior to the appointment of the receivers. He continued, "To the best of my recollection my wife did not receive any independent advice nor was she requested to do so." Mrs Troiani provided no evidence at all.

[47] No submissions were made to the Court on the basis of this paragraph. It discloses no arguable defence.

Fraud by the bank

[48] Immediately following his affidavit, Mr Troiani included in his bundle of documents a typescript of notes which he said had been made by a Mr Roger Walker, a member of the accounting firm Ernst & Young. He referred to this document only in his oral submissions. He said that in June 1996, Mr Walker had been negotiating with an officer of the bank on his (Mr Troiani's) behalf (again, I assume he meant on behalf of the company) to refinance part or all of the company's indebtedness. It was proposed that money would come from Queensland Industry Development Corporation for this purpose. Mr Troiani asserted that the notes showed that during the negotiations, the bank officer offered a bribe to Mr Walker (who is now dead). His sole basis for this assertion was a dot-point note which reads "tell us what you want", allegedly something said by the bank officer. If it were not about so serious a subject, the submission would have been farcical:

> "McPHERSON JA: ... Where is the bribe?
>
> SECOND APPELLANT: "How much do you want?"
>
> FIRST APPELLANT: It's just on the-----
>
> McPHERSON JA: Now you say that shows there's a bribe.
>
> FIRST APPELLANT: No, it says, "[indistinct]. How much you want?"
>
> SECOND APPELLANT: "Tell us what you want".
>
> FIRST APPELLANT: "Tell us what you want". That to me means a bribe.
>
> SECOND APPELLANT: Meantime, QIDC-----

FIRST APPELLANT: I understand English."

[49] The best construction that one can put on that submission is that it demonstrates quite clearly Mr Troiani's lack of understanding of English.

[50] The appropriate way to deal with this unproven document and the submissions about it is to ignore them.

Subsequent attempts to influence the appeal

[51] Since our decision was reserved, the Registrar has received several batches of documents purporting to come from Mr Troiani. Presumably these were delivered in an attempt to influence the outcome of the appeal. Unilateral attempts to influence the outcome of a case by sending documents to the judges are quite improper. A core feature of our system of justice is that parties must put their cases in open court, when their opponents have the opportunity to be present and to contradict if they so desire. I have not read the documents received by the Registrar and have ignored the fact of their delivery in reaching my decision.

Conclusion

[52] In considering this matter, I have attempted to extend to the appellants, as unrepresented litigants, every consideration which properly may be given to them. Despite this, I am unable to perceive any basis for reversing in full the decision of the Chief Justice.

[53] The appeal should be allowed. Paragraph 1 of the order of the Chief Justice made on 22 March 2001 should be set aside and in lieu thereof it should be ordered that the plaintiff have judgment for part of its claim against the first and second defendants in the sum of $3,451,599.24. The appellants should pay half of the respondent's costs of the appeal to be assessed.

[54] **HELMAN J:** I have had the advantage of reading in draft the reasons prepared by Fryberg J. I agree with his Honour's reasons except on the issue of the sale of the appellants' property at an undervalue. In my view the Chief Justice was correct in treating Mr Troiani's evidence concerning the values of the property in question as completely worthless.

[55] The appeal should be dismissed with costs.