SUPREME COURT OF QUEENSLAND

CITATION:	*Telco Australia Limited v Favell & Anor* [2002] QSC 208
PARTIES:	**TELCO AUSTRALIA LIMITED** **(ACN 075 419 715)** plaintiff **GRAHAM DOUGLASS FAVELL** first defendant **TAUTA PAERAU** second defendant
FILE NO/S:	No. 697 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application to set aside default judgment
ORIGINATING COURT:	Brisbane
DELIVERED ON:	18 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2002
JUDGE:	Holmes J
ORDER:	**The application is dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROECDURE – QUEENSLAND – JURISDICTION AND GENERALLY – SETTING ASIDE JUDGMENT Setting aside default judgment – lack of satisfactory explanation for delay in appearance – merits of defence – construction of deed of settlement - applicant entering deed as trustee – whether liability limited to assets of trust – whether action for amount owing under deed properly brought in debt or specific performance – whether defence under *Contracts Review Act* 1980 (NSW). *Contracts Review Act* 1980 (NSW) *Trustee Act* 1925 (NSW) *Trusts Act* 1973 *Helvetic Investment Corporation Pty Ltd v Knight* (1984) 9 ACLR 773. *Workman Clark & Co Ltd v Brazileno* [1908] 1 KB 968 *Turner v Bladin* (1951) 82 CLR 463
COUNSEL:	Mr Bickford for the applicant second defendant Mr Hack SC for the respondent plaintiff

SOLICITORS: McDonald Balanda & Associates for the applicant second defendant
Hopgood Ganim Lawyers for the respondent plaintiff

The default judgment

[1] The applicant second defendant seeks to set aside a default judgment obtained against him on 19 April 2002. The Deputy Registrar gave judgment on that date for an amount of $410,909.74, the applicant not having filed a notice of intention to defend. There is no contention that the judgment was irregularly entered. The judgment was given on a claim and statement of claim filed on 18 January 2002. The respondent plaintiff had claimed the sum of $400,000 said to be owing under a deed of settlement signed by the applicant in his capacity as trustee of three trusts, the Shavell Family Trust and two other trusts associated with Mr Favell. He was not a defendant to the proceedings settled by the deed. Those proceedings had been brought against the first defendant, Mr Favell, the trustee of the NTM USA Trust, National Telephone and Marketing Inc, and Derwint Pty Ltd as trustee of the Shavell Family Trust.

[2] The deed provided for the trusts, including the three for which the applicant had signed as trustee, the defendants to the proceeding being settled, and a number of companies associated with Mr Favell to make a series of payments to the respondent plaintiff. One such payment, in an amount of $400,000, was to be made on 10 January 2002. It is that payment in respect of which the respondent obtained its default judgment against the applicant.

The entering of the deed as trustee

[3] The applicant's material explains that he had been in business with Mr Favell and agreed to act as trustee of various trusts. He was not a beneficiary of any of them, and was not paid for acting as trustee. He sought to retire from his position as trustee by sending letters dated 19 September 2001 to Mr Favell giving notice of his resignation 14 days hence. This attempt at retirement seems to have met neither the terms of s 14 of the *Trusts Act* 1973, which requires the consent in writing of co-trustees to discharge, nor those of s 8 of the *Trustee Act* 1925 (NSW) which requires both retirement by registered deed and consent by registered deed of co-trustees to the retirement.)

[4] According to the applicant, in late September 2001 he was asked by Mr Favell to attend with him at the offices of the respondent's solicitors in order to sign documents, and again in October 2001 was requested to sign documents at the offices of Clinch Neville Long. Although that firm then and later purported to be acting for him, he was not advised by it or by Mr Favell that he risked any personal liability in signing the documents.

Chronology of events leading to the judgment

[5] The chronology of events in connection with the obtaining of the default judgment is as follows. On 14 January 2002 demand was made for payment of the sum due on 10 January, and on 16 January 2002 the Clinch Neville Long, acknowledged receipt of the demand, and that the applicant remained their client. The claim was filed on 18 January, but on 30 January, Clinch Neville Long advised they were no longer acting on behalf of the applicant, and he was served personally with the claim on 9 February 2002. New solicitors wrote to the respondent's solicitors on 28 February 2002, asking that they discontinue the proceedings because he had given notice of resignation as trustee to Mr Favell in September 2001. Those solicitors were advised by letter dated 15 March 2002 that the proceedings would not be discontinued and that seven days would be allowed for filing and serving the defence, failing which an application would be made for default judgment. (The time for delivery of the defence under the rules had expired on 11 March 2002). On 20 March 2002, the applicant's solicitors wrote again asserting that there was no cause of action and that seven days was an inadequate time to allow for the filing of his defence. The letter requested that the respondent's solicitors not seek to enter a default judgment because of the inadequacy of that time.

[6] There was no response to that letter, presumably because on 20 March 2002 the plaintiff instructed his present solicitors, and they advised the respondent's solicitors on 21 March 2002 that they were acting and asked for copies of relevant documents. Some correspondence was exchanged about inspection of those documents. On 9 April 2002 the respondent's solicitors advised that they would proceed to enter default judgment if no defence were received by 17 April 2002. The applicant in his affidavit confirms that on 12 April 2002 his solicitors advised him by facsimile that a notice of intention to defend must be filed on or before 17 April 2002. His explanation for failing to act when given that advice is that he "did not realise the ramifications in failing to provide instructions to [his] solicitors in a timely manner".

[7] Judgment by default was obtained on 19 April 2002. According to the applicant's affidavit, he attended his solicitors on 13 May 2002 and gave instructions to enable preparation of the notice of intention to defend and defence. Two days later he was advised that default judgment had been entered and a bankruptcy notice issued.

Explanation of delay

[8] I do not think that the applicant's assertion that he "did not realise the ramifications in failing to provide instructions" provides, by any stretch of the imagination, a satisfactory explanation of his failure to defend. Mr Hack SC for the respondent submitted that that lack of any satisfactory explanation should, per se, be fatal to the application. As I indicated in argument, while that factor may be a powerful consideration in deciding whether judgment should be set aside, I doubt that it alone can be determinative, where, as here, there is no extreme delay and no suggestion of prejudice to the respondent. It is appropriate, in my view, to consider the applicant's arguments as to the merits of his proposed defence.

The capacity in which the applicant executed the deed

[9] The first argument of Mr Bickford for the applicant was that the deed, properly construed, was executed by the applicant only in his capacity as trustee, and not in any personal capacity, with the result that he should only be regarded as bound to the extent of trust assets. Referring to the discussion of the relevant principles in *Helvetic Investment Corporation Pty Ltd v Knight*[1], Mr Bickford accepted that a trustee executing such a deed would normally incur personal liability unless there were some indication as a matter of construction to the contrary. The mere description of the applicant as entering the deed as trustee did not constitute such an indication. But he said, the terms of the deed as a whole and the fact that the applicant had not been a party to the proceedings settled by it, and received no benefit from it, led to the conclusion that it was not intended that he incur any personal liability by entering it.

[10] I am unable to see in the deed of settlement any language to suggest that the applicant's liability should be limited. He is listed in the deed as a party, firstly by name, "Tauta Paerau as Trustee of the Shavell Family Trust" and secondly, as listed in the second schedule pursuant to the description "Each of the trustees of the trusts particularised in the second schedule hereto". According to the preamble,

> "The parties have agreed to resolve the disputes and differences that exist between them and the subject matter of the Proceedings upon the terms set forth in this deed."

Clause 2.1 then contains the agreement by "each of the defendants, the Favell companies and the Favell trusts" to make the specified payments to the respondent "for which pursuant to cl 2.2 each is to be joint and severally liable."

[11] The deed was executed by the applicant "as trustee of the Shavell Family Trust" with similar descriptions applied to his execution as trustee of the remaining trusts. There is nothing in the wording which would suggest that his personal liability as trustee was somehow to be confined to the extent to the assets of the respective trusts. Nor do I think it answers to say that he was not a party to the original litigation and that the deed conferred no personal benefit on him. He executed the deed; the question is whether as a matter of construction his liability under it should be taken as limited. In my view, there is nothing in the wording of the deed which would lead to that result.

[12] Mr Bickford's further arguments on the merits of the defence were largely premised on the proposition that any action brought on the deed should properly have been brought as an action for specific performance rather than for recovery of a debt. A court would exercise its discretion against granting specific performance of the agreement under this deed, he submitted, because of the absence of consideration and because it would be unfair to enforce it against the applicant. I doubt that any unfairness operating on the applicant here would be such as to sway a court against a grant of specific performance. If unfairness there was, it seems on the material to

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1 (1984) 9 ACLR 773.

have resulted from the conduct of Mr Favell and possibly the solicitors who acted for the applicant when the deed was executed by him in failing to advise him of its significance; but there is nothing to suggest that the respondent or its solicitors had notice of any attendant unfairness. However that may be, Mr Bickford's argument in relation to specific performance depended on acceptance of the submission that the respondent could not elect to require continued performance of the contract while at the same time suing for debt under it. I do not see why this should be so. It seems to me the situation is analogous with the position where there is default under an instalment contract. A party may elect to keep the contract on foot while seeking to recover as a debt each instalment once it has become due[2]. Accordingly, arguments as to the likely outcome in an action for specific performance do not assist.

[13] Finally, Mr Bickford suggested, the applicant might have a defence under the *Contracts Review Act* 1980 (NSW) if the deed of settlement were found to have been made in New South Wales. Section 7 of that Act enables the court to refuse to enforce the contract or declare it void "if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result". "Unjust" is defined in s 4 of the Act to include "unconscionable, harsh or oppressive". A non-exhaustive list of factors to be considered is set out in s 9(2) and includes *inter alia*:

> "(a) Whether or not there was any material inequality in bargaining power between the parties to the contract;
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> …
>
> (e) Whether or not:
>
> (1) any party to the contract (other than a corporation) was not reasonably able to protect his or her interest, or
>
> …
>
> (h) Whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this act;
>
> (i) The extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect;
>
> (j) Whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act.
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> …"

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2 *Workman Clark & Co Ltd v Brazileno* [1908] 1 KB 968; *Turner v Bladin* (1951) 82 CLR 463.

[14] In the circumstances of this case, however, where the source of any injustice to the applicant is not any conduct on the part of the respondent, nor even any conduct of which the respondent should have been aware, I would consider his prospects of success on an application under this legislation to be poor indeed. His real complaint seems to be against those who acted for him, not against those with whom he contracted.

[15] My conclusion, having regard to the absence of any satisfactory explanation for the delay in defending and the lack of any convincing case for the defence, is that the judgment should not be set aside. The application is dismissed.