SUPREME COURT OF QUEENSLAND

CITATION:	*Sexton Developments P/L v Yarrawonga P/L* [2003] QCA 173
PARTIES:	**SEXTON DEVELOPMENTS PTY LTD** ACN 010 554 953 (plaintiff/respondent) **v** **YARRAWONGA PTY LTD** ACN 009 713 071 (defendant/appellant)
FILE NO/S:	Appeal No 9135 of 2002 DC No 208 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	2 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2003
JUDGES:	McPherson and Williams JJA and Fryberg J Separate reasons for judgment of each member of the Court
ORDERS:	**1. Appeal allowed** **2. The decision of the District Court on 6 September 2002 dismissing the application to set aside the Registrar's judgment given on 27 August 2002 is set aside** **3. The application to set aside the registrar's judgment is granted and the judgment of the registrar set aside** **4. In lieu judgment is entered for the plaintiff against the defendant for $20,000 together with interest under s 47 of the Supreme Court Act from 8 April 1994** **5. Time for giving notice of intention to defend and for filing a defence to the plaintiff's claim is extended until 28 days after delivery of judgment on this appeal** **6. Further proceedings on the claim are remitted to the magistrates court at Townsville** **7. Defendant is ordered to pay:** **(1) the costs of and incidental to the entry of judgment before the Registrar on 27 August 2002;** **(2) the plaintiff's costs of the application to the District Court judge to set aside the Registrar's judgment;**

(3) half of the costs of and incidental to this appeal.

The costs of (2) and (3) above should be taxed on the scale appropriate to an action in the magistrates court in which the sum claimed is $40,000

8. The application for a certificate under the Appeal Costs Fund Act is refused

CATCHWORDS: LIMITATION OF ACTIONS – CONTRACTS – WHEN TIME BEGINS TO RUN – whether right of action accrues when acknowledgment of debt occurs

PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – PRACTICE – PRCEDURE BEFORE TRIAL – COMMENCEMENT OF ACTION AND PLEADINGS – trial judge held no issue as to liability, but ordered assessment of damages – whether trial of liability is anterior to quantum

Consumer Law (Miscellaneous Provisions) Act (Qld) 1993 (no 82 of 1993), s 34
Land Sales Act (Qld) 1984, s 6(1), s 8(1)(b), s 8(2)
Limitation of Actions Act (Qld) 1974, s 35(3), s 36
Property Law Act (Qld) 1974, s 59
UCPR (Qld) 1999 r 290

Cook v Deeks [1916] 1 AC 554, mentioned
McDermott v Black (1940) 63 CLR 161, applied

COUNSEL: M Drew for the appellant
R Alldridge for the respondent

SOLICITORS: Porter Davies for the appellant
Ruddy Tomlins & Baxter Solicitors for the respondent

[1] **McPHERSON JA:** John Sexton is a farmer at Mullaroo, but he also controls a company Sexton Developments Pty Ltd which engages in road construction. It is the plaintiff in this action. In 1994 it submitted a written quotation of $189,286.97 to carry out road building works on a property being subdivided and developed by the defendant Yarrawonga Pty Ltd. Robert Keogh & Partners Pty Ltd was in charge of that work and the plaintiff's quotation was accepted. The parties then agreed that the road should be constructed of concrete rather than being surfaced with bitumen. Certain additional work was also done by the plaintiff at the defendant's request. All up, the value of the work done by the plaintiff is alleged to have amounted to $220,062.00.

[2] In March 1994 the plaintiff delivered an invoice for $177,900 and on 8 April 1994 it was paid that sum by the defendant, leaving, as the plaintiff claimed, a balance outstanding and unpaid for that work of $41,162. The defendant, which throughout acted by Mr Robert Keogh, was unable to pay that amount. Instead, according to Mr Sexton, the defendant in satisfaction of the debt offered and agreed to transfer Lot 134 in the proposed subdivision at a discount of $40,000 from the list price of $140,000, making the price for it $100,000.

[3] That was in April 1994. The transfer of Lot 134 never took place. In June 2002 the plaintiff instituted proceedings in the District Court to recover $40,000 as monies due and owing or as damages for breach of contract. The defendant was duly served but through some accident or oversight failed to appear, and judgment in default was entered by the registrar. From that judgment an application was taken to a District Court judge who declined to set the judgment aside. This is an appeal from that decision.

[4] On the application before the District Court, the defendant presented a version of the conversation in April 1994 leading to the agreement about Lot 134 that differed in some respects from that relied on by the plaintiff. As revealed in the pleadings filed or, in the case of the defendant, confirmed by Mr Keogh's affidavit, it was in essence that: (1) it was not $40,000 but only $20,000 that was still owing by the defendant to the plaintiff for work done; and (2) that it was only if and when Lot 134 was developed in the future that it would be sold to the defendant at a discount of $20,000 off list price. The defendant also relied on the *Limitation of Actions Act 1974* to say that the plaintiff's action had been commenced more than six years after accrual of the indebtedness in April 1994; and further that the contract to sell or transfer the land was made with Mr Sexton personally and not with the plaintiff company. These submissions were repeated on appeal, with the addition of a further argument not advanced below that the agreement to transfer the land was void under s 8(2) of the *Land Sales Act 1984.*

[5] To my mind, the point taken about the identity of the proposed transferee (whether it was the plaintiff or Mr Sexton personally) is not one that should be determinative of an application like this to set aside the default judgment. The original road construction agreement was made with the plaintiff company; the work was done by it; and it was owed the money, if any, for carrying out the variations or additions to the work. For Mr Sexton to have attempted to take personal advantage of the proposed transfer at the expense of the plaintiff company would have been quite improper and, if as alleged he had done so, he would hold the contract and the land on trust for the plaintiff (*Cook v Deeks* [1916] 1 AC 554). It would require more cogent material than is now before us to persuade a court that Mr Sexton had deliberately put forward his name with a view to practising this form of equitable fraud on the plaintiff company. There is no discernible reason why he would have wished to do so. It is much more probable that, like many directors of proprietary companies, he and Keogh used their personal names to denote the corporations for which they were acting. A trial of that issue is not likely to elucidate that point to any greater degree, and at worst for the plaintiff could be cured by adding Mr Sexton as co-plaintiff.

[6] As regards the limitation issue, the action was admittedly commenced more than six years after the alleged debt fell due in April 1994. However, the pleadings refer to a meeting in April 2001 at which Keogh on behalf of the defendant advised Sexton for the plaintiff that the land that was to have been transferred by the defendant had been sold by the mortgagee and that the defendant was not in a position to transfer it as promised (Defence, para 5); and that he (Keogh) would recommend to the defendant's board of directors that it pay $20,000 to the plaintiff when it was in a position to do so (Defence, para 7). The Defence is signed by defendant's solicitor and confirmed in writing by affidavit of Mr Keogh. There is in this an admission by the defendant that at least $20,000 is owing by the defendant to the plaintiff, which is now contained in a written acknowledgment of the plaintiff's

claim to the extent of at least half or $20,000 of the amount alleged to be owing. As such, the right of action is by the joint operation of s 35(3) and s 36 of the *Limitation of Actions Act 1974* deemed to have accrued on and not before the date of that acknowledgment, which is well within the period of six years before the action was commenced in the District Court in June 2002.

[7] The plaintiff's claim is susceptible of the following analysis. It claims that in April 1994 it was owed $40,000 for work done by it in or before March or April 1994. In satisfaction of that debt, it agreed to accept transfer from the defendant of a piece of land at a discounted price, and it expressly or impliedly agreed to defer payment, or enforcement of payment, until the land was transferred to it. Had the land been transferred as promised, there would have been an accord and satisfaction extinguishing the indebtedness. But in April 2001, the defendant repudiated that accord or agreement by announcing that it was unable to and would not perform it. The operation and effect of an accord and satisfaction was explained by Dixon J in *McDermott v Black* (1940) 63 CLR 161, 183-194. Its essence is an acceptance by the plaintiff of something in the place of his cause of action:

> "It may be a promise or a contract or it may be the act or thing promised. But whatever it is the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim".

[8] Here the satisfaction was never given. The defendant never transferred Lot 134 at a discounted price. The original debt therefore remains. In April 2001 the defendant acknowledged the plaintiff's claim to the extent of $20,000, producing a fresh accrual of the right of action at least to that extent, if not to the whole amount of $40,000 claimed.

[9] There remains the point raised for the first time on appeal concerning s 8(2) of the *Land Sales Act 1984*. Title to the subject land was Crown leasehold. In the form in which it stood in 1994, the effect of s 8(1)(b) of the Act is or was to prohibit the sale of a subdivision of such land unless the approval of the Minister to subdivide the land has been obtained by or before the time of the purchase. By s 8(2) an agreement made in contravention of s 8 is void, and the amount of money paid under it is recoverable. A peculiar definition of the word "agreement" in this statutory context was inserted into s 6(1) of the Act by s 34 of the *Consumer Law (Miscellaneous Provisions) Act 1993* (no 82 of 1993). Its application in the present case turns ultimately on whether there is a note or memorandum of the contract made in April 1994 sufficient to satisfy s 59 of the *Property Law Act 1974*. However, I do not consider it necessary to pursue that question here. If, applying that criterion, the April 1994 contract was an "agreement" within the terms of s 8, it is rendered void by s 8(2) of the Act, leaving the indebtedness due in April 1993 unscathed. Conversely, if that indebtedness was the subject of a valid agreement or contract in April l994 to transfer land, the defendant repudiated it in April 2001, which again left the indebtedness untouched. The defendant's acknowledgment on that occasion means that the right of action to enforce it accrued from that date.

[10] I do not consider, however, that the learned judge was correct in holding that there was no issue as to any of $40,000 claimed by the plaintiff. The defendant admitted that it was indebted to the plaintiff for $20,000 as a result of the original road construction contract or work as varied, but denied the balance of $20,000

claimed. There must be a trial of the issue of liability for that balance. As to that, the judge ordered or confirmed that there should be an assessment of the plaintiff's damages; but the issue of liability is anterior to that of quantum. The first matter to be determined is whether in April 1994 the defendant was indebted to the plaintiff for work done on account of variations or extras, and, if so, only then in what amount. The admission that $20,000 was owing does not establish the plaintiff's claim that, with the authority of the defendant, work was done by it whether to the value of $40,000 or otherwise.

[11] The appeal must be allowed. The decision of the District Court on 6 September 2002 dismissing the application to set aside the Registrar's judgment given on 27 August 2002 must itself be set aside. The application to set aside the registrar's judgment should be granted and the judgment of the registrar set aside. In lieu there should be judgment for the plaintiff against the defendant for $20,000 together with interest under s 47 of the Supreme Court Act from 8 April 1994. As to the balance of the plaintiff's claim, time for giving notice of intention to defend and for filing a defence is extended until 28 days after delivery of judgment on this appeal. It is ordered that further proceedings on the claim be remitted to the magistrates court at Townsville.

[12] As to costs, the defendant should be ordered to pay: (1) the costs of and incidental to the entry of judgment before the Registrar on 27 August 2002; (2) the plaintiff's costs of the application to the District Court judge to set aside the Registrar's judgment; (3) half of the costs of and incidental to this appeal. The costs should be taxed on the scale appropriate to an action in the magistrates court in which the sum claimed is $40,000.

[13] The respondent sought a certificate under the *Appeal Costs Fund Act*; but the order made by the learned District Court judge was precisely the order sought by the plaintiff in this application before her Honour. That being so, there is no basis for exercising the statutory discretion in favour of the plaintiff as respondent to this appeal and the application is refused.

[14] **WILLIAMS JA:** I have read the reasons for judgment of McPherson JA and agree with what is said therein and with the orders proposed.

[15] **FRYBERG J:** In June 2002 the respondent sued the appellant for $40,000 in the District Court. It also claimed declarations, although without any apparent justification for doing so. It claimed the money as the rounded-down balance (contract price $220,012 less a payment of $177,900) of a debt owing since March 1994 or alternatively as damages for breach of contract. The circumstances leading to the claim are set out in the reasons for judgment of McPherson JA, which I have had the benefit of reading. The statement of claim further alleged that in that month the appellant "offered to pay the Plaintiff the said sum of $40,000 by way of deposit on an allotment of land to be developed in the estate, of the Plaintiff's choice". It alleged that the respondent accepted that offer and nominated Lot 134 on SP 132620 as the block it wished to purchase. It further alleged (para 16) that in March 2002 the appellant, through Mr Keogh, told the respondent it could never have completed the agreement, that it owed the respondent $20,000 and would examine its records to ascertain if it owed a further $20,000 and would pay the agreed amount prior to its proposed liquidation.

[16] When the appellant did not file a notice of intention to defend the respondent applied for default judgment. The Request for Judgment referred to both of the alternative claims. For unexplained reasons judgment was entered for damages to be assessed instead of for the sum claimed as debt.

[17] The appellant promptly applied to have the judgment set aside and furnished a proper explanation for its failure to defend in time. It exhibited a draft defence which Mr Keogh, a director, swore was true. The defence neither admitted nor denied the original contract, the performance of the work and the contract price of $220,012. It did not plead to the allegation of payment of the sum of $177,900 and is therefore deemed to have admitted that allegation. It admitted an agreement about Lot 134 but asserted that the proposed lot was "if and when" developed to be sold to Mr Sexton (a director of the respondent) for $20,000 less than the list price. It alleged that Lot 134 had never been developed and that the land, including Lot 134 if it then remained in the ownership of the appellant, had been sold by the mortgagee. Paragraph 7 of that defence was:

> "The defendant denies the allegations in paragraph 16 of the statement of claim except that the defendant by Keogh advised the plaintiff by Sexton that the defendant was not in a position to sell Lot 134 to Sexton. The defendant did not advise the plaintiff that the defendant owed the plaintiff the sum of $20,000.00. Keogh told Sexton that he would recommend to the Board of Directors of the defendant that the defendant should pay $20,000.00 to the plaintiff when the defendant had funds available to do so."

[18] There was some corroboration of the appellant's version in an affidavit made by Mr Sexton for the purposes of the application to set aside the default judgment. Mr Sexton swore:

> "As the Defendant was unable to pay my Company the monies outstanding, the Defendant offered to transfer to me proposed lot 134 of the Development for $100,000 which amounted to a discount of $40,000."

That affidavit was probably made without reference to the proposed defence. However the deponent has apparently exercised care to distinguish between his company and himself. There was no suggestion at first instance that Mr Sexton was identifying himself with his company. On the contrary, the respondent's counsel submitted:

> "What's happened here is earthworks have been done, company couldn't pay for all of the work that was done, so a compromise was reached whereby the earthworks man would get a block of land for a reduced price."

In the absence of evidence to the contrary I would proceed on the basis that the supplementary agreement envisaged transfer of the land to Mr Sexton personally. There is no suggestion that the respondent was insolvent at the time of the agreement. I would not be prepared to infer that a transfer to Mr Sexton personally would necessarily have involved any impropriety.

[19] But the supplementary agreement is in my judgment a red herring. Whether it be regarded as a variation of the original contract, a new contract to confer a benefit on third party or a compromise of a dispute, it was not performed. On its own evidence

the appellant breached it when the land which was its subject was sold or otherwise disposed of to someone else. There is no evidence of when that occurred or when the respondent first knew of it. However it undoubtedly found out at the latest during the conversation between Messrs Keogh and Sexton referred to in para 16 of the statement of claim and para 7 of the proposed defence. The respondent does not expressly plead an election to terminate the supplementary agreement, whether for breach or repudiation, but its conduct in starting the present proceedings is consistent only with an election to do so.

[20] It was not argued either at first instance or on the appeal that the appellant was not in breach of the supplementary agreement. The defence hinted at such an argument by the allegation that the appellant was obliged to sell the land to Mr Sexton only "if and when" it was developed. It was an argument which counsel on the appeal wisely ignored.

[21] I agree with McPherson JA that it is unnecessary to pursue the question raised on appeal by the appellant involving the *Land Sales Act 1984*. Nothing depends upon whether the supplementary contract was terminated by the respondent or was void by reason of that Act.

[22] Rule 290 of the *Uniform Civil Procedure Rules* confers a discretion upon the District Court to set aside or amend a judgment by default on terms, including terms about costs and the giving of security, the court considers appropriate. Principles governing the exercise of such a discretion have long been established and those principles are appropriately applied to the exercise of the discretion under r 290[1]. Those principles require among other things that a defendant establish by affidavit that there is a defence on the merits[2]. In the present case the appellant's affidavit raised no defence apart from that sought to be raised under the *Limitation of Actions Act 1974.*

[23] That Act provides a defence if more than six years has elapsed since the cause of action arose. The District Court judge decided the matter on the basis that there was no evidence of when the breach of the supplementary agreement occurred. She held that for this reason the appellant had not satisfied her that the Act applied. With great respect I cannot agree with that reasoning. The respondent's cause of action arose when the debt became payable. On the evidence that was in or about April 1994, more than six years before the action was commenced.

[24] Section 35(3) of the Act provides that where a right of action has accrued to recover a debt and the person liable acknowledges the claim, the right is deemed to have accrued on and not before the date of the acknowledgment. An acknowledgment must be in writing and signed by the person making the acknowledgment or his agent, and made to the person whose title is being acknowledged or his agent[3]. On 29 August 2002 Mr Keogh signed an affidavit on behalf of the appellant for the purposes of setting aside the judgment. He deposed to the truth of the facts alleged

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1 Compare *Troiani v Alfost Properties Pty Ltd (CAN 010 560 639)* [2002] QCA 281; *Yankee Doodles Pty Ltd v Blemvale Pty Ltd*, unreported, Atkinson J, 23 June 1999.

2 *Rosing v Ben Shemesh* [1960] VR 173; *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441; *Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Association of Australasia Ltd* [1984] 2 Qd R 447; *Bratic v Toohey* [1988] 2 Qd R 140.

3 *Limitation of Actions Act 1974*, s 36.

in the defence exhibited to the affidavit. Paragraph 7 of the defence is quoted above. At most that could be regarded as an acknowledgment of the claim only at an earlier date, namely March 2001, not 29 August 2002 when the affidavit was signed. In Australia that is sufficient to constitute an acknowledgment effective at the earlier date[4]. That aspect of the matter may therefore be put to one side.

[25] In *Surrendra Overseas Ltd v Government of Sri Lanka* Kerr J said:

> "What I draw from these authorities, and from the ordinary meaning of 'acknowledges the claim,' is that the debtor must acknowledge his indebtedness and legal liability to pay the claim in question … he can only be held to have acknowledged the claim if he has in effect admitted his legal liability to pay that which the plaintiff seeks to recover."[5]

[26] That dictum was applied by Balmford J in *Chethams v Remington & Co*[6]. Without wishing to cast doubt upon the terms of the dictum, I would reserve for consideration in an appropriate case the question of how it should be applied where the debtor also claims a set off in the acknowledgment document. In the present case, counsel for the appellant conceded in the course of argument that as to $20,000 there had been an acknowledgment. There is therefore no need to consider whether the words used amounted to an acknowledgment of indebtedness and legal liability to pay. Conversely counsel for the respondent did not argue that they could be regarded as an acknowledgment of a liability greater than $20,000. There is therefore no occasion to consider that issue.[7]

[27] In the result judgment should have been entered in the District Court for $20,000. The respondent is entitled to interest on that sum pursuant to s 47 of the *Supreme Court Act 1995*, but in view of its delay in bringing the proceedings I would allow interest only from the effective date of the acknowledgment. That date is alleged in the statement of claim to be "in or about March 2001", an allegation not denied (and therefore to be deemed admitted[8]) in the proposed defence. As to the balance of the claim the appellant proved a prima facie defence on the merits under the *Limitation of Actions Act 1974*. It should be permitted to defend to that extent. To achieve that result I would make the following orders:

1. Appeal allowed.

2. Set aside the order of the District Court made on 6 September 2002.

3. In lieu thereof order
   (1) that the application be allowed;
   (2) that the judgment entered by the Registrar against the defendant on 27 August 2002 be set aside;
   (3) that in lieu thereof there be *(1)* judgment for the plaintiff against the defendant as to part of its claim for $20,000 plus interest thereon under s 47 of the *Supreme Court Act 1995* from 15 March 2001 to the date of the judgment; *(2)* an order that the defendant have leave to defend the balance of

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4 *Stage Club Ltd v Millers Hotels Pty Ltd* (1981) 150 CLR 535.
5 [1977] 1 WLR 565 at p 575.
6 [1999] 3 VR 258.
7 Compare *Union Bank v Meyer* (1898) 5 Arg LR 43.
8 *Uniform Civil Procedure Rules*, r 166.

the claim notwithstanding the judgment; *(3)* an order that the time for giving notice of intention to defend and for filing a defence in respect of the balance of the claim be extended until 28 days after delivery of judgment on this appeal; *(4)* an order that of the action be remitted to the Magistrates Court at Townsville.

(4) that the defendant pay the costs of and incidental to the entry of judgment on 27 August 2002 and the costs of the application to set aside judgment, assessed on the scale appropriate to an action for $40,000 in the Magistrates Court.

[28] The remittal order should be made because there is no reason why this action should continue in the District Court. Counsel for the respondent could advance no satisfactory explanation for why the action had been commenced in that court. The claims for declarations appear to be no more than window dressing. For the same reason the respondent's costs below should be limited to those recoverable in the Magistrates Court.

[29] The appeal has in substance, but not entirely, failed. I would make the following order in respect of the costs of it:

4. Order that the appellant pay half the respondent's costs of and incidental to this appeal to be assessed.

[30] In respect of the application for a certificate under the *Appeal Costs Fund Act 1973* I agree with McPherson JA. The order should be:

5. Order that the respondent's application for a certificate pursuant to the *Appeal Costs Fund Act 1973* be refused.