SUPREME COURT OF QUEENSLAND

CITATION:	*Capital Finance Australia Limited v Airstar Aviation Pty Ltd & Ors* [2003] QSC 151
PARTIES:	**CAPITAL FINANCE AUSTRALIA LIMITED** **ABN 23 069 663 136** (applicant/plaintiff) **v** **AIRSTAR AVIATION PTY LTD** **ACN 090 114 284** (first defendant) **UZU AIR PTY LTD ACN 062 538 167** (second defendant) **TORRES STRAIT AIRCRAFT MAINTENANCE PTY LTD ACN 066 648 167** (third defendant) **BARRY WILLIAM COSTA** (fourth defendant/plaintiff by counter-claim) **GARY JAMES ROBERTSON** (fifth defendant/plaintiff by counter-claim) **DUESBURYS** (defendant by counter-claim)
FILE NO/S:	SC No. 11271 of 2000
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	22 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2003
JUDGE:	Holmes J
ORDER:	**1. THE COUNTER-CLAIM IS STRUCK OUT** **2. THE FOURTH AND FIFTH DEFENDANTS HAVE LEAVE TO REPLEAD THE DEFENCE**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – whether defendants precluded from raising counter-claim – whether no real prospect of successfully defending claim *Beri Distributors Pty Ltd v Pulitano & Anor* (1994) 10 SR (WA) 274

Coca-Cola Financial Corporation v Finsat International Ltd & Ors [1998] QB 43
Continental Illinois National Bank & Trust Company of Chicago v Papanicolaou ("The Fedora") [1986] 2 Lloyd's Rep 441
Clark Equipment Australia Ltd v Covcat Pty Ltd (1987) 71 ALR 367
C*ovino & Anor v Bandag Manufacturing Pty Ltd* (1983) 1 NSWLR 237
Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd t/a Betta Machinery Sales [2000] QSC 051
Elkhoury & Anor v Farrow Mortgage Services Pty Ltd (In Liq) (1993) 114 ALR 541
GE Capital Australia v Davis & Ors [2002] NSWSC 1146

COUNSEL: Mr P B O'Neill for the applicant plaintiff
Ms DA Skennar for the respondent fourth and fifth defendants

SOLICITORS: Dibbs Barker Gosling for the applicant/plaintiff
James Walker for respondent fourth and fifth defendants

[1] The applicant plaintiff seeks the striking out of the further further amended defence and counter-claim filed by the fourth and fifth defendants, and summary judgment. Its claim is brought on guarantees said to have been given by the fourth and fifth defendants of moneys owed by the first defendant under a number of loan agreements supported by bills of sale. The fourth and fifth defendants in an amended defence and counter-claim admit the making of the loans, but allege that the guarantees are void or alternatively that any liability under them has been discharged; and they seek damages for alleged breaches of duty by the plaintiff.

[2] The fourth and fifth defendants were directors of the first defendant, which agreed to buy an aviation business owned by the second and third defendants. That entailed purchase of the second and third defendants' shares and transfer of various assets, including two aircraft owned by a director of the second and third defendants. Those assets were subject to securities held by the plaintiff, which had financed their purchase. The plaintiff agreed to finance the first defendant's acquisition of the business subject to its purchase of all the assets in which the plaintiff had an interest and its assumption of all of the second and third defendants' liabilities. In consequence the first defendant entered into six combined loan and bills of sale agreements, the terms of which were identical. In each case the fourth and fifth defendants executed a guarantee.

The defence

[3] The further further amended defence admits the first agreement but pleads that it has been discharged by payment. Any liability under the sixth agreement, it is pleaded, was discharged by a variation in the term of, and hiring charge under, the loan

agreement. It does not admit default or demand. More significantly, it pleads that the guarantees are of no effect because they do not specify the agreement to which they relate. And, finally, it is said that the guarantees are of no force and effect, and the first defendant and the fourth and fifth defendants are not liable under the agreements, on grounds set out as paragraphs 1 – 45 of the counter-claim. The defence concludes with a claim by way of set-off for loss and damage pleaded in the counter-claim.

The counter-claim

[4] The counter-claim sets out the circumstances of the first defendant's acquisition of the business and the first defendant's application to the plaintiff for finance. It alleges that funding approval was subject to certain conditions including formal valuations, by a specified valuer, of the two aircraft at prescribed minimum values, and a CRAA check. In consideration of the fourth and fifth defendants' entering the guarantees, the plaintiff had warranted that finance would not be provided to the first defendant if the approval conditions were not satisfied. In the event, it is alleged, the valuations did not take place in the manner prescribed, and CRAA searches in relation to the second and third defendants revealed proceedings against each by the Deputy Commissioner of Taxation. Those matters are said to have rendered false the warranty in reliance on which the fourth and fifth defendants entered the guarantees. That conduct is also said to be unconscionable and to amount to a breach of s 51 AB or s51AC the *Trade Practices Act* 1974 and/or s 12 CA or s 12 CB of the *Australian Securities and Investment Commission Act* 2001.

[5] Alternatively, it is said that the plaintiff was in breach of a duty to advise the fourth and fifth defendants of its proposed disregard of those matters in providing finance to the first defendant, and in breach of a duty of care to obtain a valuation in the prescribed manner, owed by reason of its representation to the fourth and fifth defendants that such a valuation would be obtained and its knowledge of their reliance on, and inducement by it, to enter the guarantees. The representation that finance would not be approved without satisfaction of the conditions and that the valuation conditions had been met, together with silence as to any plan to approve finance outside those conditions, constituted misleading conduct in breach of s 52 of the *Trade Practices Act* and/or s 12DA or s 12DB of the *Australian Securities and Investment Commission Act*.

[6] It is further pleaded that the plaintiff, when it sold the first of the aircraft, breached a duty owed by it as mortgagee to take reasonable care that it was sold at market value, and in relation to the second of the aircraft, failed to ensure that it was maintained and sold in a timely manner, in breach of an implied condition of the guarantee.

[7] The counter-claim pleads reliance in that the fourth and fifth defendants would not have entered the guarantees had they been advised: that the plaintiff would not insist on compliance with the approval conditions; that the valuations of the two aircraft did not reach the prescribed minimum values and had not been carried out in the manner specified; and/or that the Commissioner of Taxation was proceeding against

the second or third defendants. That pleading is supported by affidavit of each of the fourth and fifth defendants. The fifth defendant also swears to having been informed by Mr Chambers, the plaintiff's Queensland finance manager, that the minimum values prescribed in the finance approval condition had been met.

[8] The fourth and fifth defendants allege in the counter-claim that by reason of the plaintiff's breaches of its duty to disclose unusual features of the transaction with the first defendant, of its duty as mortgagee, of the collateral agreement and of s 52, they have suffered loss and damage in the form of shortfalls on the sale of the secured property, including the two aircraft. The relief sought is damages for the alleged breaches, declarations as to the conduct of the plaintiff as mortgagee and a declaration that the fourth defendant is entitled to have the guarantees discharged and delivered up for cancellation.

The plaintiff's contentions

[9] The applicant plaintiff's principal point was that each of the guarantees contained as clause 10 the following term:

> "Guarantor must not exercise any right of set-off, withholding, deduction or counterclaim which reduces or extinguishes the obligation of Customer or Guarantor to pay the Money".

[10] That, Mr O'Neill, for the plaintiff, contended, was effective to preclude the bringing of the fourth and fifth defendants' counter claim. In his argument he referred to *Covino & Anor v Bandag Manufacturing Pty Ltd*[1], *Beri Distributors Pty Ltd v Pulitano & Anor*[2] and *Elkhoury & Anor v Farrow Mortgage Services Pty Ltd (In Liq)*[3], in which clauses by which the guarantor guaranteed payment of all the debtor's indebtedness, or, in the last case, provided for enforcement of the guarantee as a principal obligation notwithstanding the creditor's acts or omissions, were held to preclude reliance on remedies by way of cross-claim or set off in reduction of the guarantor's liability. (In each of those cases the guarantor sought to rely on set-offs available to the principal debtor and other issues arose as to whether, in any event, an equitable set-off could be asserted in the absence of the principal debtor.) More to the point, in *Continental Illinois National Bank & Trust Company of Chicago v Papanicolaou ("The Fedora")*[4] and *Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd t/a Betta Machinery Sales*[5], clauses similar to cl 10 had been construed as ousting any right of counter-claim or set-off. Applying a similar construction here, the counter-claim should be struck out.

[11] The question then was whether the defence, as it stood alone, could survive. It pleaded the discharge of the first agreement; but that was conceded. The allegation that the guarantees were of no force and effect because they did not specify the agreement to which they were related had no substance in circumstances where the

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1 (1983) 1 NSWLR 237

2 *Beri Distributors P/L v Pulitano & Anor* (1994) 10 SR (WA) 274.

3 (1993) 114 ALR 541.

4 [1986] 2 Lloyd's Rep 441.

5 [2000] QSC 051.

bill of sale and guarantee formed in each case a composite document. The claim of a variation to the sixth agreement, with the effect of discharging the guarantors from their liability, could not stand in the face of cl 8 of the guarantee agreement, which provided that the guarantors' obligations were not affected by things including:

> "… (b) any change in the amount of the Money or in the interest rate payable by Customer on the Money, or the Money being repaid and readvanced (whether with or without the consent of or notice to the Guarantor) and this Guarantee shall extend to such obligations as so varied;
>
> (c) any change to the terms of the Agreement or the release or variation of any security held by Capital (whether with or without the consent of or notice to the Guarantor) and this Guarantee shall extend to such obligations as so varied".

In short, without the counter-claim there was no viable defence.

The defendants' contentions

[12] For the fourth and fifth defendant, Ms Skennar argued that the existing defence was maintainable. Defects by way of failure to identify the corresponding bill of sale and the amount guaranteed were fatal to the guarantees. The reference to "counter-claim" in cl 10 should be construed as meaning a claim of an offsetting credit as an ordinary commercial proposition, rather than court proceedings. In any event, the relief sought, in the form of declarations and order for delivery up of the guarantees for cancellation, was not in a real sense a counter-claim. Those remedies were not concerned with reduction or extinguishment of the obligation of the guarantors to pay money but were related rather to defence of the plaintiff's claim.

Construction of clauses precluding counter-claim

[13] In *The Fedora*[6], the guarantees under consideration provided that amounts payable by the guarantor were to be paid "in full, free of set off or counter-claim". The guarantors sought to raise cross-claims for damages in respect of the creditor bank's alleged negligence in realisation of securities. The English Court of Appeal held that claims in negligence were not exempt from the operation of the clause, pointing out :

> "(1) that the commercial purpose of the transaction is that, upon default by the borrower the bank should be paid quickly, and (2) that the natural meaning of the words is that all set offs and counter-claims are excluded."[7]

The guarantors were still able to prosecute their claims to judgment; they were:

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6 [1986] 2 Lloyd's Rep 441.

7 at p 444.

> "merely prevented from holding up payments admittedly due under the guarantees while disputed cross-claims are litigated".[8]

The bank was entitled to summary judgment.

[14] In *Coca-Cola Financial Corporation v Finsat International Ltd & Ors*[9] the Court of Appeal again had before it a provision for payment "free and clear of any right of set off or counter-claim". There was an argument that the clause was concerned only with the mechanics for making a payment rather than the extent of the guarantor's obligations. The court held that the words defined the extent of the obligation to pay. A second argument that it was against public policy to permit parties to contract out of a right to set off one debt or claim against another was also rejected, Neill LJ observing:

> "I can see no reason in principle why parties who are in a general contractual relationship cannot isolate one contract or one aspect of their dealing and provide that their rights in relation thereto are to be treated separately from their other dealings". [10]

Again, the result was summary judgment for the plaintiff.

[15] Closer to home, White J in *Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd t/a Betta Machinery Sales*[11] had to consider a similar clause providing for payment "free of any set off or counter-claim", in that case in a dealership agreement rather than in a guarantee. The defendant sought to rely on defences of misrepresentation and set-off, and also argued that the creditor could not rely on the clause excluding set-off because by its conduct it had caused the debtor's breach of the agreement. Her Honour concluded that damages, not rescission, were the obvious remedy if the debtor company was successful, and that the clause, which was clear in its terms, precluded any claim for such relief in the counter-claim and set-off.

[16] Finally, in *GE Capital Australia v Davis & Ors*[12], Bryson J had to consider the crossclaim of guarantors in the context of a guarantee containing a clause precluding the guarantor, without the creditor's consent, from raising "a defence, set off or counter-claim" available to itself, the debtor or any co-surety. While he concluded that the guarantors had, apart from that clause, rights in respect of diminution in the value of a security by reason of default or neglect by the creditor, those rights were suspended by the effect of the clause as long as the guaranteed money remained unpaid. Although such provisions were to be construed strictly against the interest of the creditor there was no ambiguity in the language of the provision:

> "The guarantors have unequivocally agreed to the effect that they will not make such claims as they now make in their cross-claim

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8 at p 444.
9 [1998] QB 43.
10 at 52.
11 [2000] QSC 051.
12 [2002] NSWSC 1146.

> unless and until they have paid the whole of the guaranteed moneys, which they have not done"[13].

The effect of cl 10

[17] The clause here is equally unambiguous. Its effect is to preclude the defendants here from setting off any claim for damages against their liability for the monies guaranteed. Those claims must be dealt with independently of this proceeding. However, there are matters raised in the counter-claim which are, as Ms Skennar submitted, more properly matters of defence: allegations of misrepresentation or misleading conduct, and breaches of conditions which may lead to vitiation of the guarantees or discharge of the guarantors' liability under them. The counter-claim should be struck out, because insofar as it constitutes a true counter-claim, the respondent defendants have contracted not to bring it, and the balance contains pleading not properly the subject of counter-claim. But the latter, going to invalidity or complete discharge of the guarantees, could properly be repleaded in the defence.

[18] Mr O'Neill pointed to cl 2 of the guarantee, which contains the guarantor's acknowledgement that:

> (b) Guarantor has made its own enquiries, and satisfied itself, as to the financial condition of Customer and Customer's ability to perform its obligations under the Agreement and not relied in any way on any information rovided [sic] by Capital on customer or on any other matter;
>
> (c) Capital has no duty at any time to give Guarantor any information relating to the financial condition or other affairs of Customer (including notice of any default) or anyone else".

That clause, he said, prevented the defendants from relying on alleged representations by the plaintiff. But it is debateable whether it could shield positive misrepresentation as is alleged here; it may not preclude relief by way of discharge under s 87 of the *Trade Practices Act*[14]*;* and it is no answer to the allegation that an implied condition as to the maintenance of a security has not been performed. I cannot be satisfied in terms of r 292(2) that the defendants have no real prospect of successfully defending the plaintiff's claim or that there is no need for a trial of it. In those circumstances it is inappropriate for me to canvass any further the plaintiff's submissions as to the merits of particular contentions in the defence.

Orders

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13 at [94].

14 *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367

[19] Accordingly, I will strike out the counter-claim and give the fourth and fifth defendants leave to replead the defence to raise those matters which they say give rise to invalidity in the guarantees or a right of discharge of their liability under them, and to delete the existing claim in it for set-off. I will hear the parties as to the time frame for any repleading, and costs.