SUPREME COURT OF QUEENSLAND

CITATION:	*Khatri & Anor v Wilson* [2003] QCA 188
PARTIES:	**RAJ KHATRI AND MICHAEL PELDAN** (plaintiffs/respondents) **v** **JOHN ELLIOTT WILSON** (respondent/appellant)
FILE NO/S:	Appeal No 8526 of 2002 SC No 10056 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	8 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2003
JUDGES:	de Jersey CJ, Davies JA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – where appellant entered into guarantee of repayment with respondents – where arguably misleading representations made at times preceding entry into guarantee – whether effect of any misleading representations spent by time of execution of guarantees – whether summary judgment should have been entered in favour of respondents *Uniform Civil Procedure Rules* 1999 (Qld), r 292 *Swain v Hillman* [2001] 1 All ER 91, approved
COUNSEL:	J A Griffin QC for the appellant R G Bain QC, with D L K Atkinson, for the respondents
SOLICITORS:	O'Connor & Co for the appellant Abbott Tout for the respondents

THE CHIEF JUSTICE: The appellant appeals against a learned Judge's entering of judgment summarily in favour of the respondents in the sum of $2.19 million under Rule 292 of the Uniform Civil Procedure Rules. The appellant's liability arose under his guarantees of repayment by a company called Leegrove Pty Ltd under loans provided by Lex Nominees Pty Ltd. The funds were to be applied in the purchase and refurbishment of property at Surfer's Paradise.

The appellant relied on two uncontradicted representations made at times preceding the giving of the guarantees, said to warrant a trial. There were allegedly made on behalf of Lex Nominees by a solicitor Mr Triscott. They were essentially first, that Triscott would not call upon the guarantees until the refurbishment work had been completed and the property was producing income sufficient to service the loan; and second, that although the fifth of the loans was only for 12 months Triscott intended to roll over that loan for a further period of 12 months.

The representations were said to be misleading in that at the time Triscott made them he did not have the professed intentions. The representations were allegedly made in January 1999. The first loan was not made until April that year and the guarantees were signed on 15th April 1999 and 7th May 1999. In the intervening period negotiations took place between Triscott and, not the appellant, but the solicitor for Leegrove, as to the terms of the loans.

When the first loan was made it did not provide that Lex Nominees would supply all the money required but rather stipulated that after eight months Leegrove was required to pay interest on the outstanding principal.

In his affidavit the appellant deposes that in the final analysis he had not been able to negotiate a better repayment of interest and interest payments were only included for the first eight months of the loan after which Leegrove had to make interest payments monthly.

The appellant was made aware of the import of the documents, having arranged for his solicitor to execute a certificate verifying that the documents had been explained to him. As to the second representation, during the negotiations following the making of the representation, the appellant became aware that, although the moneys to be advanced were to come from five loans with the first four for terms of two years, the fifth was for 12 months with an option for roll-over by the appellant.

The appellant swore that he gave the guarantees on the basis of the alleged misrepresentations, and it may be noted that the appellant was not cross-examined and that the respondents called no contrary evidence on that point.
The Judge is to be taken, however, nevertheless to have rejected the appellant's claim. The substantial question ventilated on the hearing of the appeal is whether her Honour was entitled summarily to do that.

As I interpret her reasons, the learned Judge essentially took the view that the effect of any misrepresentation was spent or had become inoperative by the time of the execution of the guarantees. As she put it:

> "Mr Wilson contents that he relied upon assurances by Mr Triscott that he would not take up the guarantees. This was in the context of early discussions between the parties in January 1999 when Mr Wilson expressed his unease as to the size of the investment. The negotiations which occurred between Mr Wilson's solicitor and Mr Triscott's firm make no reference to these matters...The guarantees were serious commercial documents. Mr Wilson was under no constraints. His solicitor's certificate indicates that the effect of the guarantees was explained to Mr Wilson by his solicitor. He was involved in the loan transactions himself and was not without considerable commercial experience."

The learned Judge was entitled to take the view that the appellant had "no real prospect of successfully defending" the plaintiff's claim. She is to be taken as regarding the appellant's claim as improbable in light of events following the making of the alleged representations.

In my view those following events virtually compelled the Court to reach the conclusion which her Honour did reach. Her Honour approached Rule 292 correctly. She referred to what Lord Wolfe, then Master of the Rolls, said in Swain v. Hillman 2001 1 All England Reports '91, in these terms:

> "The words 'no real prospects of succeeding' do not need any amplification. They speak for themselves. The word 'real' distinguishes fanciful prospects of success or...they direct the Court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

I agree with that expression of view. Her Honour's allowing this matter to go to trial would have elevated the appellant's

prospects to an unrealistic level. Notwithstanding the appellant's submissions before this Court, there is, in my view, really no need to add to the learned Judge's expression of reasons, which I would respectfully endorse.

I would order that the appeal be dismissed with costs to be assessed.

DAVIES JA: I agree.

HELMAN J: I agree.

THE CHIEF JUSTICE: Those are the orders.
