SUPREME COURT OF QUEENSLAND

CITATION:	*Powell v Camm* [2003] QCA 353
PARTIES:	**ERNEST HARRY POWELL** **(**plaintiff/respondent) **v** **GARY STIRLING CAMM** (defendant/appellant)
FILE NO/S:	Appeal No 9037 of 2002 SC No 8945 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2003
JUDGES:	McMurdo P, Muir and Holmes JJ 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 – QUEENSLAND – SUMMARY JUDGMENT - where respondent granted summary judgment "insofar as it arises in the proceedings" - where appellant sought adjournment to produce affidavit evidence as defence material - whether the learned primary judged erred in refusing adjournment – whether the refusal caused the appellant any injustice *Maxwell v Keun* [1928] 1 KB 645, followed *Sali v SPC Ltd* (1993) 67 ALJR 841, followed
COUNSEL:	P J Favell for the appellant M T Brady for the respondent
SOLICITORS:	Bain Gasteen Lawyers for the appellant Rogers Matheson Clark for the respondent

[1] **McMURDO P:** This is an appeal from an order of 30 August 2002 giving summary judgment to the respondent "insofar as it arises in the proceedings" in the amount of $556,200.49 with costs to be assessed, and that the proceedings be otherwise adjourned. The judgment is based on a signed agreement between the parties dated 27 March 2000. The sole ground of appeal now sought to be argued is

that the learned primary judge erred in failing to adjourn the hearing of the summary judgment application to enable the appellant to produce affidavit evidence to the court as to five matters raised in his defence, first, that the appellant appointed the Stirling-Camm Trust, not the appellant, as the respondent's agent to invest funds; second, duress; third, the agreement was amended; fourth, the agreement was amended so that another person would pay the amount directly to the respondent; and fifth, repayments beyond those conceded by the respondent have been made. The appellant offers, if successful, to pay the respondent's costs of the appeal and the summary judgment application.

[2] The respondent, a 67 year old US citizen, filed a Supreme Court claim on 13 October 2000 against the appellant for damages for breach of contract. His statement of claim relevantly pleaded an original oral agreement between the parties to invest $US310,000 in Cellnet shares and that the appellant was in breach of a second agreement entered into at the appellant's home at 123 Lake Weyba Drive, Noosaville on or about 27 March 2000 in which the appellant agreed to repay to the respondent $US310,000; only $A6,004.80 had been repaid.

[3] The appellant filed a defence on 23 November 2000 claiming in relation to the second agreement that it was made on behalf of the Stirling-Camm Trust; that it was varied; that it was executed under duress in that the respondent and his nephew refused to leave his home until it was executed; that it was orally agreed that Edward Therrien would pay the amount under the agreement directly to the respondent in reduction of Therrien's indebtedness to Warbird Aircraft Recovery Pty Ltd and that payments exceeding those conceded by the respondent had been made to the respondent through the respondent's agent, Therrien.

[4] The respondent deposed he was introduced to the appellant by a third party, Edward Therrien, to invest money as the respondent's agent on the Australian stock market. On or about 8 November 1999, the respondent told him he had an 8,000 share pre-allocation available in Cellnet; the respondent caused the sum of $US310,000 to be sent to Therrien, who was to act as agent to wire the money to the appellant's agent in Australia. The parties verbally agreed that the appellant would use that money to purchase all available shares in Cellnet at or around the time that it was listed on the Australian stock market. In late September and early November 1999, it was also agreed that the appellant would from time to time recommend other Australian shares which could be purchased, if specifically authorised by the respondent; all investments would be in the respondent's name; the appellant would monitor the share price of Cellnet and any other shares purchased with the respondent's investment money and provide a weekly status report to the respondent; the respondent could terminate the agreement at any time with the result that the respondent would pay the balance of his account as soon as possible thereafter and in any event within 30 days; the appellant would be paid $5,000 together with 25 per cent of any profits generated from the investment moneys, excepting the initial investment in Cellnet. The respondent swore he provided $US310,000 to the appellant for that purpose but later became concerned about his investment. In March 2000, he travelled to Australia, accompanied by his nephew, Mitchell Candler, to obtain an accounting of the investment. They met with the appellant on a number of occasions in Noosa Heads over ten days between 17 and 29 March 2000. He was not satisfied that he had obtained an accounting of the investment. On or about 24 March the appellant said, "If you push me for repayment of the funds they will be placed in an offshore account and no-one will be able to get their

hands on it." The respondent deposed the appellant admitted using some of the respondent's funds to purchase two barges and the appellant showed Candler and the respondent a barge moored in the Noosa River.

[5] The respondent further deposed that on 27 March 2000 he and the appellant agreed in writing that the appellant would repay $US310,000 by 26 April 2000. That written agreement, signed by the respondent and the appellant and witnessed by Darryl William Lomas JP was before the court. The appellant has repaid only $A6,004.80.

[6] Edward Therrien swore an affidavit in terms generally supporting the respondent's evidence.

[7] In a fax to Therrien headed “Stirling Trust” dated 24 March 2000, the appellant stated that the respondent and his nephew had advised him that they wished to “discontinue the current project” and have “asked for an accounting and disposition of funds”. The fax included:

> “… I now intend to return the amount of $310,000 USD, plus the $40,000 USD sent to WESTPAC USD account and all profits derived form (sic) the exercise.
> Note: in sending the whole amount of $310,000 USD the $5,000 USD ‘commission’ is refunded. Also the $5000 USD for the BVI Company known as Sharpwood LTD. I require the effective removal of E. Powell from any documentation associated with this entity.
> …
> In order to arrive at an exact figure, today I am sending all documentation to a Chartered Accountant. This matter should be finalized by the end of the month, subject to the final sale of all shares. Whereas, I had previously tried to advantage Mr. Powell and cover these costs from any commission due to me, this will now not be the case. …”

[8] On 29 March 2000, in a fax to his accountant, Mr Spark, the appellant advised –

> “Under the terms of the new agreement, my obligation is to pay the amount of USD$310,000 to HKSBC at the appropriate time.
>
> The disposition of funds and stocks still remains under my control until further advice. The requirement to obtain authority from Mr E Therrien is still in place.”

[9] On 2 May 2000 the appellant sent a fax headed “Stirling Trust” to Therrien stating that he had been instructed by the respondent to send US$90,000 to Therrien’s account. The fax requested –

> “As this constitutes a variation from the standing agreement, I request this be confirmed by you both. Please sign where indicated and return signed version of fax to me.”

The requested confirmations appear to have been provided.

[10] The respondent swears in respect of this communication –

> “The [appellant] states the agreement was varied to enable me to purchase a Cessna aircraft. There was a variation only to the direction for payment and no qualification of the agreement otherwise.”

[11] On 10 May 2000 the appellant sent the following fax to Therrien on the subject "E Powell Funds":

> "I have liquidated a parcel shares and funds will start to become available this Thursday/Friday (settlement to take three working days plus one day for transfer) my time.
>
> The first amount equates to $5,000 USD which will cover the deposit on the plane deposit.
>
> I will be able to get the balance next week.
>
> I shall send you FAX advice of transfers in the usual manner.
>
> The reason for the delay is I am losing money by doing this but acknowledge there can be no further delays.
>
> Regards: Gary."

[12] On 24 October 2000, the respondent obtained a Mareeva injunction restraining the appellant from removing property from the jurisdiction.

[13] On 1 November 2000, the court further ordered that the appellant make, file and serve an affidavit setting out a full account of the $US310,000 received by him from the respondent. The appellant deposed on 15 November 2000 that he was unable to comply with that requirement because some documents had been taken by the respondent and Candler and the restrictive orders placed upon him meant that he was unable to fund accountants to produce the account. He claimed that Therrien owed him $438,397.42 and that he had total assets of $932,301.21 with liabilities of $64,720.16.

[14] In an affidavit of 23 November 2000, the appellant deposed that he was the appointer under the Stirling-Camm Trust and at all material times the trustee was one Bette Marjorie McLean. He contended that all agreements concerning the Stirling-Camm Trust, including the $US310,000 of the respondent's money, were agreements with the Trust and not with him personally and that he told the respondent this at all times. He also deposed that the respondent and Candler refused to leave his premises until he executed the agreement to repay the $US310,000. He deposed that before the execution of that agreement the respondent, Therrien and he, on behalf of the Stirling-Camm Trust, agreed that Therrien would pay the $US310,000 directly to the respondent in reduction of his indebtedness to a company associated with the appellant. He also deposed that on or about 28 April 2000, the respondent requested that he send $US90,000 and that this constituted a variation to the agreement of 27 March 2000 and that an amount

of $A65,800.03 was repaid on 29 March 2000.[1] The appellant deposed that the respondent's funds had been invested and substantial losses ensued; he invested the balance of approximately $100,000 in Warbird Aircraft Recovery Pty Ltd, a company controlled by the appellant, and that this was done with Therrien's authorisation.

[15] In an affidavit of 19 June 2002, the respondent deposed that there had been no variation to the agreement other than as to the directions for payment; nor was there an agreement that Therrien was to pay the appellant's debt to him; the debt claimed was still outstanding.

[16] Candler deposed that neither he nor his uncle made any threats of violence to the appellant prior to signing the agreement of 27 March 2000.

[17] Edward Therrien, in an affidavit dated 19 July 2002 filed on 8 August 2002, denied that he was involved with the agreement between the parties on 27 March 2000.

[18] As to the first of the matters raised on appeal, the learned primary judge in his ex tempore reasons found that the appellant's contention that the correct defendant to the proceedings should have been the Stirling-Camm Trust had no realistic prospects of success as a defence. The written agreement, which appears to have been a settlement of the parties' differences over an earlier agreement was clearly between the appellant and the respondent. On the material before him, his Honour was clearly right in that conclusion.

[19] As to the second matter, his Honour noted that the allegations in the defence were not sworn to and in any case it is difficult to see how they could amount to duress. There was no evidence that the respondent made unlawful threats to the appellant or otherwise acted unconscionably. On the material before the learned primary judge, his Honour was plainly right in this conclusion: there was no evidence to establish an arguable case that unlawful or illegitimate pressure was placed on the appellant to force him to enter into the signed agreement witnessed by a JP, the contents of which were not otherwise in dispute.

[20] His Honour did not specially deal with the appellant's claim in his defence that the agreement was varied on 2 May 2000 for the respondent to receive $90,000 for the purchase of a Cessna. The only evidence was that that money was not paid to the respondent and any variation related only to the direction for payment. The material before his Honour did not show an arguable defence on this ground.

[21] As to the fourth matter raised in the appellant's defence, that the agreement was amended so that Therrien would pay the amount directly to the respondent, his Honour concluded that the point was quite unpromising for want of reference to it in the written agreement. There was no evidence supporting the appellant's assertion and evidence from the respondent denying it. There was no evidence raising an arguable defence on this ground. Nor was there any plausible evidence before his Honour supporting the appellant's assertion that he had repaid more than $A6,004.80 under the agreement, a claim denied by the respondent on oath.

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[1] The document he relied upon to support that claim did not establish that sum was paid to the respondent. See GSC4 to affidavit of Gary Stirling Camm, 30 October 2000.

[22] In these circumstances, should the learned primary judge have granted an adjournment to give the appellant the opportunity to place further material before the court? His Honour very fairly raised the question of an adjournment. The appellant had previously been legally represented but was self-represented on this application. After considering the matter, his Honour declined to adjourn the application because the application was served on 9 August 2002 and although the appellant was in dispute with his former solicitors, he had plenty of time to put proper material before the court; he had previously filed affidavits in the court and was therefore aware that the court proceeds on the basis of sworn material.

[23] The discretionary exercise to refuse an adjournment will only be interfered with on appeal if it appears that the judge erred in law or the result of the refusal of the adjournment was to do an injustice to one or other of the parties: *Maxwell v Keun*[2] and *Sali v SPC Ltd.*[3]

[24] All the matters referred to by his Honour were material and supported the refusal of the adjournment. There were reasons to doubt the appellant's pecuniosity; he had previously had difficulty funding his accountant and he told his Honour he was unrepresented because he was unable to pay his solicitor's fees. There was a legitimate concern on the material before his Honour that he may not have been able to meet the costs of an adjournment resulting in prejudice to the respondent if the adjournment had been granted. The matter had been before the court since October 2000; the written agreement and the ensuing faxes from the appellant set out earlier in these reasons were compelling evidence against the appellant; if the appellant had an arguable defence he should have been able to satisfy the court of it by 30 August 2002. The appellant has not demonstrated that the refusal of the adjournment has caused any injustice to him. It follows that he has failed to show any reason to overturn his Honour's decision refusing the adjournment.

[25] I would refuse the appeal with costs to be assessed.

[26] **MUIR J:** I agree with the reasons for judgment of McMurdo P and the order she proposes.

[27] **HOLMES J:** I agree with the reasons for judgment of McMurdo P and the order she proposes.

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2 [1928] 1 KB 645.

3 (1993) 67 ALJR 841, 845.