SUPREME COURT OF QUEENSLAND

CITATION:	*Midland Consolidated P/L v Longworth* [2004] QSC 263
PARTIES:	**MIDLAND CONSOLIDATED PTY LTD** **ACN 084 460 284** (plaintiff) v **ROSS LONGWORTH AS TRUSTEE OF THE ESTATE OF GWENYTH FRANCES LONGWORTH** (defendant)
FILE NO:	BS9066/03
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	16 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2004
JUDGE:	Douglas J
ORDER:	**Application dismissed. Further submissions as to costs and consequential orders invited.**
CATCHWORDS:	PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – Application for summary judgment under r 293 *Uniform Civil Procedure Rules* – Whether plaintiff has no real prospect of succeeding *Unform Civil Procedure Rules 1999* (Qld), r. 293 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, referred *Gray v Morris* [2004] QCA 5, referred *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, cited *Lewis v Wilson* (1997) 42 NSWLR 228, referred
COUNSEL:	F G Forde for the plaintiff T J Hancock with him R J Anderson for the defendant
SOLICITORS:	Nicholsons for the plaintiff McCullough Robertson as town agents for Holman Webb for the defendant

[1] **DOUGLAS J**: This is a defendant's application for summary judgment of its counterclaim by which he, Mr Longworth, as trustee of an estate, claims repayment of money lent. There is an admission by the plaintiff that $404,935.00 has been lent to it but a denial that it is presently repayable. The defendant claims that the total amount lent is $963,653.00 consisting of $643,653.00 advanced to the plaintiff together with $320,000.00 advanced to a third party at the plaintiff's request. In the alternative the latter sum of $320,000.00 is said to be recoverable as monies had and received.

[2] The first issue is whether any part of the loan is now payable. The first advances were made pursuant to a loan agreement made 8 March 2001 by which the loan was to be repayable in 6 months. The statement of claim by the plaintiff, to whom the money was lent, asserts that the loan agreement was varied orally in late 2001 and in writing in May 2003 converting the loan into one repayable in 60 months rather than 6 months and changing the rate of interest payable.

[3] The defendant contends that the pleadings and the evidence relevant to them are ineffective to establish any variations of the original agreement. As to the alleged oral variation, he submits that an express term of the original agreement provides that "a variation to this document is not effective unless it is in writing and signed by the parties" and prevents reliance on an oral variation. He also contends that the evidence of the oral variation is defective in that paragraphs 40, 41 and 42 of the affidavit of Mr Adam Huxley filed 21 July 2004 swear to the ultimate issue as to the making of an agreement in late 2001 and its terms rather than providing evidence in the proper form of any conversations in which the agreement was made. For present purposes I am prepared to assume that the statements in the affidavit and those paragraphs should be taken as reflecting the effect of what was said between the parties at the meeting said to have taken place in late 2001.

[4] The written variation is pleaded in the third further amended statement of claim in paras 13A and 13B. Paragraph 13A(b) refers to a deed of loan executed in May 2003 but which is alleged in para 24 not to be of any legal effect because it was executed by the holder of a power of attorney for the lender, Gwenyth Frances Longworth, whose authority had terminated in 2002 upon her death.

[5] There is, nonetheless, evidence that the parties conducted their affairs on the basis that such a variation had occurred. For example, a statement of account provided by the plaintiff to the defendant for the period 1 January 2001 to 29 October 2002 refers to the rate of interest as 9.75% per annum, a rate referred to by the document executed in May 2003. On 23 June 2003, also, the solicitors for the defendant provided an epitome of mortgage to the plaintiff consistent only with the assumption that the repayment date had been varied to 7 March 2006 and the interest rate varied in accordance with the agreement alleged by the plaintiff. The plaintiff also obtained further advances, on the evidence available to me, after the date of the alleged variation and has pleaded, admittedly vaguely, that the defendants are estopped from denying the plaintiff's entitlement to certain declaratory relief by reason of the conduct of the defendant's attorney in negotiating new terms of the loan and accepting payment of interest on the principal at the new rate of 9.75 % and for a term of 60 months from 7 March 2001.

[6] That pleading is criticised by the defendant's counsel for not articulating the grounds necessary to establish such an estoppel described, for example, by Brennan

J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428-429. That is no doubt true but this is an application for summary judgment and it seems to me that the evidence led before me may enable the plaintiff to assert, for example, that it sought further advances on the assumption that the term for repayment of the loan had been extended, and that it was induced to do so by the defendant's representative's conduct. Arguably detriment may be caused to the plaintiff if the assumption created by the negotiations for the extension of the term of repayment of the loan and the change in the rate of interest were not fulfilled. There may also be an argument available that the defendant has waived repayment of the loan in the terms alleged in the original agreement. There is no pleading of waiver yet but it was argued to be available on these facts. It may also be significant that the defendant alleges in para 11(c) of his further amended defence and counterclaim that this deed, whose alleged inefficacy is raised by the plaintiff, operates according to its terms.

[7] In those circumstances it seems to me that it would be inappropriate to give judgment on the counterclaim at this stage, so denying the plaintiff the opportunity of making these allegations, of proving them if it can and of establishing what legal effect, if any, they may have. In other words it is not my view that this case is "hopeless" or "bound to fail" or, to use the language of r. 293, one that "has no real prospect of succeeding"; see *Gray v Morris* [2004] QCA 5 at [7], [18], [46]. It remains the case as the High Court said in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99 that "the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried".

[8] The fact that the plaintiff has not yet pleaded clearly the estoppel or waiver on which it seeks to rely should not prevent it from going to trial and having the opportunity to further amend its pleading to raise properly the allegations necessary to such a claim.

[9] Apart from that issue it was also argued before me that the evidence relating to the advance of $320,000.00 to a third party at the plaintiff's request was so clear that judgment should be given for payment of that sum also. Because of my finding about the general issue as to the date of repayment it may not be strictly necessary for me to address this issue. The circumstantial evidence derived from a chain of emails certainly suggests that the making of the payment to the third party was done at the request of Mr Greg Huxley, the father of Mr Adam Huxley who was then the only relevant director of the plaintiff. There is a factual dispute, however, as to the authority given to the solicitor who wrote the relevant letter dated 7 May 2002 offering to pay that sum. There is also a factual dispute as to whether Mr Greg Huxley had any authority to authorise the sending of such a letter on behalf of the company in any event. Again this is not a matter that can be resolved summarily.

[10] There is a further dispute concerning whether any amounts lent by the defendant beyond the sum of $404,935.00 were either paid to the plaintiff or the subject of an obligation to repay assumed by it in lieu of another company called Celrex Pty Ltd. Those issues are not at all clear on the plaintiff's pleadings but are referred to in some respects in the affidavit material on this application which attempts to put in issue, if again not very clearly, whether they are owed by the plaintiff to the defendant. The defendant relied on a statement of account by the plaintiff as evidence of an admission that $643,653 at least was owed by it to the defendant.

That is, no doubt, true; see *Lewis v Wilson* (1997) 42 NSWLR 228, 230-232. That admission can, however, be rebutted by other evidence and does not address the issue of when the debt becomes repayable.

[11] In my view, therefore, this is not a matter in which summary judgment should be given. This is not to say that the third further amended statement of claim or the reply are yet documents that adequately raise the issues relevant to the liability of the plaintiff to the defendant in respect of the monies borrowed by it. It seems to me to be necessary for the plaintiff to amend those documents again.

[12] It also seems to me that the alternative relief sought by the plaintiff that paragraphs 13A, 13B and 24 or some of them be struck out should not be granted, at least at this stage, as those allegations may be relevant to any pleading relying upon an estoppel or waiver that the plaintiff may be advised to pursue. Accordingly I shall dismiss the application and hear further submissions as to costs and any consequential orders that may be necessary.