SUPREME COURT OF QUEENSLAND

CITATION:	*Rochfort & Anor v Habashy & Anor* [2005] QCA 197
PARTIES:	**PHILLIP STANLEY ROCHFORT and CHERYL MARIE CONROY** (plaintiffs/respondents) **v** **SAMIR HABASHY and LAILA HABASHY** (defendants/applicants)
FILE NO/S:	Appeal No 1129 of 2005 DC No 741 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2005
JUDGES:	McMurdo P, Jerrard JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for an extension of time for leave to appeal dismissed** **2. Applicants pay any costs incurred by the respondents of and incidental to the application, assessed on the standard basis**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – respondents filed claim for specific performance of a property sale contract – applicants filed stay application almost two months late – respondents then applied for judgment by default and costs – applicants did not appear at hearing and default judgment ordered against them – no explanation provided for failure to either appear or file Notice of Intention to Defend – application for extension of time in which to appeal lodged six months late – applicants argued contract invalid due to 'serious errors' – whether applicants demonstrated a sufficient case on the merits to justify granting an extension of time *Service and Execution of Process Act* 1992 (Cth), s 20

Uniform Civil Procedure Rules 1999 (Qld), r 288, r 290

Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd (1933) 48 CLR 565, applied
National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd [1983] 2 Qd R 441, cited
Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, cited

COUNSEL: The applicants appeared on their own behalf
The respondents appeared on their own behalf

SOLICITORS: The applicants appeared on their own behalf
The respondents appeared on their own behalf

[1] **McMURDO P:** For the reasons given by Jerrard JA, with which I generally agree, the application for an extension of time for leave to appeal should be refused with costs.

[2] **JERRARD JA:** On 5 July 2004 a District Court judge made orders giving the plaintiffs Phillip Rochfort and Cheryl Conroy judgment in default pursuant to *Uniform Civil Procedure Rule* 288, on their claim for specific performance of an agreement for sale to the plaintiffs by the defendants of land being Lot 199 RP 31212 County of Stanley Parish of Russell, situated at 4 Kestrel Street on Macleay Island. The defendants had not filed any Notice of Intention to Defend the proceedings started by the plaintiffs' Claim filed in the Brisbane Registry on 27 February 2004, which Claim and Statement of Claim were served on the defendants on 12 and 11 March 2004 respectively. The defendants have applied, by an application filed in this Court on 11 February 2005, for orders:

- Granting leave to file an application for Leave to Appeal out of time;
- Granting leave to appeal, pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld), from the orders dated 5 July 2004;
- Setting aside that judgment by default;
- Dismissing the plaintiffs' application in the District Court, and in lieu thereof orders declaring the contract for sale void and unenforceable;
- Setting aside a caveat by the plaintiffs on the defendants' title;
- Various other orders in the defendants' favour.

[3] The defendants could have applied to the District Court under *UCPR* 290 for an order setting aside the judgment by default; if not satisfied with the result, they could then have asked for leave to appeal from a judgment refusing to set aside the default judgment. On any application to set aside, which is the step the defendants should have taken, the matters they would need to show would include:

- A satisfactory explanation for the failure to appear on 5 July 2004 or enter any appearance or notice of intention to defend;
- An explanation for any delay in applying to set the judgment aside;

- That they had a prima facie defence on the merits.

[4] In *N.M.L.A. v Oasis Developments* [1983] 2 Qd R 441 (at 449) McPherson J (as he then was) wrote that it is the last of those considerations that is the most cogent, and that it would not be often that a defendant who had an apparently good defence would be refused the opportunity of defending, subject to irreparable prejudice to the other parties (and, I add, to costs). That statement of the applicable law has been followed ever since in this State.

Background Matters

[5] The defendants are husband and wife and live at Mt Druitt in New South Wales. They are the registered owners of the land at 4 Kestrel Street, on Macleay Island in Moreton Bay. Mr Samir Habashy suffers from an orthopaedic condition and has restricted mobility; he used a walking stick to enter the court room and when standing to present his argument. English is not his first language. He was assisted in preparation and presentation of his case by a Mr Hanna.

[6] The plaintiffs are de facto partners and live at number 2 Kestrel Street on Macleay Island. On 17 October 2003 Mr Habashy, speaking for himself and his wife, agreed to sell them the land at number 4 Kestrel Street for $41,500. He forwarded a faxed note of that agreement to Mr Rochfort, and on 20 October 2003 Phillip Rochfort faxed back a copy of that same note, now bearing the written agreement of both Mr Rochfort and Ms Conroy, dated 20 October 2003, accepting the offer of $41,500 for that property. That should be understood as accepting the offer to buy the property at that price.

[7] The plaintiffs instructed Brisbane solicitors, trading as Canning Weil, in the conveyance, it was handled by their conveyancing clerk, Angela Smetzer. She was given instructions in a facsimile from the plaintiffs dated 29 October 2003. Before that date Ms Conroy had faxed Mr Habashy and provided the plaintiffs' personal details and contact numbers, and asked both that the contract of sale be subject to finance and that it be made a 60 day contract. Mr Habashy responded with a faxed advice that his solicitor (in New South Wales) was Ms Reta Hanna. Ms Smetzer forwarded a contract of sale, already signed by both plaintiffs, to the defendants for execution under cover of a letter dated 17 November 2003, addressed to the solicitor Hanna. On 18 November Mr Rochfort told Mr Habashy that he and Ms Conroy had obtained finance satisfactory to them.

[8] Ms Hanna telephoned Ms Smetzer, advising that she could not act in the conveyance because the property was in Queensland, and asking Ms Smetzer to recommend someone to act for the defendants. Ms Smetzer advised that subject to the consent of both parties, Canning Weil could act for each. On or about 18 or 19 November 2003 Mr Habashy telephoned Ms Smetzer and confirmed that that was acceptable to him, and Ms Smetzer forwarded a draft acknowledgement and authority to both plaintiffs and defendants. That draft acknowledged the potential for a conflict of interest and duties, and provided that should that occur, Canning Weil would cease to act and that both Seller and Buyer would have to obtain their own independent legal advice. It contained a request for Canning Weil to act on behalf of the party signing the draft, which Mr Habashy did as vendor on 8 December 2003, and returned the request to act and authority to Ms Smetzer.

[9] On or about 4 December 2003 Ms Smetzer received the contract of sale executed by both defendants. She observed that the designated settlement date in that draft, "60 days from date of contract", had been crossed through, as had the place for settlement, "Brisbane". I observe that it is probable that the contract was also undated, since Mr Habashy complained in this Court in his oral argument that the hand written date, "22 November", had been inserted, he submitted, by Ms Smetzer for the advantage of the plaintiffs, whereas by implication he and his wife had entered no date in it. He informed this Court that the contract was executed by the defendants on or about 20 November 2003.

[10] His affidavits sworn 7 February 2005 and 4 March 2005, both of which he read on this appeal, imply that he intended the place for settlement to be Sydney, and assert that the originally agreed settlement date was 20 November 2003, which was actually the date of execution by the defendants. His affidavits complain that this settlement date was not mentioned in the draft contract, nor was Sydney as the place for settlement, and likewise complain that Ms Hanna's name appeared in the draft as his solicitor; it should not have as she was no longer acting for the defendants at the time the contract (already executed by the plaintiffs) was forwarded to the defendants at Mt Druitt. He also complains in those affidavits that the place for settlement was specified as Brisbane, which he had not authorised, and that that equally unauthorised settlement date of 60 days from the date of the contract did appear.

[11] It was common ground that a settlement date of 10 December 2003 was agreed upon between the parties. Settlement did not occur on that date, and the issue the defendants really agitated on their application to this Court centred on their affidavit evidence that they had not agreed that settlement be extended to take place on Tuesday 16 December 2003. The contract provided in Clause 6.1 that time was of the essence, except regarding any agreement between the parties on a time of day for settlement. Ms Smetzer swore in her affidavit read by the plaintiffs before the District Court judge that Mr Rochfort had suggested, and Mr Habashy had agreed on the defendants' behalf on 11 December 2003, that settlement be put off until 16 December 2003. Ms Smetzer's affidavit records her having told the defendants on or about 4 December 2003 that Mr Rochfort had obtained finance and the contract was now unconditional in that respect; and that on that day she had forwarded the transfer documents to the defendants for execution. Mr Habashy had then agreed 10 December would be the settlement date. On 10 December 2003 the documents arrived back, but had been inappropriately executed (not witnessed by a suitably qualified person), and on 11 December 2003 she had located Mr Habashy and told him of that by telephone. She also advised in that conversation that the plaintiffs' finance had been delayed, and that the plaintiff suggested settlement be on 16 December. Her affidavit recorded that Mr Habashy told her the defendants agreed to settlement being extended to Tuesday, 16 December 2003.

[12] Her file notes, tendered on this application by Mr Habashy, (appearing for himself and, he assured the Court, authorised to speak for his wife) record that Ms Smetzer had spoken to Mr Habashy on 11 December, had advised the matter had not settled, and the that purchaser needed an extension to the next Tuesday (16 December). It records that she would call Mr Habashy "tomorrow" and discuss the matter further; and that she needed a CT (presumably a certificate of title) from him. It records his undertaking to her to "look at his paperwork when he gets back to Sydney" (on Friday, 12 December).

[13] Mr Habashy's affidavit in this Court describes a different series of conversations, first one on 10 December in which he agreed to an extension to 11 December, and then one on 11 December in which he agreed to an extension to 3.00 pm on Friday 12 December. It also described that on Saturday 13 December a real estate agent on Macleay Island assured him that that agent could obtain $65,000 for the land for Mr Habashy, and that the latter then informed Ms Smetzer on Monday 15 December, that there having been no settlement on Friday 12 December, he would not go ahead with that sale as he had a considerably higher offer. He did not actually have any such offer; the agent had said only that he could get one. He did not settle on 16 December, and refused to do so thereafter. On 19 December 2003 the plaintiffs' new solicitor obtained a caveat over the title, Canning Weil having withdrawn.

[14] Ms Smetzer's file note of 11 December does not record the fact of Mr Habashy's actual agreement to an extension to 16 December, nor does it record any specification by him that settlement must occur by 3.00 pm on 12 December. The file note appears more consistent with her account than with his, because it says nothing about 12 December, and it is consistent with her need to obtain some further documents from him.

District Court proceedings

[15] The defendants did not put any affidavit material as to the merits of the matter before the District Court, and after service of the plaintiffs' documents initiating the proceeding. The documents originally served were the Claim and Statement of Claim. The latter contained the specific pleading that the parties had mutually agreed that settlement be on Wednesday 10 December 2003, and had mutually agreed to a later settlement date of Tuesday 16 December. Service of the documents having occurred in New South Wales, it was accompanied by a notice in form 1 under the *Service and Execution of Process Act* 1992 (Cth) (the "*Process Act*") . That notice relevantly advised that if a court of a State other than the (Queensland) District Court was the appropriate court, the defendant might be able to have the proceedings stayed by applying to the District Court; and it also advised of the necessity to file an appearance in the District Court, and that the defendants had only 28 days after being served to do so. The claim served on the defendants advised as well that within 28 days of service they were required to file a Notice of Intention to Defend in the Brisbane Registry, and that, "if you do not comply with this requirement judgment may be given against you for the relief claimed". The defendants did not respond to those warnings received in mid-March 2003 regarding filing an appearance or a Notice of Intention to Defend, but did respond nearly three months later to the advice about a stay.

[16] On 7 June 2004 they filed an application for orders:

1. That pursuant s 20 of the *Process Act* the proceedings be stayed;
2. That there be no order as to costs;
3. That if the application is to be determined following a hearing that the applicants be permitted to have a hearing by video link or telephone;
4. That the plaintiffs pay the defendants' costs of the application.

That application was set down for hearing on 5 July 2004, and was supported by an affidavit sworn by Mr Habashy. In it he deposed to himself and his wife having accepted the offer to buy their land by signing the contract in New South Wales, and gave the opinion that the law of New South Wales would be the most

appropriate to be applied as the contract was entered into in that State. He also advised that there were health issues as to why he could not travel to Queensland, and attached a medical certificate from a Dr Hanna, of the Mt Druitt Healthcare Medical Centre. That certificate was dated 29 March 2004, and advised that Mr Habashy suffered from a degenerative orthopaedic conditions in his back and was unable to travel to Brisbane. Mr Habashy's affidavit also attached a copy of a parking authority entitling the holder to park in a space designed as reserved for people with disabilities. His material said nothing to challenge the claim that the agreed date of the settlement was 16 December, or that he had wrongly refused to complete.

[17] The plaintiffs applied by an application filed on 28 June 2004 for an order pursuant to *UCPR* 288 that they have judgment by default, and for costs, also set down for hearing on 5 July 2004. The transcript of the relatively brief proceedings on 5 July 2004[1] reveals that affidavits of service were read before the learned judge, and that so too was the affidavit of Ms Smetzer, sworn 1 July 2004. Service of the application for orders in default of appearance was also established. The documents supporting the application for default judgment, and described to the learned District Court judge by the plaintiffs' counsel as having been served on the defendants – apparently as a matter of prudence – included:

- Affidavits from the plaintiffs, in which Mr Rochfort swore Ms Smetzer had told him the defendants agreed to settle on 16 December 2003;
- An affidavit from Giovanni Porta, the plaintiffs' new solicitor, annexing correspondence sent on 16 and 17 December 2003 to the defendants, in which those new solicitors claimed the settlement date of 16 December 2003 had been agreed;
- A further affidavit from Mr Porta, deposing to a conversation on 1 July 2004 with Mr Habashy, in which the latter indicated an understanding of the nature of the application for specific performance, but declared he was confident the matter would be transferred to Sydney. Mr Habashy had also said he wanted a reasonable offer for the property;
- An affidavit from Ms Smetzer, deposing to her dealings with both parties, in the terms earlier described herein.

The defendants were thus certainly advised of the plaintiffs' response to the defendants' application for a stay and for orders that they appear by telephone or video link; that response was an application for default judgment.

[18] The defendants' application had not identified any telephone on which they could be contacted, or how they suggested the video link be conducted. They did not appear either in person or by any legal representative on 5 July 2004, although they did fax a further medical certificate dated 2 July 2004 to the District Court Registry. That certificate, also signed by Dr Hanna, advised that Mr Habashy was not allowed to travel and required complete bed rest for at least two weeks. Mr Habashy's affidavit filed in this Court describes the action he took in sending that medical certificate by fax on 2 July 2004 as his "seeking an adjournment due to my health

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1 Respondents' record R114-116

condition."[2] The material does not reveal that Mr Habashy actually asked in terms for any adjournment, and although he deposes to having telephoned the Brisbane Registry on July 2004 to verify receipt of his faxed medical certificate, his affidavit does not pretend that on 5 July 2004 he attempted any contact with the Brisbane Registry or provided it with any telephone number at which to contact him.

Matters about the contract

[19] The contract, executed by the defendants in New South Wales, contained on its front a warning in bold type not to sign it without reading and understanding the warning, advising that independent legal advice and an independent valuation should be obtained, and providing a specific provision for buyers to acknowledge having read the warning and the information conveyed about a cooling off period for domestic building contracts. The plaintiffs signed an acknowledgement of having read it; the general warning is not restricted to buyers and applies equally to vendors.

[20] Mr Habashy's affidavits filed in this Court contend that he had specified to the plaintiffs that he would agree to selling the property at 4 Kestrel Street for market value, and that the plaintiff represented to him that $41,500 was the market value. He deposes to having agreed on or about 20 October 2003 to sell at that price, and to having executed the written contract on or about 20 November 2003. His affidavits describe matters in the executed contract which he regards as "serious errors which were the essence of the contract for the sale of property", namely that:

- It was undated (that is, the defendants did not date it);
- No deposit was paid;
- The assertedly agreed settlement date of 20 November 2003 was not mentioned;
- In lieu thereof a settlement date of 60 days from the date of contract had been inserted, which was unauthorised, and which he crossed out;
- Sydney was not mentioned as the place of settlement (he crossed Brisbane out);
- Brisbane was, which was unauthorised by the defendants;
- His solicitor's name and address were incorrect.

[21] There was no dispute that the contract was executed on or about 20 November 2003, and the handwritten date 22 November 2003 in no way disadvantaged the defendants. The contract specifically provided for a "Nil" deposit, and there is no suggestion in any affidavit material that any deposit was agreed. Mr Habashy explained in his oral submission to this Court that the defendants had signed the contract which did not require the plaintiffs to pay a deposit, because for his part he regarded it as a "dummy" contract which would not bind him. That explanation is unconvincing in view of the significant warnings accompanying the document delivered to him[3], and his own amendment of the executed contract to delete the

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2 Applicants' record page 10; para 59 of Mr Habashy's affidavit

3 The warnings are at Respondents' record 80 and 81

specified settlement date and place. His affidavit acknowledges that he authorised the plaintiffs' solicitor to act for both parties in the conveyance, and that he instructed that solicitor that 10 December 2003 was the agreed time for settlement.

The proper law of the contract

[22] As to the place of settlement, Brisbane was the place of business of the parties' mutual solicitors in the conveyance, Canning Weil, and where the offices existed at which the transfer documents would be lodged. Despite Mr Habashy's opinion expressed in his affidavit sworn 7 April 2004, filed in support of his application for orders pursuant to s 20 of the *Process Act*, the law of Queensland was the proper law of the contract. The contract itself was silent on the point, but in accordance with the High Court's decision in *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* [4], the contract being for the sale of an immovable situated in Queensland and having as its purpose the transfer of title and delivery of possession in exchange for money,[5] delivery of title was to be given in accord with the law of Queensland[6] and the law of Queensland is the law with the most real and substantial connection with the transaction between the parties.[7] Additionally, the contract itself contains terms, expressions, and clauses plainly derived from Queensland Statutes, which include the *Electricity Act* 1994, the *Land Title Act* 1994, the *Building Act* 1975, the *Integrated Planning Act* 1997, the *Property Law Act* 1974, the *Residential Tenancies Act* 1994, and the *Queensland Building Services Authority Act* 1991.

[23] Those contract terms reflect the presumption favouring the *lex situs*, and the law of Queensland applies as the proper law.[8] That is one more reason for regarding Brisbane and not Sydney as the objectively appropriate place for settlement, and the fact that the defendants agreed to a settlement date of 10 December without any further dispute as to the place for settlement would entitle an ordinary person in the position of the plaintiffs, and the parties' mutual solicitors, to conclude that the defendants accepted that that should be in Brisbane. That conclusion means that there were no errors invalidating the contract, or any matters about which there had not been relevant agreement.

The stay application

[24] On 5 July 2004 the learned trial judge made orders[9] dismissing the defendants' application filed 7 June 2004, and ordering they pay the plaintiffs' costs of and incidental to the application to be assessed; and granting the plaintiffs' application for judgment in default of appearance. As described, the defendants had not appeared and had filed no affidavit material at all as to the merits of the matter, and had not provided a telephone contact number for themselves. Mr Habashy's affidavit filed in support of his application[10] in the District Court, and the application itself, show by their terms that he had received some legal advice. The application expressly referred to s 20 of the *Process Act*, whereas the written notice

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4 (1933) 48 CLR 565, particularly at 576-577; 580-581; and 585-587

5 *Merwin Pastoral v Moolpa Pastoral* at 576, judgment of Rich and Dixon JJ

6 *Merwin Pastoral v Moolpa Pastoral* at 580, judgment of Starke J

7 *Merwin Pastoral v Moolpa Pastoral* at 581, judgment of Starke J and 585 judgment of Evatt J

8 The defendants did not identify any difference between the law of New South Wales and Queensland, relevant to resolution of this matter

9 These appear at the Applicants' record page 21

10 The defendants' application filed 7 June 2004, and the supporting affidavit of Mr Habashy with the annexures, appear in the Respondents' record R122-126

served with the plaintiffs' claim and statement of claim referred only to that Act. His affidavit opinion that the law of New South Wales was the most appropriate law to apply also reflects legal advice. However, even if heard in full on its merits, that application for a s 20 stay order would fail; all witnesses other than the defendants resided in and around Brisbane, the land the subject matter of the proceeding was situated there, the proper law was that of Queensland, and there had been no agreement that the proceedings should be instituted outside Queensland. The material filed in the District Court did not identify the financial circumstances of the parties, other than that they both owned land on Macleay Island. The affidavit material filed in this Court, if filed in the District Court, would also have revealed that Mr Habashy is retired and owns a second block of land on that Island.

[25] The matters just discussed (the parties' and witnesses' places of residence, etc) are those which a court is to take into account when determining, on an application under s 20 of the *Process Act*, whether to grant a stay because of satisfaction that a court of another State is the appropriate court to determine the matters involved in the proceeding. The *Process Act* specifically excludes consideration of the fact that the proceeding was commenced in the Brisbane District Court, although that court was not "a clearly inappropriate forum" as that term was used in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. The specific provisions of s 20 require that an application made pursuant to it for a stay order be determined without any specific emphasis in favour of the choice of forum made by the plaintiff.[11] While a New South Wales court would have had jurisdiction to determine the matters in issue, since the defendants live in that State, there was no material filed in the District Court which could have led to satisfaction that a New South Wales court was the appropriate one to determine those matters. That position has not been changed by the affidavit material filed in this Court. Mr Habashy did in fact attend here in person, and he could have made a far more compelling application than he did for orders for his own attendance by telephone in the District Court, if unable to appear in person. Mr Habashy's physical difficulties entitled him to sympathy, but not to an order for a s 20 stay.

Explanation for delay

[26] The defendants did not give this Court any explanation for their failure to file an appearance or a notice of intention to defend, or a defence, in the District Court. The lack of any sworn explanation in their affidavits tells very strongly against their present application for an order granting leave to file an application for leave to appeal six months out of time. Mr Habashy did provide an explanation for that six months delay in his oral submission, which was that it had resulted from a combination of his ignorance of the law and of time provisions, his chronic ill health, his financial problems which resulted in an inability to pay for lawyers, and the fact of his brother's death which had left him unable to focus on his and his wife's immediate affairs. He described having suffered from a hip condition for a number of years, and having been on a sickness benefit since 1992. Although he asked for help from Legal Aid in mid September 2004 (by which date he was already out of time), the nominated solicitor had required payments from him of $200 per hour.

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[11] Applying the reasoning of Gummow J at [74]-[77] in *BHP Billiton Limited v Schultz* (2004) 211 ALR 523

[27] Those matters in combination go someway to explaining the six month delay but not far enough. The defendants could have been much more active in support of their interests. The affidavit Mr Habashy filed in this appeal demonstrates careful preparation, as does his written outline of argument. Neither of those documents has any explanation for the six months delay in seeking to appeal the District Court orders, although it is clear from the contents of those documents that the defendants have had more legal assistance. Even so, the only explanation for not appearing and defending in the District Court is the recitation of the historical fact that an application for a stay and alternatively a video or telephone link had been filed.

Merits of the defence

[28] The learned District Court judge could proceed only on the material filed in that court. The plaintiffs had filed affidavits from themselves, affidavits from Ms Smetzer and from the solicitor they had instructed after Ms Smetzer withdrew, and affidavits of service. Their affidavit material established an apparently overwhelming case that the agreement had been entered into, evidenced in writing by both parties, and followed by a properly completed contract. It deposed to the extension of the settlement date to 16 December 2003 with the agreement of both buyers and sellers and on their instructions to Ms Smetzer, and to the defendants' refusal to complete. It revealed the claim that settlement had been agreed for 16 December had been asserted in letters sent to the defendants on 16 and 17 December 2003, in the Statement of Claim served on them in mid March 2004, and in the affidavits served in early July 2004; and that the defendants had not contested the fact of that agreement at all. The defendants' own very limited affidavit material, filed in support of the stay, confirmed entry into both the agreement to sell the land and the contract. That response was entirely inadequate to provide any reason for not granting the plaintiffs' application for judgment in default of an appearance the defendants had apparently elected not to enter. Even now there is no explanation for that failure.

[29] The dismissal of the defendants' application for a hearing by video or telephone link to themselves in New South Wales falls to be regarded in the context of the dismissal of their doomed application for a s 20 stay, and their failure to enter any appearance or notice of intent to defend, or any affidavit material on the merits. The learned judge could have concluded only that they had had the benefit of legal advice, because of their own application and supporting material, but that they had chosen to take no other steps. On the apparently strong case the plaintiffs made and the defendants' non-response to that, the learned judge correctly dismissed the defendants' applications and granted the plaintiffs' application for judgment being entered.

[30] As the potential merits of the defendants' answer to the plaintiffs' case had the defendants contested it, Mr Habashy's affidavit in this Court annexes a letter he describes sending the plaintiffs on 15 December 2003, in which faxed letter he advised of a decision to "stop the sale of the land." That letter said he did so because the contract was undated, because of the reference in it to the solicitor Hanna (which Mr Habashy considered incorrect), and that his last agreement was that settlement would be on 10 December 2003. By necessary implication, he denies agreeing to settle the next day, 16 December, but his letter makes no reference to the conversation his affidavit describes occurring on 11 December 2003, in which conversation he says he instructed Ms Smetzer that settlement must

be at 3.00 pm on Friday, 12 December 2003. That contradiction would not assist the defendants on the merits of the unavoidable conflict with Ms Smetzer's evidence that Mr Habashy had instructed her that he agreed to the extension to 16 December, he himself being unready on 10 December with properly executed documents. Even now he does not exhibit copies of any correspondence at all in reply to the letters then sent to him on 16 and 17 December 2003, in which an agreement to settle on 16 December was asserted, and disputing that agreement had been made. It is reasonable to expect a denial would have been made at that time, if there was no agreement to extend the settlement date to 16 December. There is no evidence of any specific challenge by the defendants to the fact of that agreement until Mr Habashy filed his affidavits in this Court in support of his application for leave. The inference very likely to be drawn is that Mr Habashy simply changed his mind about selling to the plaintiffs, because a higher price was obtainable; his letter of 15 December advises the plaintiffs to "please contact us we may be able to reach a new agreement", and the male plaintiff deposes in this Court that in early March 2004 Mr Habashy offered to sell them the land for $50,000.

Conclusion

[31] The defendants did not explain adequately their failure to appear in the District Court, have not described any steps they took to enable that court to communicate with them on 5 July 2004, filed no affidavits on the merits of the matter in the District Court, have not adequately explained their delay in seeking to overturn the District Court orders, were not entitled to an order staying the plaintiffs' case in the District Court, have demonstrated access to legal advice which has resulted in flanking attacks rather than meeting the plaintiffs' application on the merits, and have not demonstrated a sufficient case on the merits to justify orders now granting leave to appeal so long out of time from the orders properly made on 5 July 2004. I would dismiss their application for an extension of time for leave to appeal and for other orders, and order that the applicants pay any costs incurred by the respondents of and incidental to the application, assessed on the standard basis.

[32] **PHILIPPIDES J:** I agree with the reasons of Jerrard JA and with the orders proposed.