SUPREME COURT OF QUEENSLAND

CITATION:	*Beil & Anor v Mansell & Ors* [2006] QCA 173
PARTIES:	**DESMOND THOMAS BEIL** (plaintiff/respondent) **DAJAD PTY LTD** (ACN 009 979 284) (plaintiff/respondent) **v** **NEIL RAYMOND MANSELL** (fourth defendant/first applicant) **FAY CATHERINE MANSELL** (fifth defendant/second applicant) **PARKLANDS BLUE METAL PTY LTD** (ACN 010 471 548) (ninth defendant/third applicant)
FILE NO/S:	Appeal No 3655 of 2006 SC No 1494 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/ General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 May 2006
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2006
JUDGES:	Jerrard JA, Helman and Muir JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Application dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where applicants seek leave to appeal – where first instance judgment given two years prior to filing of application – whether leave to appeal should be granted *Uniform Civil Procedure Rules 1999* (Qld), r 748 *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1985] 1 WLR 173, cited *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, distinguished *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR

424, cited
Ankar Pty Ltd & Anor v National Westminster Finance (Aust) Ltd (1987) 162 CLR 549, cited
Australian Broadcasting Commission v Australasian Performing Rights Association Ltd (1973) 129 CLR 99, cited
Brooks v Burns Philp Trustee Co Ltd (1969) 121 CLR 432, cited
Chan v Cresdon Pty Ltd (1989) 168 CLR 242, cited
Chapman v State of Queensland [2003] QCA 172; Appeal No 1759 of 2003, 2 May 2003, cited
Coghlan v SH Lock (Aust) Ltd (1987) 8 NSWLR 88, cited
Davies v Perpetual Trustee Co (Ltd) [1959] 2 All ER 128, cited
D'Orta-Ekenaike v Victoria Legal Aid (2005) 79 ALJR 755, applied
O'Callaghan v Hall & Anor [1993] QCA 297, cited
Queensland Trustees Ltd v Fawckner [1964] Qd R 153, cited
Wren v Emmett Contractors Pty Ltd (1969) 43 ALJR 213, cited

COUNSEL: L F Kelly SC, with him G R Coveney, for the applicants
M D Martin for the respondents

SOLICITORS: CBD Lawyers & Corporate Advisors for the applicant
North Coast Law for the respondents

[1] **JERRARD JA**: In this application I have read the reasons for judgment of Muir J and the orders proposed by His Honour, and respectfully agree with those reasons and orders, and adopt his description of the relevant facts. I add that the fact that the first applicant Neil Mansell had personally signed the Deed, dated 8 September 2000, signing as a Director of Pacific View (Qld) Pty Ltd, left open against that applicant an argument based on *Wren v Emmett Contractors Pty Ltd.*[1] The argument is that if that applicant as a controlling director of that company arranged an extension of time for the payment of what was due by it, then that applicant cannot be heard to say when sued upon the guarantee that the extension was given without his consent; and, I would add, or otherwise invalidated his guarantee. Menzies J wrote that for a guarantor on behalf of a principal debtor to bespeak time to pay what is owing betokens (the guarantor's) concurrence with the giving of time to pay. He added that were this not so, the law would be out of touch with reality.

[2] But that point would not be available against the second applicant Fay Mansell or the third applicant, neither of whom signed that September 2000 agreement. Those applicants, and the first applicant, have all given undertakings which would relieve the respondents from any legal obligation to repay what those respondents have received to date in accordance with the judgment sought to be appealed. Those significant undertakings relieve the respondents of any threat of prejudice from an obligation to make restitution now to the applicants, of moneys paid over to the respondents under the judgment.

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1 (1969) 43 ALJR 213 at 220 per Menzies J.

[3] But there are other important considerations. Mr M Martin for the respondents made the point that the applicants are really trying to overturn the fundamental reasoning of the learned trial judge, rather than the orders made. Those orders were that the plaintiffs recover specified amounts as principal and interest against the first, second, third, fourth, fifth, eighth, and ninth defendants, and orders giving leave to file amended statements of claim and defences. The applicants, by their undertaking, while still asking that those orders be set aside, and that the respondents' claim against them be dismissed, are promising to act as if the first order, now satisfied and executed, was validly made. What the applicants attempt to overturn is the outcome of the second order, reflecting the view expressed by the learned judge, that there was a need for a trial on the separate issue of whether or not the 25 per cent interest rate was a penalty, and not a genuine pre-estimate of damage. The applicants want to avoid the possibility of an adverse outcome on that trial by getting now a judgment on appeal which holds that their guarantee did not extend to the obligations created in the September 2000 Deed of Agreement.

[4] I was persuaded that the applicants had a reasonable argument on that point. That argument applied the principle of strict construction of a guarantee, expressed in *Ankar Pty Ltd & Anor v National Westminster Finance (Australia) Ltd.*[2] The point Mr Kelly SC particularly relied on for the applicants was that a doubt as to the status of a provision in a guarantee should be resolved in favour of the surety, and that any ambiguous provisions should be (strictly) construed in the surety's favour.

[5] Applying those rules, not questioned in any sense on this application, gives the applicants the argument that the obligations they guaranteed were the borrowers' obligations set forth in the Bill of Mortgage No L790161F, as then varied by the variation previously registered on 29 December 1995 and that the applicants did not guarantee the performance of any other obligations by the borrower. While s 6(d) of the guarantee effects a reversal of the rule that would otherwise apply (namely that if the creditor varied the principal contract or extended time in a way which materially altered the guarantor's rights, then the guarantors were discharged) and would operate to prevent the guarantors being released by reason of any subsequent variation to the terms of the mortgage, the obligations of the guarantors were still only in respect of the obligations in the Bill of Mortgage, as varied at the date on which the guarantee was entered into. Accordingly, the argument goes, the obligations expressed in the Deed dated 8 September 2000, varying the terms of the mortgage, were not obligations the performance of which the applicants had guaranteed.

[6] I consider that it is not enough that the applicants had a respectable argument to advance to that effect on an appeal. Their application for an extension of time, if granted, would mean an appeal lodged some three-and-a-half years after the judgment was given, with the only explanation for the delay being that the applicants now had a different counsel. A (presumably) different view as to the applicants' prospects of success on an appeal falls a long way short of the circumstances justifying an order extending time for appeal. The fact that that respondents are currently attempting to enforce the claim for interest at 25 per cent, relying on the September 2000 agreement which the learned trial judge held was covered by the guarantee, means that the respondents continue to rely on the judgment they got in their favour. They are entitled to; there was no appeal. They

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2 (1987) 162 CLR 549, particularly at 559-561.

have undoubtedly spent money preparing to enforce the rights they claim the agreement gives them. They have a judgment in their favour in which the reasoning holds that the applicants have guaranteed performance of the obligations under the September 2000 agreement. So quite apart from having been paid the sums ordered in accordance with those reasons for judgment, the respondents will have spent other money on the assumption that the guarantee applied to the September 2000 agreement. The undertaking offered by the applicant would not help the respondents get back any of the money they have spent based on that assumption.

[7] The applicants had their opportunity to appeal and did not, and have no acceptable explanation for the delay. They still have the opportunity to argue that the 25 per cent interest rate is a penalty. The conclusion the learned judge came to is not obviously wrong. The applicants were legally represented at the relevant times. The point in issue is the construction of a commercial agreement, not anyone's freedom, or the continuing obligations imposed by a will.[3] The respondents would still suffer some prejudice if the extension were granted and the appeal allowed, and they have acted on the assumption the point now raised was settled in their favour. They have an argument that in any event the judgment was correct, and it follows that manifest injustice is not shown if it stands. That combination of circumstances persuades me that the application should be refused.

[8] **HELMAN J:** I agree with the orders proposed by Muir J and with his reasons.

[9] **MUIR J:** By a claim filed on 14 February 2001 in the Supreme Court, the plaintiff/respondents claimed against the first defendant, Pacific View (Qld) Pty Ltd ("the mortgagor"), for moneys allegedly owing to them as mortgagees under "Bill of Mortgage registered number L790161F… as varied from time to time." The respondents also claimed against the fourth, fifth and ninth defendants/applicants and others as guarantors of the obligations of the mortgagor under a Deed of Guarantee dated 28 November 1995.

[10] On 3 February 2003 the respondents obtained summary judgment against all defendants "for the unpaid principal in the amount of $761,936" and for $319,972 interest calculated at the rate of 16 per cent per annum. The respondents had claimed interest at a default rate of 25 per cent per annum pursuant to clause 5 of a Deed of Agreement entered into on 8 September 2000 between the respondents and the mortgagor ("the September Deed"). By that clause the mortgagor agreed, in the event of failure to repay the loan secured by the mortgage by the due date, to pay interest at the rate of 25 per cent rather than at the rate of 16 per cent per annum provided for in clause 3 of the September Deed. The primary judge concluded that there should be a trial of the question of whether clause 5 was unenforceable as a penalty and whether, in consequence, interest at a rate of in excess of 16 per cent was irrecoverable.

[11] In an order of 6 March 2003 formally pronouncing judgment, the respondents were given leave to file an amended statement of claim; and the applicants and the other defendants were given leave to file an amended defence. An amended claim and an amended statement of claim were filed on 16 September 2003. In them the respondents claimed "money owing in the sum of $315,025.10" and "interest from 1

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[3] As in *Davies v Perpetual Trustee* [1959] 2 WLR 673, where the Privy Council granted leave in 1959 to appeal from a judgment given in 1919 by the Full Court of NSW.

March 2003 to date of judgment at 25 per cent per annum calculated on a monthly compound basis" and costs.

[12] A number of amended defences were filed between 18 February 2004 and 28 May 2004. A reply was filed on 11 June 2004. The trial of the outstanding issues was set down for hearing on 4 and 5 May 2006, but was adjourned to allow further evidence to be obtained. In the course of preparing for trial, counsel retained by the applicants advised "of the existence of a defence that could have been made on behalf of the guarantors that was not made at the hearing of the summary judgment application." On the basis of that advice, the applicants filed on 3 May 2005 this application for an extension of time within which to appeal.

Proposed grounds of appeal

[13] If the application for leave to appeal is successful, the applicants will appeal on the grounds:

(a) that the trial judge ought to have found that the Guarantee was discharged by the entering into of the September Deed which altered the obligations of the mortgagor and potentially increased the liability of the applicants and the other guarantors;

(b) that on its proper construction the Guarantee ought to have been interpreted as not extending to the liability of the [mortgagor] to the respondents under the September Deed;

(c) that on its proper construction the "all moneys" provision in the mortgage was inconsistent with the terms for repayment in the other parts of the mortgage. Properly construed the Guarantee extended only to obligations in the registered mortgage or in registered variations thereto; and

(d) that clause 5 of the September Deed constituted a penalty and was unenforceable. In consequence of this there was no enforceable provision for payment of interest in the mortgage.

The applicants' contention that the Guarantee was discharged by the September Deed

[14] It is contended that the September Deed varied the obligations of the guarantors in such a material and adverse way that it discharged their obligations under the Guarantee in accordance with orthodox principle.

[15] The primary judge, it is argued, fell into error by finding that clause 6 of the Guarantee entitled the respondents to vary the loan agreement without discharging the liability of the guarantors. In so finding, the argument proceeds, her Honour failed to have regard to the principle expressed in *Chan v Cresdon*[4] and *Ankar Pty Ltd & Anor v National Westminster Finance (Australia) Ltd*[5] that provisions of guarantees should be construed strictly.

[16] In *Chan* it was said in the joint judgment:

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4 (1989) 168 CLR 242.

5 (1987) 162 CLR 549.

> "In *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*,[6] Mason A.C.J., Wilson, Brennan and Dawson JJ. observed:
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> > 'At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety.'" [7]

[17] Reliance was also placed on the joint judgment in *Andar Transport Pty Ltd v Brambles Ltd*,[8] in which the following observation of Lord Oliver of Aylmerton in *Coghlan v S H Lock (Australia) Ltd*[9] in relation to guarantees was referred to with implicit approval:

> "Such a document falls to be construed strictly; it is to be read contra proferentem; and, in case of ambiguity, it is to be construed in favour of the surety."

Consideration of the relevant contractual provisions

[18] In order to follow the applicants' argument, it is necessary to set out some of the relevant contractual provisions and to explain a little about the guarantors' and mortgagor's obligations. The Guarantee recited that the respondents, at the request of the guarantors, had lent to the mortgagor "a loan ('the loan') the details of which are set forth in a Bill of Mortgage No L790161F as varied ('the deed')." It was further recited that the guarantors had agreed to guarantee the due performance by the mortgagor of the whole of its obligations and to indemnify the respondents in respect of any default on the mortgagor's part.

[19] The Guarantee contains the further following provisions.

> "4. The guarantor hereby jointly and severally guarantees to the grantee the due performance by the borrower of **the obligations of the borrower set forth in the deed** including but without prejudice to the foregoing generality the obligations concerning payment, repayment and interest.
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> 5. The guarantee shall be a continuing guarantee for the purpose of securing the performance of the whole of **the obligations of the borrower in the deed** notwithstanding any partial performance thereof.
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> 6. The guarantor shall not be released in whole or in part from its obligations hereunder by virtue of any of the following namely:-
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> (a) Any time or indulgence the grantee may grant to the borrower;
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> …
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> (d) Any variation to the terms of the deed;
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> …" (emphasis added)

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6 (1987) 162 CLR 549 at 561.
7 At 256.
8 (2004) 217 CLR 424 at 434, 5.
9 (1987) 8 NSWLR 88 at 92.

[20] At the date of the Guarantee, the mortgage had been varied once. It was further varied in October 1997 by an agreement registered on 11 November 1997. The applicants do not rely on that variation and concede that the Guarantee extends to the obligations it imposes on the mortgagor.

[21] A third variation of the loan was effected by the September Deed. That deed was not in registrable form and was not registered on the Freehold Land Register as an amendment to the mortgage.

[22] The September Deed recited that, inter alia:

> "B. The terms of that Loan Agreement have been varied and amended between the parties from time to time the latest amendment thereof being set form [sic] in a Form 13 Amendment dated 24 October 1997 (the latest loan document)."

[23] The operative part of the September Deed provided:

(a) for the amount owing by the mortgagor to the respondents as at 21 July 2000;
(b) that the mortgaged lots be released in a particular way in return for specified payments;
(c) in clause 3, that interest on the outstanding balance of the loan accrue at the rate of 16 per cent per annum "until repayment";
(d) in clause 4, that the principal be repaid no later than 31 December 2000; and
(e) in clause 5, that in default of repayment of the loan by the due date, interest be increased to 25 per cent per annum.

[24] Under the mortgage as amended in October 1997, the balance of the principal was required to be repaid by 4 April 1997 and rate of interest was 16 per cent per annum.

[25] Plainly, the September Deed varied some of the obligations imposed on the mortgagor, by the mortgage, as varied by deeds entered into prior to the September Deed. The applicants argue, however, that the variations effected by the September Deed did not vary the terms of the mortgage as registered; rather that there was a material variation to the terms of the loan without a variation to the terms of "the deed", as that expression is used in clause 6(d) of the Guarantee.

[26] It was also argued that for a variation to fall within clause 6(d) of the Guarantee, it must be in an instrument registered in the Freehold Land Register. The reason given for this conclusion is that the Guarantee defines the term "deed" by reference to the registered bill of mortgage "as varied", and that at the date of the Guarantee the only variation of the mortgage had been registered.

[27] The applicants' construction does not resolve an ambiguity in favour of a guarantor because there is no ambiguity. In my view, it is arguable that the applicants' approach is not one of strict construction but one which imposes a limitation on a contractual provision which is not to be found in the plain words of that provision. The operation of clause 6(d) is triggered when there is to be a "variation to the terms of the deed." The September Deed, by creating different and inconsistent obligations between the same parties to those contained in the mortgage (as varied), necessarily varied the terms of the mortgage (as varied). One would think from the

recitals to the September Deed that the intention of the parties, objectively ascertained, was to vary the terms of the mortgage. Clause 6(d) contains no express requirement that any variation of mortgage must be registered and I have difficulty in seeing why one is to be implied. Whether the mortgagee respondents required variations to the mortgage to be in registrable form and registered would not appear to be a matter of interest or concern to the guarantors.

[28] For the above reasons, I find the applicants' arguments less than compelling; however, I do not find it necessary to express a concluded view on them.

Did the Guarantee extend to the obligations created by the September Deed?

[29] The applicants' alternative argument is that the Guarantee "did not extend to or respond to" the September Deed. It is asserted that the Guarantee, particularly in clause 4, specifies the obligation as a guarantee of the obligations of the mortgagor "set forth in the deed." The "deed" is defined in Recital 1 in terms of the registered mortgage as varied. Reliance is placed on the requirement for strict construction under which any ambiguity is to be resolved in favour of the guarantor; and it is contended that even if clause 6(d) of the September Deed sanctions variations of the mortgage, its application does not extend the scope of the guarantors' liability. That liability is defined in terms of the obligations under the registered mortgage as varied by registered instruments of variation.

[30] Another possible construction, which was not advanced on behalf of the applicants, is that the words "as varied" in clause 1 of the Guarantee's recital mean "as varied at the date of the Guarantee", not "as varied from time to time." To assist the applicants, however, any such construction must surmount the hurdle of the mortgage's "all moneys clause."

[31] The schedule to the mortgage includes, in the definition of "moneys secured", "all moneys now or hereafter to become owing or payable to the mortgagee by the mortgagor either alone or in conjunction with any other person on any account whatsoever."

[32] Clause 2 of the schedule provides that if the time for payment of the moneys secured is not specified, such moneys will be payable on demand. Clause 3 provides for payment of interest on "the moneys secured."

[33] The applicants assert that there is an inconsistency between the terms of annexure "A" to the mortgage's Form 5 and the Schedule; and that such inconsistency should be resolved in favour of the applicants by giving precedence to the terms of annexure "A".

[34] Item (9) of Form 5 provides:

> "The mortgagor for the above consideration hereby covenants with the mortgagee in terms of the schedule hereto and charges the estate or interest herein specified in the land above described with the repayment of all sums of money referred to in item (8) above in the manner therein expressed."

[35] Item (8) refers to annexure "A" which, in turn, makes reference only to a consideration of $425,000 and interest thereon. Express provision is made in

annexure "A" for payment of such principal and interest, but nothing is said about other moneys.

[36] In my view the applicants' arguments, although tending to overlook the necessity that "the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious, one with another,"[10] are not bereft of merit. These arguments, though, were not pleaded or relied on by the applicants on the summary judgment application. The applicants concede that had the arguments now advanced been raised on the summary judgment application, the respondents could have pleaded and relied on the October 1997 variations to improve their position. In order to meet this difficulty, the applicants offer not to raise any limitation defences in that regard should they be successful on the appeal. But this Court is now not in a position to know what responses, other than an argument based entirely on construction, may have been open to the respondents at the time of the summary judgment application. One possible response to the discharge of the Guarantee argument, referred to by the respondents' counsel, was to attempt to rely on an agreement by the first applicant on behalf of the other applicants to the September Deed. The first applicant executed that Deed in his capacity as director of the mortgagor.

The penalty interest question

[37] The applicants contend that if clause 5 of the September Deed was a penalty, it was void and that it was not open to the primary judge "to make an agreement for the parties for a lesser amount of interest which they had not made themselves." The September Deed, however, contains clause 3 which provides for the payment of interest at the rate of 16 per cent until repayment of the principal. It may be that the primary judge concluded that if clause 5 was void, the operation of clause 3 would be unaffected on the basis that clause 5 was severable in accordance with the principles stated in authorities such as *Brooks v Burns Philp Trustee Co Ltd*[11] and *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd.*[12] This question was not addressed by the written submissions of the applicants' counsel, but in argument it was asserted that *AMEV-UDC Finance Ltd v Austin*[13] was authority for the proposition that severance of a provision, such as the one under consideration, was not permissible if it constituted a penalty. The court in *AMEV*, however, was not called on to consider the possibility of severance. Nor was it a case in which there existed another clause, such as clause 3, which made provision for payment of interest at a specified rate, lower than the alleged penalty rate, until repayment of the principal.

Considerations relevant to the exercise of the discretion to extend time within which to appeal

[38] Under r 748 of the *Uniform Civil Procedure Rules* 1999 (Qld) a notice of appeal must, unless the Court of Appeal otherwise orders, be filed within 28 days after the date of the appealed decision. Counsel for the respondents contended that in order to

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10 *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 at 109.

11 (1969) 121 CLR 432.

12 [1985] 1 WLR 173.

13 (1986) 162 CLR 170.

succeed on their application, the applicants would need to satisfy the court "that there are exceptional circumstances and the necessity to avoid plain injustice." Reference was made to *O'Callaghan v Hall & Anor*, a case in which the notice of appeal was about 18 months late. It was observed in the reasons of the Court that:

> "It is desirable that, as far as practicable, the Courts discourage undue and unnecessary delay. The notion that the rules setting time limits should be treated as of no importance is one which if accepted would be destructive of the proper administration of justice. The present is a plain case of undue and unnecessary delay on the part of the defendant. Only in the most extraordinary circumstances, and to avoid a plain injustice, could this Court consider granting an extension of time to appeal after such a long and unjustifiable delay as has occurred here." [14]

[39] Counsel for the applicants submitted, correctly, that the Court's discretion could not be fettered by making the exercise of its discretion subject to some rigid criterion, such as the need for "exceptional circumstances."[15] It is plain in my view that the Court in *O'Callaghan*, in the passage just quoted, was stating no more than that in the circumstances of that case the applicant would need to show extraordinary circumstances.

[40] The Court's discretion to extend time is unfettered, but like any discretion of this nature it must be exercised judicially. Mere lapse of time, of itself, is not generally regarded as imposing an insuperable obstacle to an extension of time,[16] nor is the lack of satisfactory explanation for the delay,[17] and the merits of the substantive application are a relevant consideration.[18]

[41] In this case there is an explanation for the delay but it can hardly be regarded as satisfactory. The explanation is simply that different arguments have been thought of by other counsel entering the case some years after judgment and the payment of the judgment debt. It will often be the case that after a matter is decided, fresh consideration of the issues by lawyers who were not acting for the unsuccessful party at first instance will reveal fresh arguments which may have been advanced or different approaches which may have been taken. But it is not normally considered that such reappraisals justify the reopening of proceedings long determined.

[42] It is an important principle that the determination of courts except in "a few, narrowly defined, circumstances" be final.[19] As the Court observed in *O'Callaghan*, "the notion that the rules setting time limits should be treated as of no importance is one which if accepted would be destructive if the proper administration of justice." In this regard it is not without relevance that the *Uniform Civil Procedure Rules* are framed with a view to encouraging and facilitating the timely and efficient resolution of proceedings. In *D'Orta-Ekenaike v Victoria Legal Aid* it was observed in the joint judgment:

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14 [1993] QCA 297.
15 See e.g. *Chapman v State of Queensland* [2003] QCA 172 at [3].
16 See *Queensland Trustees Ltd v Fawckner* [1964] Qd R 153.
17 Ibid.
18 *Chapman v State of Queensland* [2003] QCA 172 at [3] and *Queensland Trustees Ltd v Fawckner* (supra).
19 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at [34].

> "The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal…are all rules based on the need for finality. As was said in the joint reasons in *Coulton v Holcombe*: '[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial'." [20]

[43] Another material consideration is the prejudice suffered by the respondents should the application be successful. Much has happened since judgment and payment of the judgment sum. One of the respondents, Mr Beil, is now 64 years of age. He is a director of the corporate respondent. He deposes that the judgment sum paid in April 2003 was used to repay debt, to acquire an interest in a business and to finance the operations of that business. At the request of the applicants, the mortgage was released in order to enable the applicants to obtain alternative finance and to pay the judgment debt. In consequence the respondents are now without security for the moneys which would be in dispute should the application succeed.

[44] The applicants criticise the evidence of Mr Beil for vagueness, incompleteness and for swearing the issue of "financial hardship." It is true that the evidence could have been fuller and more precise, but it does establish those aspects of prejudice to which reference has just been made. It establishes that Mr Beil, not surprisingly, has ordered his affairs and those of Dajad Pty Ltd on the basis of the entitlements established by the judgment obtained in March 2003.

[45] Recognising that the existence of prejudice may prove fatal to the success of their application, the applicants proffered the following undertaking during the hearing of the appeal:

> "The applicants (named as the first, second and third appellants above) undertake to the Court that, as a condition of obtaining leave to appeal out of time, they will not seek to recover any moneys paid to the respondents (namely the sum of $1,081,908) paid to the respondents on 24 April 2003."

Conclusion

[46] The applicants argue that the continuing litigation concerning the penalty question is an important consideration in their favour. The existence of the litigation, it is said, reveals that all issues between the parties relating to the guarantee are not resolved and that if the appeal is not allowed the applicants "are deprived of a real defence to [the respondents' claim]". These matters are relevant but the applicants had an opportunity to appeal against the orders made on the summary judgment application. They elected not to do so. Consistently with that election, they have sought to meet the respondents' limited claim in proceedings which have gone through protracted interlocutory steps.

[47] For the reasons already given, the respondents have established that they would suffer prejudice, were the application to succeed. In the context of inordinate delay

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[20] At [35].

explained only by afterthought, that prejudice would render it inappropriate for leave to be granted. It is relevant also that the arguments which would be advanced on appeal are not unassailable.

[48] The undertaking reduces the prejudice to the respondent substantially but not entirely. To allow the application would be to put the respondent to the inconvenience, expense and anxiety of re-litigating matters determined long ago in their favour by due process of law. Their justified belief that issues had been finally determined, upon which they had ordered their affairs, would be falsified. And their confidence and the confidence of others in the administration of justice would tend to be eroded.

[49] In my view the applicants will suffer no injustice if their application is refused. They were afforded a hearing on the merits and lost. They could have appealed within time and/or obtained other timely advice about the prospects of success on appeal. They did neither. The prejudice suffered by them through not being permitted to re-litigate matters decided more than three years ago largely results from their own conduct. It is of little moment when balanced against the prejudice to the respondents and the public policy considerations discussed above.

[50] I would dismiss the application with costs.