# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Hanson Construction Materials P/L v Norlis & Ors* [2010] QSC 34 |
| PARTIES: | **HANSON CONSTRUCTION MATERIALS PTY LTD ACN 009 679 734**<br>(plaintiff)<br>**v**<br>**NORLIS PTY LTD ACN 097 876 303 trading as SEQUENCE BUILDING SOLUTIONS BN 1960782**<br>(first defendant)<br>and<br>**NORMAN LISTER DAVEY also known as NORMAN LISTER DAVEY SNR**<br>(second defendant)<br>and<br>**NORMAN LISTER DAVEY also known as NORMAN LISTER DAVEY JNR**<br>(third defendant) |
| FILE NO/S: | SC No 8511 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application for summary judgment<br>Application for leave to withdraw admissions |
| ORIGINATING COURT: | Supreme Court, Brisbane |
| DELIVERED ON: | 11 February 2010 |
| DELIVERED AT: | Supreme Court, Brisbane |
| HEARING DATE: | 22 January 2010 |
| JUDGE: | Margaret Wilson J |
| ORDER: | |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – OTHER MATTERS BEFORE TRIAL – LEAVE TO WITHDRAW DEEMED ADMISSIONS – where plaintiff and first defendant entered into an agreement for plaintiff to supply goods to first defendant on credit – where second and third defendants guaranteed first defendant's obligations – where an administrator subsequently appointed to first defendant and creditors resolved that first defendant should execute a deed of company arrangement – where such deed executed – where plaintiff claims against second and third defendants declarations that by the written guarantee they granted plaintiff equitable mortgages over their respective interests in the fee simple in certain parcels of land and that |

the equitable mortgages charge their interests in lands with payments of all monies due and owing by first, second and third defendants to plaintiff, as well as an order that equitable mortgages be enforced by sale, and an order that second and third defendants pay the sum of $53,897.47 to plaintiff for goods sold and delivered by plaintiff to first defendant – where defence does not satisfy requirements of r 166 of the *Uniform Civil Procedure Rules* 1999 – where second and third defendants bring application for leave to withdraw admissions – whether there is a genuine dispute about matters deemed to have been admitted – whether leave to withdraw admissions should be granted in all the circumstances

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – where plaintiff brings application for summary judgment – where plaintiff relies upon deemed admissions – whether there is a triable issue regarding the value of any goods delivered to first defendant – whether second and third defendants were released from their obligations pursuant to the deed of company arrangement – where deed of company arrangement cannot prevent a creditor enforcing guarantees given by directors – whether second and third defendants have any real prospect of defending claim – whether there is need for trial – whether relief sought by summary judgment is within the claim

MOTRGAGES – PARTICULAR SECURITIES – EQUITABLE MORTGAGE – WHAT CONSTITUTES GENERALLY – where plaintiff seeks declarations as to existence of equitable mortgages – whether under guarantee plaintiff obtained equitable mortgages or equitable charges

*Corporations Act* 2001 (Cth), s 444D, s 444H, s 444J
*Property Law Act* 1974 (Qld), s 99(2), s 100
*Uniform Civil Procedure Rules* 1999 (Qld), r 166(3), r 166(4), r 166(5), r 188

*City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243, considered
*Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738, cited
*EA & S Plaster Co Pty Ltd v Registrar of Titles* [2004] QSC 014, cited
*Equititrust Ltd v Gamp Developments Pty Ltd* [2009] QSC 115, applied
*Equititrust Ltd v Gamp Developments Pty Ltd (2)* [2009] QSC 168, applied
*Gan v Sanders* (1994) 15 ACSR 298, cited
*M & S Butler Investments Pty Ltd v Granny May's United Franchising Pty Ltd* (1997) 24 ACSR 695, cited
*Phillips v Hogg* [2001] QSC 390, cited

*Ridolfi v Rigato Farms Pty Ltd* [2001] 2 Qd R 455, cited
*Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584, cited
*Travel Agencies v Cain* (1990) 20 NSWLR 566, cited
*Worrell v Issitch* [2001] 1 Qd R 570, cited

COUNSEL: DD Keane for the plaintiff
P Travis for the second and third defendants

SOLICITORS: Patane Lawyers for the plaintiff
Piper Alderman Lawyers for the second and third defendants

[1] **MARGARET WILSON J:** There are two applications before the Court – an application by the plaintiff for summary judgment against the second and third defendants and an application by the second and third defendants for leave to withdraw deemed admissions.

[2] On or about 23 September 2004 the plaintiff and the first defendant entered into an agreement for the plaintiff to supply goods to the first defendant on credit. The second and third defendants, who were then directors of the first defendant, guaranteed the obligations of the first defendant.

[3] On 4 August 2009 an administrator was appointed to the first defendant and on 9 September 2009 the creditors resolved that the first defendant should execute a deed of company arrangement. That was executed on 17 September 2009. The deed administrators are Messrs David James Hambleton and Robert Eugene Murphy.

**Claim**

[4] By its claim, which was filed on 6 August 2009, the plaintiff claims against the second and third defendants declarations that by the written guarantee they granted the plaintiff equitable mortgages over their respective interests in the fee simple in certain parcels of land and that the equitable mortgages charge their interests in the lands with payments of all monies due and owing by the first, second and third defendants to the plaintiff, as well as an order that the equitable mortgages be enforced by sale, relief pursuant to s 99(2) or alternatively s 100 of the *Property Law Act* 1974 (Qld), and an order that pursuant to the guarantee the second and third defendants pay the sum of $53,897.47 to the plaintiff for goods sold and delivered by the plaintiff to the first defendant.

**Defence**

[5] On 19 August 2009 the second and third defendants filed a notice of intention to defend and defence. The defence was in these terms –

> "1. The Second and Third defendants ("the defendants") are unable to plead further to the Statement of Claim as it is defective and embarrassing on its face and fails to plead a cause of action against the Defendants. The Defendants are in the process of requesting clarification of the Statement of Claim, including further and better particulars. Until that clarification and particulars have been provided, and the

> Defendants afforded an opportunity to complete an investigation of the facts alleged, the Defendants are unable to properly plead to these proceedings. For these reasons the Defendants deny the allegations contained in the Statement of Claim.
>
> 2. Save as specifically admitted, the Defendants deny each and every allegation of the Plaintiff as if each allegation was transversed [sic] in this pleading."

***UCPR* r 166**

[6] That defence did not satisfy the requirements of *UCPR* r 166, in particular sub-rules (3) and (4) which are in the following terms –

> "**166 Denials and nonadmissions**
>
> (3) A party may plead a nonadmission only if—
>
> (a) the party has made inquiries to find out whether the allegation is true or untrue; and
>
> (b) the inquiries for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in which the denial or nonadmission of the allegation is contained; and
>
> (c) the party remains uncertain as to the truth or falsity of the allegation.
>
> (4) A party's denial or nonadmission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted."

[7] Sub-rule (5) provides –

> "(5) If a party's denial or nonadmission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation."

**Application for summary judgment filed**

[8] On 9 December 2009 the plaintiff filed an application for summary judgment returnable on 23 December 2009. It was quite clear the plaintiff relied upon deemed admissions arising from non-compliance with r 166.

[9] On the return date orders were made by consent adjourning the application to 22 January 2010, for the second and third defendants to pay the plaintiff's costs of and incidental to the application to date on the indemnity basis and for the second and third defendants to file an application to withdraw the deemed admissions by 8 January 2010.

**Application for leave to withdraw admissions filed**

[10] The second and third defendants filed an application for leave to withdraw admissions, returnable on 22 January 2010. In support of that application they filed an affidavit of their solicitor to which was exhibited a draft defence.

[11] On 20 January 2010 the second and third defendants filed an amended defence without having first obtained leave. It was in different terms from the draft exhibited to the affidavit.

**Hearing on 22 January 2010**

[12] Both applications came before the Court on 22 January 2010.

[13] On the summary judgment application, counsel for the plaintiff asked that the application for orders for sale be adjourned, but that the Court determine the applications for a money judgment and declarations.

[14] It is convenient to deal first with the application for leave to withdraw admissions.

**Whether to give leave to withdraw admissions**

[15] The second and third defendants are deemed to have admitted the following allegations in the statement of claim –

> "5. In accordance with its obligations under the Credit Agreement, the Plaintiff from time to time supplied materials and products on credit and on a running account to the First Defendant.
>
> 6. In breach of its obligations to the Plaintiff under the Credit Agreement, as at 6 July 2009, the First Defendant had wrongfully neglected and/or refused to pay all outstanding sums due by it to the Plaintiff in accordance with the Credit Agreement.
>
> 7. As at 6 July 2009, the total of the indebtedness to the Plaintiff for the supply of materials and products stood at $52,693.19 for goods sold and delivered to the First Defendant by the Plaintiff in accordance with the Credit Agreement.
>
> 8. The First Defendant:-
>
> (a) Remains justly and truly indebted to the Plaintiff for the balance of the debt in the sum of $52,693.19;
>
> (b) Pursuant to the Credit Agreement and by reason of its aforesaid breach of the Credit Agreement, is now liable to pay the Plaintiff continuing interest, until the payment of debt plus all costs, charges and expenses are recovered;

> (c) Pursuant to the Credit Agreement and by reason of its breach as aforesaid, is now liable to pay to the Plaintiff all costs and expenses incurred by the Plaintiff, in respect of anything instituted or being considered against the First Defendant"

[16] A party may withdraw an admission made in a pleading only with the Court's leave.[1] The following matters are generally relevant to the exercise of the discretion whether to grant leave:

- how and why the admission came to be made;
- the evidence surrounding the issues the subject of the admission;
- whether there is likely to be a real dispute about the evidence;
- any delay in making the application for leave to withdraw the admission;
- prejudice to the other party.[2]

Leave to withdraw admissions is not obtained for the asking. It will rarely be granted in the absence of evidence that there is a genuine dispute about the matters deemed to have been admitted.

[17] The holding defence which contained the deemed admissions was prepared and filed by a very inexperienced solicitor who intended serving with it a letter setting out the second and third defendants' concerns about the statement of claim. However, he failed to do so. When it became obvious that the plaintiff was relying on the deemed admissions, the second and third defendants consented to the order made on 23 December 2009 which included an order for costs on the indemnity basis. However, the solicitors compounded their error by filing an amended defence which purported to withdraw the admissions without leave having been obtained.

[18] In an affidavit filed on 8 January 2010 the third defendant deposed –

> "2. I was the director of the First Defendant during the period that the Plaintiff supplied goods and services to the First Defendant.
>
> 3. I have reviewed the limited records of the First Defendant that I presently have access to and I verily believe that, if there is any debt owed by the First Defendant to the Plaintiff, that it is much less than the amount claimed by the Plaintiff.
>
> 4. The balance of the First Defendant's records, being those that I do not presently have access to, are presently under the control of Mr David Hambleton and Mr Robert Murphy of

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1 *Uniform Civil Procedure Rules* 1999 (Qld), r 188.

2 *Ridolfi v Rigato Farms Pty Ltd* [2001] 2 Qd R 455; *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at [742] –[750]; *Civil Procedure Queensland* [188.1] page 8271.

> R.E. Murphy and Co who are the joint deed administrators for the First Defendant ("the Deed Administrators").
>
> 5. The First Defendant, who is presently controlled by the Deed Administrators, is not joined as a party to the application set down to be heard on 23 December 2009.
>
> 6. Based on my recollection of the goods supplied to the First Defendant by the Plaintiff, I deny that most of it, if not all, the goods set out in the invoices that appear as exhibit "CS-4" of the affidavit of Carolann Skerratt filed 9 December 2009 [Document No. 3 on the Court File Index] were ever supplied or invoiced to the First Defendant."

[19] Ms Skerratt, the plaintiff's credit manager, had deposed to having had access to the plaintiff's books and records regarding the account maintained on behalf of the first defendant, and that –

> "12. In accordance with its obligations under the Credit Agreement, the Plaintiff from time to time supplied materials and products on credit and on a running account to the First Defendant."

She had then deposed that the total purchase price of the products and materials supplied was $53,897.47, as shown in a table listing invoices by date, number and amount. She had exhibited copies of those invoices to her affidavit, before continuing –

> "14. In breach of its obligations to the Plaintiff under the Credit Agreement, the First Defendant has failed and/or refused to pay the outstanding sum of $53,897.47, referred to in paragraph 13 above, to the Plaintiff."

[20] The third defendant did not provide any details about which of the goods the subject of the invoices were not delivered or which were not invoiced in support of the application for leave to withdraw the admissions.

[21] In my view the second and third defendants have not shown that there is a genuine dispute about the delivery and invoicing of the goods.

[22] In all the circumstances, I refuse leave to withdraw the admissions.

**Whether to grant summary judgment**

[23] Even if leave had been granted, I would not have been satisfied that this was a case where the second and third defendants had any real prospect of defending the claim or that there was a need for a trial.

[24] Counsel for the second and third defendants submitted that there are three principal reasons why the plaintiff's application for summary judgment should be dismissed –

(a) that there is a triable issue regarding the value of any goods delivered to the first defendant;

(b) that the second and third defendants were released from their obligations pursuant to the deed of company arrangement;

(c) that the plaintiff seeks declarations as to the existence of equitable mortgages when at most it has equitable charges.

[25] Pursuant to the guarantee and indemnity the second and third defendants undertook the following obligations –

"**1. Guarantee**

The Guarantor unconditionally and irrevocably guarantees to Hanson the due and punctual payment of the Guaranteed Moneys and agrees:

(a) on demand from time to time to pay an amount equal to the Guaranteed Moneys then due and payable;

(b) any statement signed by a Hanson director, secretary, credit manager or authorised representative certifying the amount of Guaranteed Moneys or the money owing by the Guarantor under his Guarantee is, in the absence of manifest error, binding and conclusive on and against the Guarantor;

(c) this Guarantee is a continuing guarantee and remains in full force and effect until all the Guaranteed Moneys are paid or satisfied in full and is in addition to, and not prejudiced or affected by any other security or guarantee held by Hanson for the payment of Guaranteed Moneys;

(d) the liabilities of the Guarantor and the rights of Hanson under this Guarantee are not affected by anything which might otherwise affect them at law or in equity; and

(e) if any payment by the Guarantor under this Guarantee or the Customer is avoided, set aside, ordered to be refunded or reduced rendered unenforceable by any laws relating to bankruptcy, insolvency or liquidation, that payment will be taken not to have been made and Hanson is entitled to recover from the Guarantor the value of that payment as if that payment had never been made. This clause continues after this Guarantee is discharged.

**2. Indemnity**

If the obligation of the Customer to pay the Guaranteed Moneys to Hanson is unenforceable for any reason, the Guarantor as a separate undertaking unconditionally and irrevocably indemnifies Hanson against any loss Hanson suffers as a result. Hanson need not incur any expense or make any payment before enforcing this right of indemnity.

> **5. Continuing Guarantee**
>
> Any guarantee shall remain in force so long as the customer shall maintain an account with Hanson. All guarantees shall be continuing guarantees and will terminate only in writing from Hanson.
>
> **7. Charge**
>
> As security for payment to Hanson of the Guaranteed Moneys and for its obligations generally under this Guarantee, the Guarantor charges in favour of Hanson the whole of the Guarantor's undertaking, property and assets (including, without limitation, all of the Guarantor's interests, both legal and beneficial, in freehold and leasehold land) both current and later acquired.
>
> **9. Expenses**
>
> The Guarantor must pay to Hanson all costs, charges, fees and expenses (including, without limitation, all stamp duty and legal fees) incurred by Hanson in connection with any entry into this Guarantee, the exercise or attempted exercise of any power, right or remedy under this Guarantee, and the failure of the Guarantor to comply with any obligations under this Guarantee."

[26] The plaintiff made demand on each of the second and third defendants on 20 July 2009.

[27] Counsel for the second and third defendants objected to the evidence of Ms Skerratt to the effect that goods were supplied and delivered to the value of $53,897.47 and that there has been non-payment by the first defendant. But in deposing to having custody and control of the matter, having access to the plaintiff's books and records and in particular those relating to the credit account for the first defendant, and her role as credit manager Ms Skerratt has laid a sufficient basis for the evidence to be admissible. I overrule the objection. And, of course, there is the deemed admission.

[28] I am satisfied that goods to the value of $53,897.47 were supplied and delivered to the first defendant, and that they have not been paid for.

[29] It is clear that a deed of company arrangement cannot prevent a creditor enforcing guarantees given by directors.

[30] Section 444D of the *Corporations Act* 2001 provides (so far as relevant) –

> "**444D Effect of deed on creditors**
>
> (1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).
>
> (2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security, except so far as:

(a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or

(b) the Court orders under subsection 444F(2)."

[31] Then ss 444H and 444J provide –

"**444H Extent of release of company's debts**

A deed of company arrangement releases the company from a debt only in so far as:

(a) the deed provides for the release; and

(b) the creditor concerned is bound by the deed.

**444J Guarantees and indemnities**

Section 444H does not affect a creditor's rights under a guarantee or indemnity."

[32] In *City of Swan v Lehman Bros Australia Ltd* Stone J said –

"5. … A deed of company arrangements is binding on creditors of the company by force of the provisions of Pt 5.3A of the *Corporations Act*, Section 444D(1) states that such a deed 'binds *all* creditors of the company *so far as concerns* claims arising on or before the day specified in the deed under paragraph 444A(i)' (emphasis added). It is not in dispute that a deed binds not only those creditors who voted in favour of the company entering into the deed but also those who voted against it. It is clear from the principles of contract law that, for this reason alone, the binding force is not contractual. It follows that the deed has such force as the statute provides and no more.

31. In a decision that predates the insertion of s 444J into Pt 5.3A, Spender J considered a deed of company arrangement that, inter alia, purported to prevent a creditor from enforcing guarantees given by the directors of the company in *M & S Butler Investments Pty Ltd v Granny May's Franchising Pty Ltd* (1997) 24 ACSR 695. His Honour held that the deed could not so provide and held, at 703:

> A deed of company arrangement can only deal with *company* property: it is not competent for an administration under Pt 5.3A … to exempt directors from their personal guarantees.

32. The enactment of s 444J put the matter of guarantees beyond doubt by specifically providing that the release of debts referred to in s 444H does not affect a creditor's rights under a guarantee or indemnity. Nevertheless, his Honour's

> general proposition that a deed of company arrangement can only deal with company property is unaffected by that change; indeed it is supported by it."[3]

[33] An equitable mortgagee is entitled to foreclosure while an equitable chargee is not. An equitable mortgage can come into existence, for example, by means of unperformed agreement express or implied to execute a legal mortgage.[4] The distinction is blurred somewhat by the definition of mortgage in the *Property Law Act* 1974 – it is expressed to include a charge on any property for securing money or money's worth.[5]

[34] An equitable chargee may obtain an order for sale pursuant to s 99(2) of the *Property Law Act* or the inherent power of the Court.[6]

[35] I agree with the submission of counsel for the second and third defendants that under the guarantee the plaintiff obtained equitable charges rather than equitable mortgages in the strict sense. I respectfully concur in the views expressed by PD McMurdo J in *Equititrust Ltd v Gamp Developments Pty Ltd*[7] and by Applegarth J in *Equititrust Ltd v Gamp Developments Pty Ltd (No 2)*[8] that a plaintiff cannot seek summary judgment for relief which is not within its claim as filed or duly amended. While the claim seeks declarations as to equitable mortgages, it also seeks orders for sale pursuant to s 99 of the *Property Law Act*. Given the definition of mortgage in the *Property Law Act* I am satisfied that declarations of equitable charges would be within the relief claimed.

[36] In all the circumstances there should be summary judgment against the second and third defendants for the money claims and the declaratory relief.

**Orders**

[37] I will counsel on the form of the orders on each application and on costs.

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3 *City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243 at 247; 252. See also *Gan v Sanders* (1994) 15 ACSR 298 per Mandie J.

4 See *United Travel Agencies v Cain* (1990) 20 NSWLR 566; *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584*; EA & S Plaster Co Pty Ltd v Registrar of Titles* [2004] QSC 014.

5 *Property Law Act* 1974 (Qld), Schedule 6.

6 *Phillips v Hogg* [2001] QSC 390; *Worrell v Issitch* [2001] 1 Qd R 570.

7 [2009] QSC 115.

8 [2009] QSC 168.