SUPREME COURT OF QUEENSLAND

CITATION:	*Crane Distribution Ltd v Brown* [2011] QSC 90
PARTIES:	**CRANE DISTRIBUTION LIMITED** **ACN 000 003 832** (plaintiff/applicant) **v** **DARK STAR TWO PTY LTD (in liquidation)** **ACN 124 230 842** (first defendant) **DAVID GLENN BROWN** (second defendant/respondent)
FILE NO:	BS 785 of 2009
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	19 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	Application on the papers
JUDGE:	Fryberg J
ORDERS:	**Application dismissed**
CATCHWORDS:	Procedure – Supreme Court procedure – Queensland – Procedure under *Uniform Civil Procedure Rules* and predecessors – Default of pleading Procedure – Costs – Nature of proceedings – Damages recovered small – Action which should have been brought in inferior court *Property Law Act 1974* (Qld), s 99 *Uniform Civil Procedure Rules 1999* (Qld), r 5, r 24, r 282, r 283, r 288, r 378, r 491, r 496, r 694, r 702, r 703 *Adelaide Bank Ltd v Teni* [2005] QSC 40 *Wallace v Witan Investments (Qld) Pty Ltd*, Unreported, 12 March 1986, no 3281/84, Master Weld (SCL # 86/070).
SOLICITORS:	Holman Webb Lawyers for the plaintiff/applicant Ex parte

[1] **FRYBERG J:** This is an application on the papers[1] for default judgment under r 288 of the *Uniform Civil Procedure Rules*.

History

[2] The plaintiff is a seller of plumbing supplies. The first defendant carried on a construction business and the second defendant was one of its directors (or perhaps the sole director). In March 2007, the plaintiff agreed to sell goods to the first defendant on credit. The plaintiff alleges in the present application that at that time the second defendant gave the plaintiff a guarantee in respect of the first defendant. It filed an affidavit made by its Queensland credit manager supporting the application and exhibiting the guarantee. It also filed an affidavit by a solicitor in support of the application. In the application it claims $957.10 for interest calculated to 27 August 2009 and $5,188.02 for costs.

[3] Rule 288 provides:

> "**288 Judgment by default—other claims**
> (1) This rule applies if a defendant is in default and the plaintiff is not entitled to apply for judgment under rule 283, 284, 285 or 286.
> (2) The plaintiff may apply to the court for a judgment.
> (3) On the application, the court may give the judgment it considers is justified on the pleadings even if the judgment was not claimed."

The plaintiff does not suggest that the court has any other relevant power, inherent or statutory, to give default judgment in the circumstances of this case.

[4] Sub-rule (3) directs attention to the only pleading in the matter, the statement of claim. I shall summarise it as far as possible. The first three paragraphs identify the parties. Paragraph 4 alleges that on 27 March 2007 the first defendant entered into an identified agreement with the plaintiff. Three paragraphs of that agreement are then set out in para 5 of the statement of claim. Only the second of those paragraphs is presently relevant: "2. Whether or not credit facilities are approved, future supply of products to the applicant shall be on terms and conditions of this document ("the agreement') *[sic]*..." None of those terms and conditions are pleaded, but in paragraph 6 the plaintiff asserts that at the trial it will refer to the agreement for its full meaning, terms and effect.

[5] Paragraph 7 alleges that on the same date the second defendant executed a guarantee and charge. Paragraph 8 quotes the terms of the alleged guarantee. After quoting the alleged opening paragraph (to which I shall revert shortly), it continues to set out all 16 operative clauses *in full*. The 16 clauses occupy nearly five pages of the statement of claim and most of them are irrelevant to the claim. Superfluously, para 9 advises that at the trial the plaintiff will refer to the document for its full meaning, terms and effect.

[6] Paragraph 10 pleads the sale of goods by the plaintiff to the first defendant. It alleges that $11,271.45 remains unpaid. Inferentially, that amount represents the balance of the account for the price of the goods. Paragraphs 11 and 12 plead a

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1 See rule 489.

demand made by the plaintiff to the defendants for payment of that amount and the failure of the defendants to pay it.

[7] The remaining four paragraphs deal with a claimed charge over the second defendant's land. It is unnecessary to refer to them in detail, because the plaintiff has abandoned this claim.

[8] Paragraph 8 begins:

> "8. The Guarantee states:
> *'In consideration of [the plaintiff] agreeing at the request of Ennis Leah Reid ("the Guarantor") to commence or continue to supply to EPR Plumbing Pty Ltd ('the Debtor') on credit or otherwise products and/or services from time to time … the Guarantor … agrees with the Supplier as follows …'.*"[2]

It is nowhere alleged in the statement of claim that the guarantee contains any term by which the second defendant guarantees the indebtedness of the first defendant.

[9] Nowhere in the application, or the submissions in support of it, filed under r 496 was the attention of the court drawn to this fact. On the contrary, it was incorrectly asserted that the prayer for relief sought payment for a debt owing under a guarantee provided by the second defendant to the plaintiff for the liability of Dark Star Two Pty Ltd (in liquidation). The solicitors for the applicant addressed the difficulty only after my associate drew their attention to it. They submitted that I should give a judgment other than one justified on the pleadings because:

- the incorrect pleading "was a typographical error";
- the second defendant has made no contact since service of the claim, nor filed any notice of intention to defend nor raised any concerns about the pleading;
- a copy of the correct guarantee is exhibited to the credit managers affidavit;
- the plaintiff pleads that it will refer to the guarantee at any trial of the action;
- the statement of claim could arguably be amended to delete paragraph 8;
- the second defendant would not be prejudiced by judgment on the basis of the pleadings in their current state; and
- the plaintiff has already incurred significant costs, to some extent occasioned by the second defendant's avoidance of service, and r 5 provides that the purpose of the rules is to facilitate resolution of the issues at a minimum of expense.

[10] The question which must be addressed is whether, when the only relevant power to give judgment is a power to give "the judgment [the court] considers is justified on the pleadings",[3] the court may give a judgment which is not justified on the pleadings. Even assuming that the error is correctly described as a typographical error, the first two and the penultimate points advanced on behalf of the plaintiff do not address that question. It is not a matter of discretion.[4]

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2 Italics in the original.

3 See rule 288(3).

4 If it were, it would be necessary to investigate why the court's attention was not drawn to the error in the statement of claim and why the issue was not addressed in the first submissions.

[11] As to the third point, an affidavit in support of an application is not a pleading within the meaning of the *Uniform Civil Procedure Rules*. The rule does not empower the court to give judgment in accordance with the evidence. That is the purpose of the summary judgment rules. Rule 288 requires judgment on the pleadings. Indeed I question whether it is appropriate in an application under that rule to file affidavits which address anything other than service of the claim,[5] whether the defendant is in default[6] and any other procedural matter relevant to the applicability of the rule. I am aware that this is sometimes done, but I have not found a case which considers the point. I refrain from deciding it in the absence of argument.

[12] It is true that the plaintiff pleads that it will refer to the guarantee at any trial of the action. This application is not a trial within the meaning of the rules.

[13] The plaintiff did not amend the statement of claim. Presumably it could have done so under r 378 but, again presumably, that would have required re-service of the amended statement of claim. I doubt whether the problem would be cured simply by deleting para 8, but it is unnecessary to decide that point.

[14] Rule 288 must be construed in the light of r 5. However that does not mean that the plain meaning of words must be disregarded simply because the words result in the imposition of expense. In any event, there would be no problem if the plaintiff had complied with the rules and pleaded its claim properly.

[15] I do not consider judgment for the plaintiff is justified on the pleadings. Consequently the application will be dismissed.

[16] In case that conclusion be wrong, there are some other matters to which I should refer.

[17] Rule 288 applies only if the plaintiff is not entitled to apply the judgment under r 283. Rule 283 provides for default judgment to be given by a Registrar on the filing of a request for judgment. It applies "if the plaintiff's claim against the defendant in default is for a debt or liquidated demand, with or without interest." In this case, before (probably long before) the application was brought, the plaintiff abandoned any claim in respect of the second defendant's land. All that remained was a claim for a debt or liquidated demand. Why then could it not have proceeded under r 283? I doubt the decision in *Wallace v Witan Investments (Qld) Pty Ltd*[7] would be an obstacle.

[18] That may not be an academic question. Rule 283 specifies what may be claimed for costs. They are limited to costs for issuing the claim and obtaining judgment and to other fees and payments "to the extent that they have been *reasonably* incurred and paid". The rule was amended in 2005, presumably as a result of the decision in *Adelaide Bank Ltd v Teni*.[8] In the circumstances of the present case that might have had consequences.

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5 Rule 282.

6 Rule 288(1).

7 Unreported, 12 March 1986, no 3281/84, Master Weld (SCL # 86/070).

8 [2005] QSC 40.

[19] Even if the case falls for determination under r 288, the question of costs is a significant one. The reason why a commercial claim for a mere $11,000 odd was brought in this court was that the guarantee contained a clause by which the second defendant charged "all of its *[sic]* interest in real property both present and future and wheresoever situated" with the amount of his indebtedness to the plaintiff. The claim as filed sought not only a money judgment but also a declaration that the plaintiff holds an equitable mortgage or charge over the specified land and an order for sale under s 99 of the *Property Law Act 1974*. Such a clause is commonly encountered by judges sitting in the applications jurisdiction of this court. In the present case it meant that a claim, which could have been made as a small debt claim in the Magistrates Court with costs consequences appropriate to such a claim potentially attracted costs quite out of proportion to the amount of the claim.

[20] In my view the use of such clauses by trading companies should not be allowed to inflate costs in this way. It is inappropriate to use this mechanism for recovering relatively small routine debts. There is much to be said for the view that costs in this court should be limited in such cases to what could have been recovered in the Magistrates Court.

[21] Quite apart from that general consideration, there is doubt about the quantum of the plaintiff's claim on the affidavit evidence. To demonstrate that doubt it is necessary to refer to the facts in some detail.

[22] On 31 August 2007, the second defendant became the registered proprietor of the land. He gave a registered mortgage over it to the National Australia Bank Ltd. Plainly that mortgage took priority over the plaintiff's charge.

[23] A full history of the trading account between the plaintiff and the first defendant is not in evidence; but it is not relevant. In the period April to July 2008 the plaintiff sold and delivered building materials and products to the first defendant for $11,271.45. The first defendant did not pay for those goods when payment was due, nor was any payment made as a result of a letter of demand sent by the solicitors for the plaintiff to at least one guarantor in September 2008. (It seems there were two guarantors.)

[24] Some desultory correspondence took place between the solicitors for the plaintiff and the other guarantor in September and October 2008, but no payment was forthcoming. On 4 November the plaintiff lodged a caveat in respect of the second defendant's land. On 11 December a company called Metecno Pty Ltd also lodged a caveat. The present action was commenced, doubtless to support the plaintiff's caveat, on 22 January 2009. The first defendant was served promptly, but did not file a defence. The second defendant was not served. The process server reported in effect that he was avoiding service and suggested that the only way to serve him might be by way of substituted service. That step was not taken.

[25] The plaintiff did not seek default judgment against the first defendant and continued negotiating with the second defendant until August 2009. On 4 August Flexihire Pty Ltd applied to the court to wind up the first defendant and on 26 August 2009 the first defendant went into liquidation. Two days later, someone (the evidence does not reveal who) paid the plaintiff $12,522.70 in respect of the company's debt. That payment may have been made by the other guarantor, for it appears that the

plaintiff commenced proceedings against him in the Magistrates Court in late July or early August and discontinued them in early September.

[26] The payment was not enough to discharge the claim in full, because interest owing under the credit agreement up to and including 27 August 2009 was alleged to be $2,208.35. The shortfall was $957.10. There was also the question of costs. The plaintiff now claims that by 28 August 2009 it had incurred legal costs of $3,758.85 which were recoverable under the guarantee. It follows that on the most optimistic view of the plaintiff's claim against the second defendant, the maximum amount recoverable at that time was $4,715.95. Unless costs were recoverable as a sum due under the guarantee the claim was for only $957.10. There is no evidence of how the plaintiff appropriated the money paid to it; so I shall assume that it was appropriated to the price of the goods and to part of the interest.

[27] Thereafter the action went to sleep. No step was taken until June 2010. I infer that around that time either the bank, as first mortgagee, sold the second defendant's land or that under pressure from the bank, he sold it himself. The plaintiff's solicitors drafted a withdrawal of the plaintiff's caveat on 15 June and I assume that the plaintiff was at all material times aware of the sale. It must surely have known the sale price before its solicitors perused a final settlement statement on 17 June. On 22 June withdrawals of both caveats, a release of the mortgage and a transfer to new owners were registered. I infer that there was no money left over after the discharge of the registered mortgage to pay to the plaintiff.

[28] The plaintiff wished to recover the $4,715.95 plus further costs. By June it had at least two courses open to it. The first was to renew the claim (which had ceased to be in force the previous January),[9] serve the renewed claim on the second defendant; and proceed with the Supreme Court action on the basis of the alternative relief claimed, ie payment of money. The other was to commence proceedings as a minor debt claim in the Magistrates Court or the Queensland Civil and Administrative Tribunal[10]. Some time before 17 June, the plaintiff chose the first option. The second defendant was served with the renewed claim on 30 June 2010.

[29] The guarantee provided for the second defendant:

> "1. (a) To pay the [plaintiff] without any demand and without any deductions, all monies which are now or may from time to time hereafter be owing or remain unpaid *by the Customer* to the [plaintiff] on all accounts whatsoever including (without limitation):
> (i) all moneys payable in respect of the supply of goods or services;
> (ii) interest payable on overdue accounts; and
> (iii) costs (on a full indemnity basis) of any attempt made by or on behalf of the [plaintiff] to recover monies from the Customer or from the guarantor or to secure any such indebtedness or liability to the [plaintiff]. …".[11]

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9 *Uniform Civil Procedure Rules*, r 24.

10 The choice depended at least in part on when the proceedings were started.

11 Emphasis added.

No rate of interest was specified in the guarantee.

[30] Having regard to the terms of the guarantee, the claim for interest is correct and appears to be correctly calculated.

[31] As regards the claim for costs, the plaintiff has exhibited a series of tax invoices rendered to it by its solicitors from December 2008 to June 2010. The total charged in those invoices is $5,188.02. That is the totality of the evidence on the question. The issue of reasonableness is not addressed.

[32] Two points arise in relation to the claim for costs, even if the matter be dealt with under r 288. First, as appears from the words emphasised, cl 1 of the guarantee is limited to amounts owing by the *customer*. The plaintiff has not claimed that the costs in the invoices are part of the sum owed by the first defendant and has not sought to recover them as such under the guarantee. It has sought only an order for costs of the proceeding, albeit on the indemnity basis. A substantial part of the work the subject of the invoices related not to the action but to the Magistrates Court proceeding and to the caveat. These are not costs of the proceeding. It may be that a number of other items also are not costs in the present proceeding. It is not possible on the evidence before me to assess the amount of the plaintiff's costs of this proceeding.

[33] Second, the plaintiff seeks an order for costs on the indemnity basis. It therefore seeks to have the court depart from the usual practice whereby the Registrar fixes costs in accordance with the prescribed scale: r 694. Why the court should depart from that rule is unclear. Even if it were appropriate to do so, it would not be possible to assess indemnity costs. Such costs include "all costs reasonably incurred and of a reasonable amount" having regard to certain matters.[12] They are to be contrasted with standard costs which are "all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed".[13] It seems probable that the references to costs on "a full indemnity basis" in the guarantee are to be construed as limited to costs reasonably incurred and to the reasonable amount, in accordance with the *Uniform Civil Procedure Rules*. In other words the issue of the reasonableness of the costs must be addressed.

[34] Were it necessary for me to deal with these matters in the circumstances of the present case, I would consider it inappropriate to decide the matter without an oral hearing.[14]

[35] For the reasons previously stated, the application is dismissed.

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12 Rule 703.

13 Rule 702.

14 Rule 491.