SUPREME COURT OF QUEENSLAND

CITATION:	*Capital Finance Australia Limited v Edwards & others* [2011] QSC 104
PARTIES:	**Capital Finance Australia Limited ACN 069 663 136** (plaintiff/ respondent) v **Christopher Malcolm Edwards** (first defendant/ applicant) and **Lawrence Paul Robson** (second defendant) and **Christopher Paul Hawkins** (third defendant/ applicant) and **Moonbrook Holdings Pty Ltd ACN 089 494 673** (fourth defendant) and **Great Northern Developments Pty Ltd ACN 094 805 286** (fifth defendant) and **Clarence Road Project Pty Ltd ACN 099 686 709** (sixth defendant)
FILE NO/S:	BS 13114 of 2010
DIVISION:	Trial Division
PROCEEDING:	Setting Aside Judgment /Order

ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2011
JUDGE:	Boddice J
ORDER:	**The application is refused**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT – IN GENERAL – where applicant made application to set aside a default judgment – whether judgment was irregularly entered – circumstances in which rule 290 of the *Uniform Civil Procedure Rules* permits a default judgment to be amended – whether defence on merits shown *Uniform Civil Procedure Rules 1999* (Qld), r 290 *Anson v Trump* (1998) 1 WLR 1404 *Cook v DA Manufacturing Co Pty Ltd* [2004] QCA 52 *Cusack v de Angelis* [2008] 1 QdR 344 *Hughes v Justin* [1894] 1 QB 667 *National Mutual Life Association of Australasia Limited v Opie*, White J, Supreme Court of Western Australia, 6 December 1994. *Pollack v National Australia Bank* [2002] FCA 237 *Ward v National Bank of New Zealand* (1883) 8 App Cas 755
COUNSEL:	Peden, J for the applicants/defendants Atkinson, D for the respondent/plaintiff

SOLICITORS: Frews Solicitors for the applicants/defendants

Hopgood Ganim for the respondent/plaintiff

Overview

[1] The first and third defendants ("the applicants") apply, pursuant to r 290, UCPR, to set aside default judgments obtained on 28 February 2011, on the grounds that:

(a) The judgments entered were irregular; and

(b) Irrespective of whether they were irregularly entered, they have a prima facie defence to the claim and have provided an explanation as to why they did not file defences within the time prescribed by the UCPR.

Background

[2] The plaintiff ("the respondent") commenced proceedings against six of seven guarantors of loans it advanced to Discovery Beach Project Pty Ltd, the joint venture developer of the Surfair beachside development at the Sunshine Coast.

[3] On 20 December 2002, the respondent lent $3 million to Discovery Beach Project Pty Ltd. On the same day, the fourth and fifth defendants executed Deeds of guarantees in favour of the respondent in relation to that loan.

[4] On or about 19 May 2003, the first, second and third defendants, together with Derek William McCartney, executed Deeds of guarantee in favour of the respondent in respect of the loan amount. These guarantees were later varied so that the loan amount was increased, and the facility was repayable on or before 23 August 2009.

[5] The facility was not repaid by 23 August 2009. On 27 August 2010, the respondent gave written notice to each of the defendants demanding payment of the sum of $2,850,151.74. None of the defendants complied with this demand.

[6] On 6 December 2010, the respondent issued the claim and statement of claim. Defences were not filed within the time period prescribed by UCPR. Default

judgments were entered against the first, second and third defendants on 28 February 2011 for $2,406,308.93.

Grounds of Application

(i) Judgment irregularly entered

[7] The applicants contend the judgment entered was for a sum $50,000.00 greater than the amount particularised in the statement of claim and that as a consequence, the judgment is irregularly entered and ought to be set aside.

[8] A judgment entered for in excess of the true amount due and owing is entered irregularly. Although a defendant may be entitled to have such a judgment set aside *ex debito justitiae*,[1] it does not follow that such a course must occur where there is power to amend a default judgment. That power, which exists under r 290 UCPR, is properly to be exercised where the existence of the lesser debt is clearly established and there is no suggestion of a defence on the merits.[2]

[9] The statement of claim pleaded the amount owing as at 23 November 2010 was $2,943,846.58, being the amount particularised in Annexure A to the statement of claim.[3] After commencement of the claim, the respondent received a part payment of $610,320.28 from the applicants in reduction of the debt. The amount owing by the applicants was therefore, $2,333,526.30 plus costs and interest.

[10] Default judgment was entered on 28 February 2010 against the applicants in the sum of $2,406,308.93, particularised as being made up as follows:

(a)	Amount of claim	$ 2,333,526.30
(b)	Interest	$ 70,768.13
(c)	Costs	$ 2, 014.50

[11] The material relied upon to obtain the judgments by default swore that the debt due and owing was $2,943,846.58, being the amount set out in Annexure A to the statement of claim, less $610,320.28 part paid, together with interest and costs. The applicants contend that Annexure A only established an outstanding debt of $2,893,846.58. Whilst that was the figure that appeared at the end of the columns in

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1 *Hughes v Justin* [1894] 1 QB 667; see also *Anson v Trump* (1998) 1 WLR 1404 at 1409.
2 *Cusack v de Angelis* [2008] 1 QdR 344 at 351-2.
3 See paragraph 17 of the statement of claim.

that annexure, Annexure A also contained the following entry at the top of the first page: "Risk fee of $50,000 is payable – refer letter of offer dated 26/6/09". That risk fee, albeit obliquely referred to in Annexure A, explains the total claim of $2,943,846.58. It is $2,893,846.58 plus the $50,000 risk fee. Each of these figures was contained in Annexure A. There was a proper basis to include them in the judgment amount.

[12] The applicants also contend the default judgments were irregularly entered as they included an interest component which is void for uncertainty as it is not "apparently claimable" on the face of the statement of claim. There is no uncertainty. The statement of claim specifically claimed interest, either at 13.3% per annum pursuant to the agreement or, alternatively, pursuant to s 47 of the *Supreme Court Act* 1995 (Qld).[4] The latter claim would be at a rate of 10%.[5] That was the interest rate used for the calculation of interest for the default judgment.

[13] At the hearing of the application, the applicants relied upon a further basis for the judgment by default being irregularly entered. That basis related to an assertion it had been entered into in circumstances where the parties were continuing ongoing negotiations, and the applicants were not given a reasonable opportunity to enter a defence prior to the entering of the default judgments.

[14] The basis for this assertion lies in a series of email communications. Whilst those email communications evidence ongoing discussions, prior to entering judgment the respondent:

(a) specifically advised that the applicants had until 5.00pm on 24 February 2011 in which to resolve the matter or the respondent would apply to enter judgment on the morning of 25 February 2011;[6]

(b) confirmed that position on the evening of 24 February 2011;[7]

(c) further confirmed that position at 3.58pm on 25 February 2011.[8]

[15] There is no basis to assert the applicants were denied a reasonable opportunity to file a defence so as to avoid default judgment.

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4 See paragraphs 3 and 4 of the Claim

5 See para 2 of the Supreme Court of Queensland, Practice Direction Number 6 of 2007

6 Affidavit of Samuel Roadley Kingston, Exhibit SRK-1, letter dated 22 February 2011.

7 Affidavit of Christopher Paul Hawkins, Exhibit CPH2; see also CPH3.

8 Affidavit of Christopher Paul Hawkins, Exhibit CPH4.

[16] The applicants have not established the judgment should be set aside on the basis it was irregularly entered.

(ii) Discretionary grounds to set aside judgment

[17] The Court has a discretionary power to set aside a judgment by default.[9] In exercising that power, three considerations are particularly relevant:[10]

(a) Is there a satisfactory explanation for failure to appear?

(b) Was there any delay in making the application? and

(c) Does the defendant have a prima facie defence on the merits?

[18] As to (a), the applicants contend the guarantors, through Mr McCartney, were negotiating with the respondent and were under the common assumption that default judgment would not be entered until settlement negotiations had concluded.[11] The applicants were personally served with the claim and statement of claim on 24 January 2011. The last date for filing a notice of intention to defend was 21 February 2011. Default judgment was entered after that time, which was more than 28 days after the claim was personally served.[12] Notice was given of an intention to enter default judgment should defences not be filed. No defence was filed.

[19] As to (b), default judgment was entered on 28 February 2011. The applicants filed their application on 4 March 2011. There was no delay in making the application.

[20] As to (c), the applicants contend there is a prima facie defence on the merits as there has been a release of the guarantors' liability by reason of a compromise of the co-guarantors' liability. The applicants assert that as the respondent has not sued Mr McCartney, or his two companies, pursuant to their guarantees, there is a triable issue as to whether the respondent has agreed to release Mr McCartney and, inferentially, his two companies from their re-payment obligations. Such a release would operate to excuse the applicants from their obligations under the guarantee.

[21] The relevant law in relation to guarantees can be shortly stated:

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9 Rule 290, UCPR.

10 *Cook v DA Manufacturing Co Pty Ltd* [2004] QCA 52 at [19].

11 Affidavit of Christopher Paul Hawkins, sworn 31 March 2011 at [38].

12 Rule 137, *Uniform Civil Procedure Rules* 1999 (Qld).

(a) As a general principle, when a creditor releases one or two or more guarantors who have contracted jointly and severally, the remaining guarantors are thereby also released from liability under their guarantee;[13]

(b) A guarantor, may, by the terms of the guarantee waive the right to be excused from liability as a consequence of the release of the other sureties;[14] and

(c) Where an arrangement with a co-surety is that the creditor gives a covenant not to sue, rather than a release, the other guarantors are not excused from their obligations.[15]

[22] The applicants rely upon affidavit material, together with a letter from Hopgood Ganim dated 15 March 2011, to support the assertion of an agreement to release Mr McCartney and his companies.[16] Mr Robson deposes that Mr McCartney said he was not being pursued by the respondent, and "had reached an understanding with them".[17] Mr Edwards deposed Mr McCartney told him he had already negotiated "a deal" with the respondent.[18] Mr Hawkins deposed Mr McCartney said he had reached an agreement with the bank.[19] They assert an alleged deal between the respondent and Mr McCartney can also be inferred from the fact that Mr McCartney was not joined as a defendant.

[23] The respondent's affidavit material asserts:

(a) the two corporate defendants, Moonbrook and GND, entered into an arrangement in November 2009 *inter se* for the payments of moneys owed;

(b) although GND (which is associated with the current applicants) did little or nothing to further that arrangement, Mr McCartney has been co-operating with a view to making re-payments under the guarantee;

(c) Mr McCartney is making arrangements in good faith. In contrast, the applicants have done little or nothing to meet their obligations;

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13 *National Mutual Life Association of Australasia Limited v Opie*, White J, Supreme Court of Western Australia, 6 December 1994. See also, *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 764.

14 Ibid.

15 *Pollack v National Australia Bank* [2002] FCA 237.

16 See affidavit of Christopher Malcolm Edwards, sworn 31 March 2011, para 8 and affidavit of Christopher Paul Hawkins, sworn 31 March 2011, para 54 and affidavit of Jonathan Harold Walter Frew, sworn 4 April 2011, filed by leave 5 April 2011, Exhibit JHWF2.

17 Affidavit of Lawrence Paul Robson, paras 6-8.

18 Affidavit of Christopher Malcolm Edwards, para 6.

19 Affidavit of Christopher Paul Hawkins, para 30.

(d) on the basis of the arrangements that have been made, proceedings have not been commenced against Mr McCartney. However, there has been no written or oral agreement has been reached with Mr McCartney. Legal proceedings may be commenced against him for recovery of the amount owed at any time.[20]

[24] There is nothing in the affidavit material relied upon by the applicants to support a contention the respondent has agreed to release Mr McCartney, or his companies, or otherwise covenanted with them so as to impair the rights of the applicants as guarantors. Each of the conversations deposed to, even if accepted as having occurred, are consistent with the respondent agreeing a repayment programme with Mr McCartney whilst reserving its rights against him and his companies.

[25] The affidavit material relied upon by the applicants does not establish there is a triable issue that a compromise has been reached releasing Mr McCartney and his companies from their obligations under the guarantees. The letter from Hopgood Ganim also does not support the existence of any agreement to release Mr McCartney.

[26] The applicants also relied upon a defence that the claim for interest is not supported by the documentation, as the interest is uncertain. However, the claim for interest is not uncertain.

[27] The applicants have not established they have a prima facie defence to the claim on the merits.

Conclusion

[28] There is no basis for setting aside the default judgments.

[29] The application is refused. I will hear the parties as to costs.

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20 Affidavit of Derek Stacey, sworn 4 April 2011 .