SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Liquor Marketers (Qld) Pty Limited (ACN 010 756 519) and Ors v Spiro Anton and Ors* [2011] QSC 195
PARTIES:	**AUSTRALIAN LIQUOR MARKETERS (QLD) PTY LIMITED (ACN 010 756 519)** First Plaintiff AND **AUSTRALIAN LIQUOR MARKETERS PTY LIMITED (ACN 002 885 645)** Second Plaintiff AND **AUSTRALIAN LIQUOR MARKETERS (WA) PTY LIMITED (ACN 009 196 614)** Third Plaintiff **V** **SPIRO ANTON** First Defendant AND **JIM PRAPAS** Second Defendant AND **STAN TSOUTSOURAS** Third Defendant AND **DENIS ANTHONY RAPHAEL RYAN** Fourth Defendant AND **MR LIQUOR (QLD) PTY LTD (ACN 134 540 453)** Fifth Defendant AND **MR LIQUOR HOTEL GROUP PTY LTD (ACN 121 956 081)**

	Sixth Defendant
FILE NO/S:	9464 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	27 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2011
JUDGE:	Byrne SJA
ORDER:	**The application is dismissed.**
CATCHWORDS:	CIVIL PROCEDURE – SUMMARY DISMISSAL, SETTLEMENT AND DISCONTINUANCE – SUMMARY DISPOSAL OF LITIGATION – SUMMARY JUDGMENT FOR DEFENDANT GUARANTEE – Where the defendants applied for summary dismissal of the plaintiffs' claim on the basis that it has no real prospect of success – where the plaintiffs claimed amounts owing for liquor purchased under a second credit agreement created on comparable terms to the earlier 'Credit Trading Terms and Guarantee' Agreement – where the second defendant contends that the guarantee accompanying the second credit agreement is not capable of encompassing the defendants – whether there was any real prospect of success of the claim against the defendants for monies owing under the second credit agreement – whether there was sufficient factual basis to support the continuation of the claim – whether there was a reasonable issue to be tried CONTRACTS: SPECIFIC – GUARANTEES – GENERAL PRINCIPLES OF CONTRACT AND GUARANTEES – PARTIES – PRIVITY – where the defendants purchased liquor from the plaintiffs under a credit account entitled 'Credit Trading Terms and Guarantee' Agreement – where the first defendant was mistakenly named as the customer under that credit account – where the second defendant was named as guarantor for that first Agreement – where a second credit account was created – where the plaintiff's claim was for an amount owing for liquor purchased under that second credit account – whether the 'customer' referred to in the second credit agreement and guarantee on its interpretation was capable of referring to the defendants
COUNSEL:	A F Fernon for the second and fifth defendant/applicants. D Samuel for the first, third, fourth and fifth defendant/applicants.

D Williams for the plaintiffs/respondents.

SOLICITORS: Carlisle Attorneys for the plaintiffs.

Morgan Conley Solicitors for the defendants.

Summary judgment for a defendant sought

[1] The second defendant applies for summary dismissal of the claims against him on the basis that there is no real prospect that they might succeed.[1]

Parties

[2] Mr Prapas has been a director of the sixth defendant ("MLHG") since its incorporation in 2006.

[3] In 2007, MLHG owned the Shamrock Hotel, which traded as a licensed hotel in Fortitude Valley.

[4] The first defendant was MLHG's Group General Manager.

[5] The respondents ("ALM") are wholesale suppliers of liquor.

First Agreement

[6] In March 2007, MLGH wanted ALM to supply liquor for the hotel and two detached bottle shops. To facilitate that business relationship, ALM concluded a "Credit Trading Terms and Guarantee" agreement ("the first agreement") with "the customer named and described in the schedule…" and "the guarantor named and described in the schedule…".

[7] The schedule shows the customer as:

> "Name: Spiro Anton
> Premises: Shamrock Hotel (Fortitude Valley)"

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1 See UCPR 293.

[8] Mr Prapas's "name" and "address" appear above his signature as guarantor.

[9] ALM, Mr Prapas and MLHG agree that the description of Mr Anton as the customer is a mistake. ALM says that MLHG is the customer.[2] Mr Prapas and MLHG agree, up to a point. They contend that MLHG is "only the customer … to the extent it places orders … in respect of the Shamrock Hotel" and its associated bottle shops.[3]

[10] From March 2007 until October that year, ALM supplied liquor to MLHG under the first agreement.

Claimed source of liability

[11] It is common ground that MLHG has paid all amounts owing to ALM under the first agreement. ALM's claims against Mr Prapas arise from other dealings.

[12] In October 2008, Mr Anton, purporting to speak for MLHG, arranged a "second account" to secure liquor supplies to other hotels and bottle shops. Those retail outlets were owned by the Ryan Hotels Group Pty Ltd ("RHG"). Mr Anton told ALM representatives that MLHG would be acquiring them.

[13] On 1 October 2008, Mr Anton sent an email as "Group General Manager for Mr Liquor Hotel Group/Ryan Group" asking for the new account to be a "carbon copy of our existing accounts". In the context of earlier dealings by ALM and MLGH and more recent negotiations between Mr Anton and ALM representatives, ALM pleads that the request for the new account was that it have "identical trading terms to those contained in the first agreement".[4] ALM also alleges that the request was accepted.[5]

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2 That is ALM's primary position. ALM also pleads, in effect, that ALM and Mr Anton were the customers and, alternatively, that Mr Anton was.

3 Amended defence para 3(b).

4 Para 10 (b) Statement of Claim.

5 Mr Prapas and MLHG assert that Mr Anton had no authority to provide any further guarantee of Mr Prapas in respect of the second account. That issue is not to be decided in this application.

[14] On ALM's case, that meant that Mr Prapas's first agreement guarantee rendered him liable to pay a $842,437.83 debt incurred by MLHG for debits to the second account for supplies to outlets other than the Shamrock Hotel and its bottle shops.

[15] ALM's case depends upon the effect of the guarantee.

Reach of the guarantee

[16] Clause 30.1 of the first agreement stipulates that:

> "The Guarantor guarantees to ALM that he will be with the Customer jointly and severally liable to ALM for the due payment of all moneys to be paid by the Customer under this Agreement…".

[17] "This Agreement" means "the terms and conditions set out in these Credit Trading Terms." The Agreement also provides that the "customer" is bound by those Credit Trading Terms "for each and every transaction and dealing between the Customer and ALM".[6]

[18] The Credit Trading Terms envisaged that ALM would establish the customer's credit account and periodically issue a statement showing the balance.[7]

[19] If the balance is in debit, the customer is obliged to pay that balance, which the first agreement calls "Amount(s) Payable".[8]

[20] "Amount(s) Payable" is defined to "mean and include":

> "2.2.1 All amounts debited to the Customer's Credit Account for the Goods or otherwise under and pursuant to this Agreement, now and in future;
>
> 2.2.2 All money now or hereafter owing or payable to ALM by the Customer, either alone or jointly with another person now or in the future, whether directly or indirectly or contingently under this Agreement or on any other account whatsoever, and including all such money arising from:
>
> 2.2.2.1 Any guarantee…account, document, or other agreement in writing between ALM and the Customer and/or any Guarantor;
>
> …"

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6 See the first agreement description of the consideration, which appears in the document immediately before the first operative clause.

7 Clause 1.4.

8 Clause 2.1.

Principles of interpretation

[21] For present purposes at any rate, ALM is content to accept that:

1. The guarantee will be construed strictly, and in favour of Mr Prapas;
2. An "all moneys" clause, such as the "or any other account whatsoever" reference in Clause 2.2.2, will not be construed to extend to a debt of a fundamentally different character from the debt specifically contemplated by the parties when entering into the contract;
3. In construing such a clause, the court confines its operation by reference to context and commercial purpose.[9]

Context about interpretation

[22] Nonetheless, ALM contends that, by virtue of Clause 2, the customer is liable to pay moneys owing "under this agreement or on any account whatsoever, including debts arising under any 'account'." ALM's case is that the second account debts are not of a fundamentally different character; they, too, are for liquor supplied pursuant to a credit account opened by MLHG. And so, it is said, Mr Prapas is liable for the outstanding second account debts.

[23] Mr Prapas's answer is that MLHG was not the "customer" under the first agreement, except for supplies to the Shamrock Hotel and its bottle shops. Two considerations are relied on: the language of the first agreement, and a course of dealing by ALM in respect of its customer accounts.

Completing the standard form

[24] The first agreement is expressed to be concluded between ALM and "the customer named and described in the Schedule…". Mr Prapas says that the customer should have been named as MLHG.

[25] Under the heading "customer", there is, as I have said, provision for an address to be inserted after "premises". That address is "Shamrock Hotel (Fortitude Valley)".

On Mr Prapas's case, these words are fundamental in determining the identity of the customer and the obligations of Mr Prapas.

Extrinsic evidence

[26] The importance of the customer's description by reference to premises is said to be underlined by State licensing requirements for hoteliers and wholesale suppliers. More importantly, Mr Prapas deposes that separate agreements have always been entered into with ALM for separate licensed premises. His affidavit mentions several agreements from 1995 that ALM concluded for supplies to bottle shops with which Mr Prapas was associated. He says that ALM made separate supply agreements every time and that separate customer numbers were routinely assigned for different outlets.

[27] Against this background, the first agreement "customer" is said not to be MLHG operating from any premises but only from the Shamrock Hotel and its detached bottle shops.

[28] Another factual issue should be mentioned.

[29] When the account for one of the RHG outlets, the Woombye Hotel, was opened in October 2008, Mr White, ALM's sales manager, emailed Mr Anton asking him to arrange for attached documents to be signed so that individual accounts could be opened for each of the hotel outlets, as well as for a central warehouse location.

[30] The attachments included a draft of a letter to be signed by Mr Prapas confirming that his first agreement guarantee "will cover all debts incurred for the accounts of" the nine outlets operated by RHG.

[31] Mr Prapas did not sign the documents. He deposes that he "refused to sign", asserting that his guarantee applies only to Shamrock Hotel trading.[10]

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9 *McVeigh v The National Australia Bank* [2000] FCA 187 at [83].

10 And its two bottleshops.

[32] ALM says that Mr Prapas did not refuse to sign the documents. Rather, he made no response to the request to affirm that his guarantee extended to trading at the new outlets. ALM also points out that Mr Prapas's affidavit does not explain why he did not make his now stated position clear if at the time he held the view that the guarantee did not extend beyond the trading activities of the Shamrock.

[33] Evidently, the factual setting, therefore, has potential to influence the interpretation of the guarantee. In particular, it is a question whether the surrounding circumstances support the narrow meaning for which Mr Prapas contends.

Disclosure useful?

[34] ALM suggests that disclosure might matter: it may reveal information pertinent to ALM's practices and Mr Prapas's knowledge of them that could be relevant.

[35] That possibility cannot be excluded. Once this position is reached, there should be a trial of the claim founded on the second account, after the usual interlocutory steps, especially disclosure.

Second Agreement

[36] The other claim upon the guarantee concerns what was described in argument as the "second agreement".

[37] In March 2009, the fifth defendant and RHG entered into an agreement with ALM. Materially, it was in the same terms as those in the first agreement, including guarantee obligations.

[38] Mr Prapas was not a guarantor. This time, the guarantors were Mr Anton and Mr Ryan.

[39] The second agreement concerned the supply of liquor to the Woombye Hotel and the Woombye distribution centre. Those operations have no relationship with the Shamrock.

[40] Between April and July 2009, liquor was supplied to the fifth defendant and RHG pursuant to the second agreement. The plaintiff's case is that $964,801.11 is owed by the buyers.

[41] Mr Anton is said to be indebted in that amount as a guarantor.

[42] ALM claims to recover the amount of his liability as guarantor from Mr Prapas on the footing that his first agreement guarantee comprehends the liability of Mr Anton as guarantor under the second.

[43] This claim depends upon the notion that Mr Anton was a first agreement "Customer".

[44] The case in this respect is not pleaded exclusively in the alternative. So it cannot be disposed of on the basis that it is common ground that Mr Anton was not a, or the, first agreement "Customer".

[45] ALM points to Clause 2.2.2.1, contending that the "amounts payable" guaranteed by Mr Prapas extend to any guarantee Mr Anton gave of his obligations to ALM.

[46] The question whether Mr Prapas guaranteed only the debts of the "customer" and not those of Mr Anton raises factual questions of the kind mentioned in connection with the second account: issues fit for a trial after the usual interlocutory processes are invoked.

Release?

[47] It is also said for Mr Prapas that, if Mr Anton was the customer, the claim in respect of the second agreement should be dismissed. This contention – raised in writing but not pursued in oral argument – is that, by virtue of a debt repayment agreement, Mr Anton has been released from his obligations under the first agreement.

[48] This does not appear to be an issue on the pleadings, which may explain why the point was not addressed in oral argument. Another explanation may be Clause 30.4

of the first agreement, by which the liability of the guarantor is not to be affected by the

> "granting of time or any other indulgence with the customer or by the compounding compromise, release, abandonment, waiver, variation or renewal of any of the rights of ALM against the customer…or by any other thing which under the law relating to sureties would or might but for this provision release the guarantor in whole or in part of his obligations under this guarantee".

Disposition

[49] The application is dismissed.