SUPREME COURT OF QUEENSLAND

CITATION:	*Perpetual Trustee Company Limited v Nebo Road Pty Ltd & Ors* [2011] QSC 283
PARTIES:	**PERPETUAL TRUSTEE COMPANY LIMITED** **ACN 000 001 007** (plaintiff) **v** **NEBO ROAD PTY LTD** **ACN 125 069 516** (first defendant) and **NEBO ROAD PTY LTD** **ACN 125 069 516** **AS TRUSTEE FOR NEBO ROAD UNIT TRUST** (second defendant) and **GERARD WILLIAM BATT** (third defendant) and **KEITH LAURENCE BATT** (fourth defendant) and **ROBERT LESLIE EDWARDS** (fifth defendant) and **DONALD CHARLES GRAHAM** (sixth defendant) and **PETER WILLIAM DAWSON** (seventh defendant) and **MILLENIUM DEVELOPMENTS QLD PTY LTD** **ACN 090 589 610** **AS TRUSTEE FOR THE BATT FAMILY TRUST** (eighth defendant) and **QUEENSLAND PROPERTY PARTNERS PTY LTD** **ACN 082 672 213** **AS TRUSTEE FOR THE KEITH BATT FAMILY TRUST** (ninth defendant)
FILE NO:	BS 6586 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 22 September 2011

DELIVERED AT: Brisbane

HEARING DATE: 15 April 2011

JUDGE: Daubney J

ORDER:

[1] **There will be an order for summary judgment against the fifth, sixth and seventh defendants.**

[2] **The fifth, sixth and seventh defendants are to pay the plaintiff's costs on an indemnity basis of and incidental to the claim, including the summary judgment application, against the fifth, sixth and seventh defendants.**

[3] **The parties shall bring in a draft order.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiff seeks summary judgment against the fifth, sixth and seventh defendants – where the fifth and seventh defendants submit that there are factual issues to be determined at trial – whether there are questions of fact to be determined at trial.

CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – AUTHORITY OF AGENTS – where the fifth, sixth and seventh defendants submit that there is an issue regarding the authority of the plaintiff to bring the proceeding – whether the agent had authority to sue - whether the authority was created by the contract .

Uniform Civil Procedure Rules 1999 (Qld), rule 292

GE Commercial Corp (Australia) Pty Ltd v ACN 089 812 813 Pty Ltd [2008] WASC 205, cited
Lundie v Rowena Nominees Pty Ltd (Receivers & Managers Appointed) (in liquidation) [2006] WASCA 106, cited
Montgomerie v United Kingdom Mutual Steamship Association [1891] 1 QB 370, cited
National Australia Bank v Sinnathamby [2000] QSC 303, cited
Perpetual Trustee Company Limited v Nebo Road Pty Ltd & Ors (unreported, Supreme Court of Queensland, Brisbane, Applegarth J, 24 November 2010), considered
Re Bankrupt Estate of Murphy; *Donnelly v Commonwealth Bank of Australia Ltd* (1996) 140 ALR 46, cited

COUNSEL:	M D Martin for the plaintiff P D Tucker for the fifth and seventh defendants S J Rowe (sol) for the sixth defendant
SOLICITORS:	Middletons for the plaintiff Merthyr Law for the fifth and seventh defendants ClarkeKann for the sixth defendant

[1] The plaintiff has applied for summary judgment against the fifth, sixth and seventh defendants. It claims that those defendants owe it $1,518,431.66 pursuant to certain guarantees.

[2] A letter dated 21 May 2007 on the letterhead of "Mirvac Aqua" offered a 12 month loan facility to "Nebo Road Pty Ltd in its own right and as trustee of The Nebo Road Unit Trust". The letter of offer specified the "Lender/Mortgagee" as "Perpetual Trustee Company Limited ACN 000 001 007 as custodian for the Mirvac AQUA Mezzanine Debt Pool". The "Facility Amount" was "$850,000 including a reserved amount of $61,000, being six months interest". The stated "Purpose" was to "fund the acquisition of 239 Nebo Road MACKAY, (the "Property")". One of the securities required to be provided under the letter of offer was a joint and several guarantee by the third, fourth, fifth, sixth and seventh defendants. This offer was accepted on 22 May 2007. The third, fourth, fifth, sixth and seventh defendants executed the letter of offer as guarantors. The "Guarantor's Acceptance" which they signed included:

> "I/We also acknowledge that all the securities and guarantees I/we have given or may give to the Lender, including but not limited to those described in this Facility Agreement, stand as security for all money due to the Lender on any account including under the Facility described in this Facility Agreement."

[3] The third, fourth, fifth, sixth and seventh defendants then executed a deed of guarantee dated 25 May 2007 ("the Guarantee"). The Guarantee named the "Lender" as "Perpetual Trustee Company Limited ABN 42 000 001 007 as custodian for Mirvac AQUA Mezzanine Debt Pool", and recited:

> "A. The Guarantor has requested the Lender to advance money and/or provide other facilities or financial accommodation to the Borrower (Facilities).
>
> B. The Guarantor has before execution of this Guarantee inspected, understood and approved the documents specified in Item 2 (Documents).
>
> C. The Guarantor has agreed to guarantee and indemnify the Lender as set out in this Guarantee."

[4] The "Borrower" was defined in the schedule to the Guarantee to be "Nebo Road Pty Ltd ACN 125 069 516 as Trustee for Nebo Road Unit Trust" and "Nebo Road Pty Ltd ACN 125 069 516".

[5] The Guarantee relevantly provided:

"**2. Guarantee and indemnity**

The Guarantor irrevocably and unconditionally guarantees to the Lender the due and punctual payment of the Debt to the Lender and the due and punctual performance of all the obligations undertakings and provisions contained in or implied by the Documents other than those imposed on the Lender and indemnifies the Lender against all loss damage costs and expenses suffered or incurred by the Lender as a result of any failure by any person to pay in a due and punctual manner the Debt on due date or as a result of any breach of any of the covenants and conditions contained in or implied by the Documents.

The Guarantor must pay the Debt immediately on demand to the Lender."

[6] "Debt" was defined in cl 11.1 of the Guarantee as follows:

"Debt means all money (and where the context admits any part of that money) which the Borrower whether directly or indirectly or contingently or otherwise at any time and from time to time is or becomes liable either alone or jointly or severally to pay to the Lender on any account including without limitation:

(a) on or upon any guarantee bond account document negotiable or other instrument including this Guarantee and/or the Documents and/or any collateral security;

(b) by reason of any matter or thing by which the Lender is or may become in any manner a creditor of the Borrower;

(c) on the account of any other person or upon the order or request or under the authority of the Borrower;

(d) arising from any thing done or omitted to be done by the Borrower which gives rise to a payment expense or loss by the Lender;

(e) by reason of the lender drawing accepting endorsing paying or discounting any order draft cheque promissory note bill of exchange or other negotiable instrument on behalf of the Borrower;

(f) pursuant to any bond guarantee letter of credit or indemnity issued or given by the Lender on behalf of the Borrower; and

(g) interest upon all money described in this clause at the highest rate prescribed for that money or if none as determined by the Lender;"

[7] Clause 6.1 of the Guarantee provided:

"This Guarantee will not prejudicially affect or be prejudicially affected by any other security, guarantee, or indemnity at any time held by the Lender and that security, guarantee, or indemnity will be deemed to be collateral and the Guarantor must not as against the Lender in any way claim the benefit or seek the transfer of any security guarantee or indemnity or any part of them."

[8] On 21 April 2008, a further letter of offer was issued on the letterhead of "Mirvac AQUA". This letter again nominated Nebo Road Pty Ltd in its own right and as trustee of the Nebo Road Unit Trust as "Borrower" and "Perpetual Trustee Company Limited ACN 000 001 007 as custodian for the Mirvac AQUA Mezzanine Debt Pool" as the "Lender/Mortgagee". The 21 April 2008 letter relevantly stated:

> "We are pleased to offer a loan facility (the "Facility") on the terms and conditions set out in this letter (the "Facility Agreement")."
> …
>
> | | |
> |---|---|
> | Facility Amount: | Increase of $340,000, to be released upon satisfaction of ongoing condition number 1.

Total facility limit of $1,190,000 (One Million, one hundred and ninety thousand dollars) |
> | Facility Term: | To mature 31 May 2009. You must repay the Facility Amount and all other amounts due in respect of the Facility (the "Debt") at the end of the Facility Term." |

[9] The 21 April 2008 letter also specified the security to be provided as including joint and several unlimited guarantees by the third, fourth, fifth, sixth and seventh defendants.

[10] The 21 April 2008 letter of offer was accepted by the Borrower thereunder on 26 June 2008. Each of the third, fourth, fifth, sixth and seventh defendants also signed a "Guarantor's Acceptance" form annexed to the letter of offer. This form stated:

> "The undersigned Guarantor(s) agree(s) to guarantee the Borrower's obligations in this Facility Agreement.
>
> I/We also acknowledge that all the securities and guarantees I/we have given or may give to the Lender, including but not limited to those described in this Facility Agreement, stand as security for all money due to the Lender on any account including under the facility described in this Facility Agreement."

[11] It appears that the third, fourth, fifth, sixth and seventh defendants were not asked to execute a further formal deed of guarantee after the 21 April 2008 letter of offer was accepted.

[12] On 24 June 2010, the plaintiff commenced the present proceeding by filing a claim and statement of claim. Relevantly, the relief claimed against the third, fourth, fifth, sixth and seventh defendants was for:

> "The sum of $1,194,215.53 being the balance of the monies due and owing by the first and second defendants to the plaintiff under the Loan agreement, as at 15 June 2010 payment of which was guaranteed by the third, fourth, fifth, sixth and seventh defendants under written agreement and indemnity dated 25 May 2007".

[13] In the statement of claim filed on 24 June 2010, the plaintiff relevantly pleaded:

(a) that the "loan agreement" was the letter of offer dated 21 April 2008; and

(b) by the Guarantee and Indemnity dated 25 May 2007, the third, fourth, fifth, sixth and seventh defendants "guaranteed to the plaintiffs (sic) to secure the repayment of all monies which were or would become owing by the first and second defendants under the Loan and by the Unlimited Guarantors [being a reference to the third – seventh defendants] under the Unlimited Guarantee [being a reference to the Guarantee dated 25 May 2007]".

[14] On 8 July 2010, the then solicitors for the plaintiff filed a notice of discontinuance against, inter alia, the first and second defendants.

[15] On 28 July 2010, notices of intention to defend and defences on behalf of each of the third and fourth defendants were filed. On 3 September 2010, a notice of intention to defend and defence on behalf of the fifth, sixth and seventh defendants was filed.

[16] On 28 October 2010, the plaintiff filed an application for summary judgment against the third – seventh defendants, returnable on 16 November 2010. It was adjourned by consent to 24 November 2010. On that day, the application against all respondents except the third defendant was adjourned. Applegarth J heard and determined the application for summary judgment against the third defendant on 24 November 2010, and ordered that the application be dismissed.

[17] To the extent that the application for summary judgment filed on 28 October 2010 sought judgment against the fifth, sixth and seventh defendants, the application was then further adjourned on several occasions until it eventually came on for hearing before me on 15 April 2011.

[18] The affidavit filed in support of the application for summary judgment was sworn by Mr William Davis. He deposed to the following:

> "1. The Plaintiff is the custodian for the Balmain AQUA Mezzanine Debt Pool (Balmain). I am a credit manager in the employ of Balmain and am authorised to swear this affidavit on the Plaintiff's behalf.
>
> 2. Exhibit WD1 to my affidavit are true copies of letters of offer dated 21 May 2007 and 21 April 2008 (Loan Agreement). The dates of these documents as pleaded in paragraph 4 of the statement of claim in these proceedings are incorrect. The loan agreement is made up of these two letters of offer, one of which (21 April 2008) was signed on 26 June 2008. Pursuant to the Loan Agreement, the plaintiff lent the first and second defendants $1,190,000 as set out in the table below. From 1 December 2007 to 1 March 2010 the first and second defendants made interest payments only."

[19] In his affidavit, Mr Davis then set out a table of the advances which had been made between 30 May 2007 and 30 November 2007, totalling $1,190,000 (after allowing for a repayment which had been made on 1 December 2007). He also exhibited a copy of the Guarantee and copies of the letters of demand dated 24 March 2010 which were sent to, inter alia, the fifth, sixth and seventh defendants. He then deposed to the default in repayment and swore:

"I verily believe the third, fifth, sixth and seventh defendants do not have a defence to these proceedings."[1]

[20] On 12 November 2010, an affidavit sworn by the seventh defendant, Mr Dawson, was filed, in which he deposed to the following:

"2. I crave leave to refer to the letters dated 21 May 2007 and 21 April 2008, which commence, respectively, at pages 1 and 12 of the exhibits to the affidavit of William Davis filed in this proceeding on 28 October 2010.

3. The letter dated 21 May 2007 refers to a loan that the Second Defendant sought in relation to the development of land at Nebo Road Mackay.

4. The letter dated 21 May 2008 was issued when the Second Defendant sought further funding in relation to the development of the land at Nebo Road Mackay.

5. I attended a number of meetings with representatives of the Plaintiff between March and June 2010, including:

(a) 30 March 2010 – between myself, David Jones or Balmain Commercial, John Champion and Mal Graham of ING;

(b) 5 April 2010 – between myself and David Jones of Balmain Commercial;

(c) 29 April 2010 – 4:00pm meeting between myself and David Jones of Balmain Commercial;

(d) 5 May 2010 – 3:30pm / 4:00pm meeting between myself and David Jones of Balmain Commercial;

(e) 11 May 2010 – between myself and David Jones of Balmain Commercial;

(f) 12 May 2010 – between myself and David Jones of Balmain Commercial, John Champion and Mal Graham of ING; and

(g) 21 June 2010 – between myself and David Jones of Balmain Commercial.

("**the Meetings**")

6. When each of the Meetings was held, the "Facility Term" specified in the letter dated 21 April 2008, expiring on 31 May 2009, had expired. Notwithstanding, after 31 May 2009 the Second Defendant thereafter made monthly interest payments to the Plaintiff until July 2010, when the present proceeding was started. In that regard, I crave leave to refer to pages 43 and 44 of the exhibits to the affidavit of William Davis filed in this proceeding on 28 October 2010.

[1] Affidavit of William Davies, filed 28 October 2010 at [4].

7. I informed the persons who attended the Meetings that the Second Defendant was continuing with its plans to develop the land at Nebo Road Mackay, and a new loan was being sought to enable those plans to continue.

8. At no time in any of the discussions at the Meetings was I told that the existing loan would not be extended, or that any demand would be made in respect of the existing loan provided that the Second Defendant continued to pay interest as it had since June 2009. Rather, I was told that an offer of new finance terms would be presented in due course.

9. In relation to a new finance terms:

   (a) annexed hereto and marked "PD-1" is a true copy of an email that I received from David Jones; and

   (b) annexed hereto and marked "PD-2" is a true copy of an email from David Jones dated 10 May 2010, sent to me and each of the Fifth and Sixth Defendants in this proceeding, enclosing an Indicative Funding Proposal.

10. The Indicative Funding Proposal refers to a new borrower, which was a matter that I had raised in the course of the Meetings.

11. As indicated in paragraph 5 above, after I received the Indicative Funding Proposal I held two further meetings with David Jones. At those meetings, more precise terms of the Indicative Funding Proposal were discussed.

12. Because of the discussions I had had in the course of the Meetings, and the Plaintiff's acceptance of interest payments since July 2009:

   (a) the Second Defendant did not seek to obtain funding from another source so as to repay the principal to the Plaintiff, as it otherwise would have; and

   (b) the Fifth Defendant, the Sixth Defendant (I am informed and verily believe) and I, funded various expenditures relating to the Nebo Road property that we otherwise would not have. Annexed to this affidavit and marked "PD-3" is a table of these expenditures.

13. Without any warning, and notwithstanding the above emails and the discussion in the course of the Meetings, the Plaintiff commenced the present proceeding."

[21] On 22 November 2010, the plaintiff filed an amended statement of claim. This pleading amended paragraph 4 of the statement of claim to read as follows:

> "4. At the request of the first and second defendants, the plaintiff loaned money to the first and second defendants.
>
> **Particulars**

> The Loan agreement is in writing dated 22 May 2007 and 26 June 2008, ~~and~~ as described as Letters of offer dated 21 May 2007 and 21 April 2008 (**Loan**)."

[22] An amended defence was filed on behalf of the fifth and seventh defendants on 30 November 2010.

[23] At the hearing before Applegarth J on 24 November 2010, the third defendant, Mr Gerard Batt, relied on an affidavit by him which he filed that day. The fifth, sixth and seventh defendants also relied on that affidavit in the application before me. Mr Batt said that before obtaining the letter of offer dated 21 May 2007, he had a number of discussions with one David Jones, a finance broker with Balmain Commercial Finance, who negotiated the subject loan on behalf of the plaintiff. Mr Batt said that Mr Jones made a number of representations on behalf of the plaintiff. As Applegarth J observed when giving his judgment on 24 November 2010, the critical representation was that the plaintiff would provide funding to enable a development approval to be obtained over the relevant land and if the total loan needed to be extended to enable the development approval to be obtained that would not be a problem.[2]

[24] As already noted, Applegarth J dismissed the application for summary judgment against the third defendant, finding, inter alia:

> "... there is an issue to be tried concerning the express or implied representations that were conveyed by Mr Jones' words. There's an allegation of reliance. I accept that there is then a causal inquiry as to what detriment was suffered by reason of those representations. It might be, as Mr Batt says, that he simply would not have entered into the guarantee at all. If that was the case and if other guarantors had not done the same, then the loan may not have been made at all and the transaction may not have proceeded."[3]

[25] On 15 March 2011, the plaintiff filed a further amended statement of claim. Paragraph 4, which I have quoted above, was deleted and replaced with the following allegations:

> "4. …
>
> on or about 22 May 2007 the plaintiff lent the first and second defendants $850,000 pursuant to a written letter of offer dated 21 May 2007 (the loan).
>
> 4A. On or about 26 June 2008 the loan was increased by $340,000 to a total facility limit of $1,190,000 pursuant to a letter of offer dated 21 April 2008.
>
> 4B. The loan as increased was to be repaid in full on 31 May 2009.
>
> 4C. The interest rate payable on the loan was 17% per annum (lower rate) and default interest rate payable under the loan was 23% (higher rate).

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2 *Perpetual Trustee Company Limited v Nebo Road Pty Ltd & Ors* (unreported, Supreme Court of Queensland, Brisbane, Applegarth J, 24 November 2010).

3 At 3.

> 4D. The terms of the loan were as set out in the letters of offer pleaded in paragraphs 4 and 4A herein and included the Mirvac AQUA loan terms and conditions version 5 October 2006 (the Mirvac AQUA loan terms).
>
> 4E. Pursuant to clause 7.1 of the Mirvac AQUA loan terms the first and second defendants were to pay the plaintiff's legal costs and expenses arising from any event of default on a full indemnity basis.
>
> 4F. The plaintiff relies upon the letters of offer pleaded in paragraphs 4 and 4A herein including the Mirvac AQUA loan terms as if there terms were set out in this statement of claim in full."

[26] The allegations concerning guarantees were also amended, such that the further amended statement of claim now pleaded:

> "5. By guarantee and indemnity dated 25 May 2007 the third, fourth, fifth, sixth and seventh defendants guaranteed to the plaintiffs to secure the repayment of all monies which were or would become owing by the first and second defendants to the plaintiff under the loan.
>
> 5A. Further or in the alternative by written guarantees dated 22 May 2007 and 26 June 2008 contained within the letters of offer dated 21 May 2007 and 21 April 2008 as pleaded in paragraphs 4 and 4A herein the third, fourth, fifth, sixth and seventh defendants guaranteed the obligations of the first and second defendant pursuant to the loan."

[27] The prayer for relief was amended to make claim against, inter alia, the fifth, sixth and seventh defendants for:

> "$1,483,406.54 as money due and owing under a guarantee dated 25 May 2007 as at 28 February 2011 or alternatively pursuant to the guarantees pleaded in paragraph 5A herein."

[28] On 1 April 2011 a further amended defence was filed on behalf of the fifth and seventh defendants. On 12 April 2011, a second further amended defence was filed for those parties, in which, amongst other things, the fifth and seventh defendants:

(a) join issue with the plaintiff's plea of being the "custodian for the Mirvac AQUA Mezzanine Debt Pool", stating that the meaning and effect of "custodian" are unparticularised;

(b) effectively admit the terms of the 21 May 2007 letter, admit that the fifth and seventh defendants signed that letter, admit that monies were advance to the second defendant on 22 May 2007, but do not admit that the plaintiff advanced $850,000 to the second defendant, asserting that the plaintiff expressly advanced funds only as agent for Mirvac Funds Management Limited;

(c) deny that the loan was increased in June 2008, averring that the offer made in the 21 April 2008 letter was an offer of a new loan to replace any loan made under the 27 May 2007 letter and that any monies advanced in respect of the

offer contemplated in the 21 April 2008 letter were advanced in respect of a new loan and not the loan as defined in the further amended statement of claim;

(d) contend also that the specific Guarantee in the 21 April 2008 letter was intended to replace any Guarantee given in respect of monies lent under the 21 May 2007 letter;

(e) deny, with reasons pleaded, the allegations in paragraphs 4B – 4F of the further amended statement of claim;

(f) admit executing the Guarantee dated 25 May 2007, but say that on its proper construction the Guarantee did not extend beyond the obligations described in and monies advanced under the letter of 21 May 2007;

(g) contend that because the plaintiff executed the Guarantee as agent for Mirvac Funds Management Limited, it was not enforceable at the suit of the plaintiff;

(h) contend, as an alternative case, that the Guarantee was discharged by operation of law by the subsequent granting of the new loan pursuant to the letter dated 21 April 2008;

(i) contend further that any Guarantee contained in the 21 April 2008 letter was limited to the loan agreement provided under the 21 April 2008 letter and was, in any event, later discharged by operation of law by the subsequent granting of certain indulgences to the second defendant;

(j) deny default, pleading, amongst other things, that:

> "at meetings and in correspondence between the Third Defendant, on behalf of the First and Second Defendants, and representatives of the Plaintiff, the Third Defendant was advised and led to believe that finance would be extended to the First and Second Defendant until development approval was obtained by the Second Defendant in respect of the property located at 239 Nebo Road Mackay"[4]

(k) further plead representations allegedly made on behalf of the plaintiff to the seventh defendant between March and June 2010 to the effect that:

> "(1) the then existing loan between the Second Defendant and the Plaintiff had been, and would be continued to be extended, provided that the Second Defendant continued to make monthly repayments of interest to the Plaintiff; and
>
> (2) a new loan offer would be provided by the Plaintiff in due course that would supersede and replace the existing loan."

(l) allege that, by its conduct, the plaintiff had entered into a new loan agreement with the first and second defendant, which included terms that the plaintiff would accept monthly interest instalments at the non-default rate under the

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4 At [5(a)].

21 April 2008 letter, the new agreement would continue until development approval was obtained by the second defendant in respect of the property at 239 Nebo Road, Mackay, or alternatively until the plaintiff provided a new loan offer and afforded a reasonable time to consider acceptance of that offer, and that the plaintiff would not demand repayment of the monies under the new agreement until the development approval was obtained or alternatively without affording the second defendant a reasonable time for repayment;

(m) allege, in the alternative, that the plaintiff was estopped from denying the new agreement;

(n) deny receiving letters or notices of demand, the plaintiff having alleged in the further amended statement of claim that it "sent demands to the defendants" which it particularised as a written "notice of default" dated 24 March 2010 which required payment within 14 days.

[29] On the hearing of the present application, the plaintiff relied on an affidavit which had been sworn by the seventh defendant on 4 August 2010 in an application by Nebo Road Pty Ltd to set aside a statutory demand which had been served by the plaintiff.[5] In that other affidavit, the seventh defendant deposed:

> "6. The amount of $1,190,000 is claimed in the [statutory demand]. This amount is purportedly due and owing by Nebo Road pursuant to the terms of two letters of offer dated 21 May 2007 and 21 April 2008 between [the plaintiff] as lender and Nebo Road as borrower.
>
> 7. I admit that Nebo Road entered into a loan agreement with [the plaintiff] which contained various terms specified in the letters of offer dated 21 May 2007 and 21 April 2008 ("finance facility")."

[30] In this affidavit, however, the seventh defendant also deposed to attending some seven meetings between March and June 2010 with, relevantly, Mr Jones. The seventh defendant then said (referring to the present plaintiff as "the Respondent"):

> "12. During the meetings the Respondent by their words and conduct lead me to believe that the finance facility with Nebo Road would be, and had been, extended conditional upon the monthly repayments of interest being made and deposed to in paragraphs 9 and 10 of this affidavit.
>
> 13. At no point during or after the meetings did the Respondent inform me that the finance facility with Nebo Road was at an end or that it was reserving its position regarding any alleged default under the finance facility.
>
> 14. I received an email from David Jones dated 29 April 2010 informing me that the extension of the loan guarantees will be joint and several. The loan guarantees were guarantees provided to the Respondent by myself and the remaining directors of Nebo Road in relation to the facility. Therefore, by analogy, if the guarantees were being extended, I believed justifiably that the finance facility was also

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5 A copy of that affidavit was Exhibit PD1 to the affidavit of the seventh defendant filed on 10 November 2010 in the present proceeding.

> extended. Exhibit "**PZD3**" is a copy of the email from David Jones to myself dated 29 April 2010.
>
> 15. I received an email from David Jones dated 10 May 2010 attaching the Indicative Funding Proposal as discussed in the meetings. The Indicative Funding Proposal had a term of 12 months which I understood to mean the finance facility expired on 24 May 2011. Exhibit "**PZD4**" is a copy of the email from David Jones to myself dated 10 May 2010 with the attached Indicative Funding Proposal.
>
> 16. Accordingly, despite not having ever signed the Indicative Funding Proposal or receiving the Letter of Offer, the Respondent represented at the meetings and by its conduct that the extension of the facility agreement had been granted.
>
> 17. The Respondent has not given the Applicant any other notice suggesting that the Applicant was otherwise in default of its facility."

[31] On the present application, the plaintiff also relied on the affidavit of Mr Davis, to which I have referred above, and two affidavits by the plaintiff's solicitor, Mr Zabow, who:

(a) produced a copy of the "Mirvac AQUA Loan Terms and Conditions";

(b) deposed to being informed that no interest payments had been received by the plaintiff since 1 October 2010;

(c) produced copies of material relating to the Nebo Road Property, including a copy of an order made by the Planning and Environment Court on 19 November 2010 by which it was ordered that a certain development application for the land be approved on certain stated conditions.

[32] Apart from Mr Batt's affidavit, to which I have referred above, the fifth and seventh defendants relied in this hearing on an affidavit by their solicitor which exhibited correspondence between the solicitors, including a request on behalf of the fifth and seventh defendants for further and better particulars of the further amended statement of claim and the plaintiff's refusal to provide those particulars. The fifth and seventh defendants also relied on the affidavit of Mr Dawson filed on 12 November 2011 (referred to above).

[33] The sixth defendant did not file any specific material, but seemed to rely on the defence filed on behalf of the fifth and seventh defendants on 1 April 2011. In effect, the sixth defendant's submission was that he rises or falls in this application with the fifth and seventh defendants.

[34] In applying for summary judgment, the plaintiff submitted:

(a) By the accepted letter of offer on 21 May 2007, the plaintiff agreed to lend $850,000 for a term of 12 months. This loan was guaranteed by, inter alia, the fifth, sixth and seventh defendants;

(b) The accepted letter of offer of 21 April 2008 evidenced an agreement to extend the existing facility to 31 May 2009 and to increase the amount lent under the facility by $340,000 to $1,190,000. By signing the "guarantor's

acceptance" on the letter of 21 April 2008, the fifth, sixth and seventh defendants further guaranteed repayment of this extended facility;

(c) Apart from the terms of the "guarantor's acceptance", executed by each of the fifth, sixth and seventh defendants in both letters, those defendants also executed an "all monies" guarantee in favour of the plaintiff;

(d) The fifth, sixth and seventh defendants are therefore liable to pay the amount still owing under the extended facility.

[35] Counsel for the respondent fifth and seventh defendants advanced the following arguments to resist summary judgment:

(a) Given that the plaintiff had amended its case significantly since the application for summary judgment was originally filed, the Court ought be slow to grant summary judgment;

(b) There are numerous factual issues to be determined at trial, including:

- waiver or estoppel in respect of the alleged breach of a loan agreement;
- whether the named plaintiff is in fact the proper plaintiff;
- what documents (and other conduct) constituted the loan agreement and guarantee upon which the plaintiff sues;
- the reach of the alleged guarantees.

[36] In respect of the first argument, it was submitted that "[t]he very fact that the plaintiff pleaded originally that the 21 April 2008 [letter] gave rise to a new loan agreement, and then retracted that contention after its application for summary judgment was filed, weighs in favour of dismissing the present application".[6] The fifth and seventh defendants relied on *National Australia Bank v Sinnathamby*.[7] In that case, the bank which was seeking summary judgment against guarantors relied on an amended statement of claim which had been filed after the application for summary judgment. In the course of rejecting a preliminary objection by the guarantors on jurisdiction, Margaret Wilson J observed at [4]:

> "If the case as amended were substantially different from that originally pleaded, that would be a factor in the exercise of the Court's discretion favouring the dismissal of the application."

[37] It is correct that the plea in the statement of claim concerning the principal debt has become more elaborate since this application was originally filed. It has moved from being a simple allegation of a loan evidenced by the 21 April 2008 letter to a more elaborate plea which catches both the 21 May 2007 and 21 April 2008 letters and also the terms of the loan. Whilst more elaborate, however, the fundamental nature of the case has not changed. It is supported by the affidavit of Mr Davis, which was filed with the application. And in any event, the final version of the pleading was filed and served weeks prior to the hearing of this application against the fifth, sixth and seventh defendants. They can hardly be heard to say that they suffered prejudice by reason of having to meet a late amended case on the summary

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6 Fifth and Seventh Defendants' Submissions at [25].

7 [2000] QSC 303.

judgment application. I do not think this factor is applicable in the particular circumstances of this case.

[38] Turning then to the factual issues sought to be raised on behalf of the fifth and seventh defendants, it was argued first that the fifth and seventh defendants have the benefit of what were called "inducing representations" made to the third defendant that finance would be provided to the first or second defendant until development approval was obtained and that the fifth and seventh defendants relied on these representations in respect of accepting the offer of finance and executing the Guarantee in 2007.

[39] Before proceeding further, I note that no evidence was led by or on behalf of the sixth defendant on this application. Indeed, his solicitor submitted:

> "1. The Sixth Defendant has not been involved in the principal negotiations of the loan agreement with the Plaintiff in this matter. It has only been through his dealings with the seventh defendant that has led him [sic] enter into this agreement.
>
> 2. The Sixth Defendant's knowledge of the meetings undertaken with the Plaintiff is through the Seventh Defendant. As a consequence, his understanding of the matter goes no further than information relayed to him by the Seventh Defendant."

[40] There was no evidentiary basis for those submissions.

[41] Nor was there any affidavit by the fifth defendant filed in this application.

[42] The affidavit by the seventh defendant filed 12 November 2010 did nothing but refer in passing to the letters of 21 May 2007 and 21 April 2008, and then went on to speak of the meetings which the seventh defendant attended in March-June 2010. I have quoted that affidavit at length above.

[43] Counsel for the fifth and seventh defendants relied on the affidavit of the third defendant in which, as already noted, he deposed to representations which he said Jones had made prior to May 2007. The third defendant then deposed:

> "33. On or about 25 May 2007, and in reliance on the representations made by Jones in paragraph 30:
>
> (a) Keith, Edwards, Dawson, Graham and I provided a guarantee and indemnity to Perpetual in respect of Nebo's obligations under the Facility (the Guarantee);
>
> (b) The entities through which I hold shares provided a guarantee and indemnity to Perpetual in respect of Nebo's obligations under the Facility; and
>
> (c) Perpetual was granted a second ranking mortgage over the Nebo Road Land."

[44] This bald assertion of reliance, purportedly on his own behalf and on behalf of, inter alia, the fifth, sixth and seventh defendants, is the closest the material goes to establishing a case of reliance on those representations by the fifth, sixth and seventh defendants. None of those defendants deposed to such reliance themselves,

let alone to having acted to their detriment. This is a particularly thin evidentiary basis on which to found resistance to a summary judgment application.

[45] Counsel for the fifth and seventh defendants then sought to mount an argument to the effect that an original loan agreement evidenced by the letter of 21 May 2007 had been completely replaced by a new loan agreement evidenced by the letter of 21 April 2008. It was argued that:

(a) The offer of 21 April 2008 was self contained;

(b) It contained terms which were significantly different, particularly with respect to interest rates and securities to be provided;

(c) It contemplated execution of a new guarantee, which was contained in the annexure to the 21 April 2008 letter;

(d) The terms of the 21 April 2008 letter, which reserved to the Investment Manager the right to withdraw if the Facility Agreement offered under the letter was not accepted within 14 days and which specified that the Facility Amount of $1,190,000 would only be advanced after the Investment Manager was satisfied of all matters under the Facility Agreement, were indicative of the 21 April 2008 letter giving rise to a new agreement.

[46] From this contention that there was a completely new loan agreement in April 2008, it was then argued:

(a) The guarantee contained in the April 2008 letter superseded any guarantee given in respect of the original loan agreement;

(b) The Guarantee dated 25 May 2007 was either discharged, or limited in its terms so as not to apply to the asserted April 2008 fresh loan agreement.

[47] It was said that all of these matters involve questions of fact which need to be investigated at trial. I do not agree.

[48] In my view, a fair reading of the letter of offer dated 21 April 2008 reveals that what was being offered was a variation of the existing loan agreement between the parties to provide for an extension of the term of the loan, an increase in the amount advanced, and a variation of the terms under which the loan was made. So much is clear, in my opinion, merely from the full definition of "Facility Amount" which appears on the face of the 21 April 2008 letter, set out above at [8].

[49] But even if I am wrong about that, and a separate loan agreement was established by acceptance of the 21 April 2008 letter, the fundamental and terminal difficulty which the fifth, sixth and seventh defendants have is that on 25 May 2007 they executed an all monies and all accounts guarantee, the terms of which are set out above. The primary obligation on the fifth, sixth and seventh defendants under the Guarantee was to guarantee due and punctual payment of "the Debt". That term was widely defined, and would clearly catch the advances and further advances made pursuant to the 21 April 2008 letter. Reference to the fifth, sixth and seventh defendants also guaranteeing due and punctual performance of obligations contained in or implied by the "Documents" does not assist the respondents to the

present application. It is not to the point that those "Documents" may have been limited to the documents specified in the schedule to the Guarantee (particularly the 21 May 2007 letter). That does not derogate from the expansive nature of the guarantee obligation primarily imposed by clause 2 of the Guarantee. It does not, in my view, give rise to a limitation on the ambit of the "all monies" character of this Guarantee, such as to require it to be read down as if the terms of the "all monies" clause was limited to, and only to, the debts referred to in those specified documents.[8]

[50] The fact that the fifth, sixth and seventh defendants executed the "guarantor's acceptance" annexed to the 21 April 2008 letter did not derogate from the efficacy of the 2007 Guarantee. On the contrary, by clause 6.1 of the Guarantee, the further Guarantee contained in the 21 April 2008 letter had effect as being collateral to the 2007 Guarantee.

[51] In short, there is, in my view, no factual issue raised on the material which affects the efficacy of the 2007 Guarantee.

[52] Counsel for the fifth and seventh defendants next argued that there was an issue as to whether the named plaintiff had authority to bring this proceeding in its own name, or whether the proceeding ought be brought by the principal for which it acted as agent. Each of the 21 May 2007 and 21 April 2008 letters expressly provided that the terms and conditions contained in the "Mirvac AQUA's Loan Terms and Conditions, October 2006 Version 5" booklet formed part of the Facility Agreement. Clause 6.4(a) of those terms provided:

> "The Lender enters into the Offer Letter only as agent of the responsible entity funding the facility described in the Offer Letter (**Responsible Entity**). The Lender can only act in accordance with the terms of the agreement under which it is appointed as the Responsible Entity's agent and is not liable under any circumstances to any party to the Offer Letter. This limitation of the Lender's liability applies despite any other provision of the Offer Letter and extends to all liabilities and obligations of the Lender in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to the Offer Letter."

[53] The "Responsible Entity" defined in both letters was Mirvac Funds Management Ltd.

[54] Consistent with that, cl 10.4(a) of the Guarantee provided:

> "The Lender enters into this Guarantee only as agent of Mirvac Funds Management Limited ABN 78 067 417 663 (**Responsible Entity**). The Lender can only act in accordance with the terms of the agreement under which it is appointed as the Responsible Entity's agent and is not liable under any circumstances to any party to the Guarantee. This limitation of the Lender's liability applies despite any other provision of the Guarantee and extends to all liabilities and obligations of the Lender in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to the Guarantee."

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[8] See also *Re Bankrupt Estate of Murphy*; *Donnelly v Commonwealth Bank of Australia Ltd* (1996) 140 ALR 46; *GE Commercial Corp (Australia) Pty Ltd v ACN 089 812 813 Pty Ltd* [2008] WASC 205 at [17].

[55] Counsel for the fifth and seventh defendants argued:

(a) The general rule is that where an agent enters into an agreement on behalf of a named principal, only the principal can sue for breach of that agreement;

(b) There is an anomalous exception in the case of an agent executing a deed, but that exception is not applicable in this case;

(c) There is no evidence of the actual agreement between the plaintiff and Mirvac Funds Management Ltd;

(d) Mirvac Funds Management Ltd is described in the 21 May 2007 letter and the 21 April 2008 letter as "the operator of the mortgage trust scheme funding your loan".

(e) The plaintiff has, despite request, refused to provide particulars as to who actually provided the loan funds.

[56] It was submitted that the intersection of these rules and facts renders this a matter which is not apposite for summary judgment. Reliance was placed in that regard on the concurring judgment of McLure JA in *Lundie v Rowena Nominees Pty Ltd (Receivers & Managers Appointed) (in liquidation)*.[9] In a brief judgment in which his Honour agreed with the lengthy and expositive reasons for judgment of Steytler P, McLure JA stated a number of propositions from *Bowstead & Reynolds on Agency*[10] and Dal Pont's *Law of Agency*[11] and said: "Whether or not these articles correctly state the law is a matter to be determined at trial in light of the facts found at trial concerning the source and circumstances of the lending."[12]

[57] That conclusion was undoubtedly appropriate in the factual and legal matrix of that case. I do not, however, understand his Honour thereby suggested a rule of universal application, as the present fifth and seventh defendants would seek to have it read.

[58] 120 years ago, Wright J in *Montgomerie v United Kingdom Mutual Steamship Association*[13] made the following statement, which I understand still to be an accurate statement of the relevant common law on this topic, at 371:

> "There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal the contract is the contract of the principal, and not that of the agent; and, prima facie, at common law the only person who may sue is the principal, and the only who can be sued is the principal."

[59] Immediately following that statement of general principle, Wright J said that "[t]o that general rule there are, of course, many exceptions".[14] The first exception identified was:

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9 [2006] WASCA 106 at [81] – [83].
10 F M B Reynolds, *Bowstead & Reynolds on Agency*, 17th ed, Sweet & Maxwell, London, 2001.
11 G Dal Pont, *Law of Agency*, Butterworths, Sydney, 2001.
12 At [83].
13 [1891] 1 QB 370.
14 At 371.

> "First, the agent may be added as the party to the contract if he has so contracted, and is appointed as the party to be sued."[15]

[60] Equally, the contractual arrangements between the parties may confer an entitlement on the agent to sue. As is noted by the learned authors of *Bowstead & Reynolds on Agency* (19th ed)[16] at [9-008]:

> "In any case, the right to sue can often be specifically assigned to the agent when this is thought desirable."

[61] The terms and conditions which were incorporated into the Facility Agreement expressly conferred on the present plaintiff, as "Lender", an entitlement to sue. So much is clear from cl 4.2 of those terms and conditions, which relevantly provided:

> "Despite any other provision of the Offer Letter, at any time after an Event of Default, the Lender may do any one or more of the following.
>
> (a) Demand and require immediate payment of the Debt and recover the Debt from the Transaction Parties." (underlining added)

[62] There was no real issue before me that an event of default had occurred. Despite issue being raised in the defences of the fifth and seventh defendants, none of the current respondents denied on oath having received the requisite notices of demand. The term "Transaction Party" was defined in cl 8.1 of the terms and conditions to mean both "the Borrower" and "any Guarantor".

[63] Moreover, and in any event, the terms of the May 2007 Guarantee expressly provided that the Guarantee was in favour of "the Lender", i.e. the present plaintiff.

[64] It seems to me, in these circumstances, that it is clear that the present plaintiff had conferred on it contractually an entitlement to sue as it has done.

[65] Counsel for the fifth and seventh defendants also sought to make some point from the fact that the copy of the Guarantee exhibited to the material before me was not a copy which had been executed by the present plaintiff. That does not assist the fifth, sixth or seventh defendants. The copy of the Guarantee exhibited to the material has been signed by each of them. That is sufficient to satisfy the requirements of s 56 of the *Property Law Act* 1974 (Qld).

[66] Finally, counsel for the fifth and seventh defendants pointed to the evidence of the meetings held between March and June 2010 and to evidence by Mr Batt that he was informed by representatives of the plaintiff that finance would be extended to allow development approval to be obtained.

[67] It is asserted in counsel's submissions that:

> "In reliance upon statements made during the Meetings and the acceptance of monthly interest payments without demur:
>
> (a) no other source of external funds was explored by the Defendants; and

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15 At 371.

16 P Watts & F M B Reynolds, *Bowstead & Reynolds on Agency*, 19th ed, Sweet & Maxwell, London, 2010.

(b) expenses were met in relation to the Nebo Road property that otherwise would not have been funded."[17]

[68] In fact, the only evidence on this topic is that found in paragraph 12 of the affidavit by the seventh defendant, which I have quoted at length above. There is not a shred of evidence from the fifth or sixth defendants. The only real representation which the seventh defendant identifies is that he was told that an offer of new finance terms would be presented in due course. It appears that this, in fact, occurred. The seventh defendant does not, however, identify any representations on which he relied which would found a case of waiver in relation to the demand which had been made by the plaintiff for payment of the monies owed. Certainly, there is no evidence to advance such a case on behalf of the fifth or sixth defendants.

[69] Counsel for the fifth and seventh defendants also sought to make a case that the plaintiff was estopped from denying that a further loan agreement had been entered into between the parties following the expiration of the Facility Agreement under the 21 April 2008 letter. Even if there were such a new loan, however, the defendants' own case is that it was to enure until the development approval for the land was obtained. That development approval was obtained in November 2010.

[70] But in any event, an argument by the present defendants that the plaintiff's conduct in accepting interest payments after the Facility Agreement expired and held out the lure of a new finance package amounted to a waiver of the plaintiff's rights to pursue the guarantors or gave rise to an estoppel to prevent the plaintiff from pursuing the guarantors is completely gainsaid by cl 4.1 of the Guarantee, which provided, inter alia, as follows:

"4.1 **Non-waiver**

This Guarantee will not be abrogated, modified, prejudiced, affected or considered as wholly or partially discharged by any one or more of:

(a) any time credit indulgence or concession extended by the Lender to the Borrower any Guarantor or any other person;

(b) any compounding compromise release abandonment waiver variation relinquishment or renewal of any rights of the Lender against the Borrower or any other person;

(c) any variation of the Facilities or of any term covenant or condition contained in or implied by any of the Documents and the Guarantor will be deemed to have consented to any such variation and in particular without limitation this Guarantee extends to:

(i) any extension of the period for repayment of the Facilities;

(ii) any increase or decrease in the Facilities;

(iii) any increase or decrease in the interest rate payable in respect of the Facilities;

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17 Fifth and Seventh Defendants' Submissions at [39].

(iv) any partial or total release or discharge of the security conferred by the Documents or otherwise irrespective of the amount, if any, paid in reduction of the Debt; and/or

(v) any other variation in the obligations set out in the Documents, whether or not such variations are formalised in writing and whether or not the Guarantor is aware of those variations;"

[71] Having regard to these arguments which have been raised on behalf of the fifth and seventh defendants, and the concurring submissions on behalf of the sixth defendant, I am not satisfied that any of these defendants has any real prospect of successfully defending the plaintiff's claim. Nothing said on behalf of the fifth, sixth or seventh defendants has persuaded me that there is a need for a trial of the claim against any of those defendants. It follows that the plaintiff ought have summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld).

[72] There will be an order for summary judgment against the fifth, sixth and seventh defendants. It is appropriate for that order to include an order that the fifth, sixth and seventh defendants pay the plaintiff's costs on an indemnity basis of and incidental to the claim, including the summary judgment application, against the fifth, sixth and seventh defendants. Those costs are contractually recoverable by the plaintiff pursuant to the terms of the Facility Agreement and the Guarantee.

[73] The parties shall bring in an order for summary judgment against the fifth, sixth and seventh defendants.