SUPREME COURT OF QUEENSLAND

CITATION:	*The Reserve Vault P/L v Barrier Reef Arts P/L & Ors* [2012] QCA 35
PARTIES:	**THE RESERVE VAULT PTY LTD** ACN 110 082 427 (appellant) **v** **BARRIER REEF ARTS PTY LTD** ACN 118 145 627 (first respondent) **BLUE STAR CAPITAL LIMITED** ACN 092 798 635 (second respondent) **BRISCOE PROPERTIES PTY LTD** ACN 118 992 073 (third respondent)
FILE NO/S:	Appeal No 7049 of 2011 DC No 707 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2012
JUDGES:	Muir and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed.** **2. The judgments and orders of the District Court pronounced and made on 9 June and 4 August 2011 be set aside except in so far as they relate to costs.** **3. The costs in the appeal be the parties' costs in the cause.** **4. The security for costs given by the appellant pursuant to the order made on 30 August 2011 be discharged.** **5. The appellant file and serve an amended defence and counterclaim, if any, within 14 days of today's date.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – CIVIL JURISDICTION – APPEAL – where the respondents' successfully applied for summary judgment against the appellant in the District Court pursuant

to r 292 UCPR – where the appellant did not attend that hearing – where the appellant applied to have the summary judgment set aside pursuant to r 302 UCPR – where that application was denied – where the appellant was not legally represented – whether the primary judge erroneously instructed the appellant that it must provide a reasonable explanation for its failure to attend and show a sufficient basis for the judgment not to be maintained – whether the primary judge failed to inform the appellant of the need to show an arguable defence

Competition and Consumer Act 2010 (Cth), s 18 of Schedule 2, s 87
Storage Liens Act 1973 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 292, r 166(5), r 302

Abram v Bank of New Zealand [1996] ATPR 41-507; [1996] FCA 1650, considered
Barrier Reef Arts Pty Ltd & Ors v The Reserve Vault Pty Ltd [2011] QDC 143, disapproved
Mbuzi v Hall & Anor [2010] QSC 359, considered
National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd [1983] 2 Qd R 441, considered
Pavlovic v Commissioner of Police [2007] 1 Qd R 344; [2006] QCA 134, considered
Platcher v Joseph [2004] FCAFC 68, considered
Reserve Vault Pty Ltd v Barrier Reef Arts Pty Ltd & Ors [2011] QCA 216, considered

COUNSEL: G Handran for the appellant
M Steele for the respondents

SOLICITORS: Doud & Company for the appellant
Hemming & Hart Lawyers for the respondents

[1] **MUIR JA: Introduction** The appellant, the Reserve Vault Pty Ltd, was the defendant in District Court proceedings commenced against it by the respondents which claimed for delivery of 33 painted fibreglass panels which, when locked together, formed a panoramic image of the Great Barrier Reef ("the panorama"). The second respondent, Blue Star Capital Limited, also claimed a declaration that the appellant had engaged in conduct in contravention of s 18 of Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) and an order pursuant to s 87 of that Act setting aside an oral agreement between the appellant and the second respondent ("the Agreement") under which the appellant agreed to display the panorama for six to eight months in the art room within the appellant's premises ("the vault") and thereafter store it for a monthly fee of $500 exclusive of GST.

[2] The respondents applied for judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* ("UCPR"). The appellant failed to appear and it was ordered on 9 June 2011 that the appellant deliver up possession of the panorama and pay the respondents' costs.

[3] On 10 June 2011, the appellant was served with a sealed copy of the order. He made application on 7 July 2011 to have "the summary judgment… dismissed". After a hearing on 29 July 2011, the application was dismissed with costs on 4 August 2011. The appellant appeals against that order.

The Statement of Claim

[4] The Statement of Claim relevantly alleged:

(a) The first respondent was the owner of the panorama.

(b) In about 2006, Mr Hall on behalf of the second respondent and Mr Mooney on behalf of the appellant entered into the Agreement.

(c) The appellant was under a duty to keep the panorama safely and to redeliver it to the second respondent on demand in the order and condition it was in when deposited.

(d) On 10 December 2010, the first respondent sold three of the fibreglass panels of the panorama to the third respondent.

(e) The appellant refused to deliver up the panorama despite demand being made on it by the second respondent unless invoices it issued were paid by the second respondent.

(f) The second respondent refused to pay the invoices issued by the appellant as they did not "reflect the terms of the agreement". The invoices referred to a storage fee of $553 (inclusive of GST) per month and included a "finance charge".

(g) On 20 January 2011, the first respondent sold four more of the fibreglass panels of the panorama to the third respondent.

[5] There were also allegations in support of a claim for relief under the *Competition and Consumer Act* which were not pursued on the summary judgment application.

The defence

[6] The defence is a four paragraph document.

[7] Paragraph one admits the allegations in paragraphs 1, 3, 7, 10, 13, 15 and 19 of the Statement of Claim. Paragraph two does not admit the allegations in paragraphs 2, 11, 16 and 17 of the Statement of Claim. Paragraph three denies the allegations in paragraphs 4, 5, 6, 8, 9, 12, 14, 18, 20, 21, 22 and 23 of the Statement of Claim "because they are incorrect, misrepresentation[s] of facts and manipulation of the true events".

[8] Paragraph four provides:

> "This matter has been blown out of all context with various negotiations, mediation and concessions in trying to resolve the matter, being accepted then ignored, then renegotiated, then accepted again, then defaulted on when deadlines for various payments fell due. This was with a representative of the second plaintiff. Previously, various invoices and correspondence hand delivered and

sent to the plaintiffs supplied mail address over a 3 year period were purposefully ignored."

Mr Hall's affidavit

[9] In an affidavit before the Court on 9 June 2011, Mr Hall, a director of the first and second respondents, described the panorama, swore to Mr Mooney's representations as alleged in the Statement of Claim and stated that at the end of the meeting he and Mr Mooney agreed as alleged in the Statement of Claim and stated that:

(a) the panorama was delivered to the vault on or about 17 November 2006 and displayed there for approximately six months after which time it was dismantled and stored in the vault;

(b) on 18 November 2009, the appellant issued the second respondent with one invoice in the sum of $28,468.44 and another in the sum of $7,299.60;

(c) he inspected 10 of the panels at the vault in March or April 2010. He found the panels "stacked against each other" and that "some appeared to have mould and damage on them";

(d) he became ill in mid-2007 and for many months "had little capacity to manage" his business interests. The business activities of the second respondent "came to a halt", but it retained its postal address. Its registered office was changed to the address of a Mr Craig, with whom Mr Hall remained in contact. Some business activities of the first and second respondents recommenced in mid-2009 when his health had improved;

(e) in December 2010 and January 2011, he, by himself and his solicitors, engaged in correspondence with the appellant with a view to resolving a dispute which had arisen over storage fees. Repeated requests for invoices and a reconciliation statement made to the appellant were ignored; and

(f) the respondents' requests for delivery up of the panels were refused.

[10] It is now convenient to consider the grounds of appeal.

The primary judge erred in concluding that it was a prerequisite to the success of the appellant's application to set aside the summary judgment under r.302 of the UCPR that the appellant "give a reasonable explanation for its failure to attend, and provide a sufficient basis for the judgment not to be maintained"[1]

[11] The primary judge determined the appellant's application on the basis that the appellant had failed to provide a reasonable explanation for its failure to appear on the summary judgment application. In paragraph [21] of his reasons he repeated the view which he had expressed in paragraph [5] of his reasons that to succeed on its application to set aside the judgment, the appellant "had to provide both a reasonable explanation for its failure to attend and show a sufficient basis for the judgment not to be maintained". In paragraph [19] of his reasons, the primary judge held that the appellant had not provided such an explanation.

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1 *Barrier Reef Arts Pty Ltd & Ors v The Reserve Vault Pty Ltd* [2011] QDC 143 at [5].

[12] On an application under r 302, the Court is required to consider all relevant facts and circumstances. As I remarked in reasons given on a stay application in this matter:

> "Despite the conclusion to the contrary in *GEL Custodians Pty Ltd v RQ Consultants Pty Ltd and Ors* [2010] QSC 181, there is no warrant in principle for the grafting on to r 302 of the *Uniform Civil Procedure Rules* 1999 (Qld) of a prerequisite to a successful application that an applicant which failed to appear on the hearing of the summary judgment application must provide a reasonable explanation for the failure: presumably the primary judge meant 'reasonable excuse'. A discretion conferred on the Court by Rules of Court or statutory provisions is not to be fettered by conditions formulated by previous Courts exercising the discretion. That is not to say that useful guidance in relation to the exercise of the discretion cannot be obtained from considering the accumulated wisdom and insight provided by precedent."[2]

[13] A failure to explain the applicant's non-attendance at the hearing of the application for summary judgment is, no doubt, a highly relevant consideration and, in some circumstances, may prove fatal to the success of the application. It cannot, however, be treated as a precondition to the favourable exercise of the discretion. Its relative importance in the exercise of the discretion will tend to diminish as an applicant's case increases in strength. In *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd*,[3] McPherson J observed, in relation to the setting aside of a judgment entered in default of appearance, "It is not often that a defendant who has an apparently good ground of defence would be refused the opportunity of defending, even though a lengthy interval of time had elapsed provided that no irreparable prejudice is thereby done to the plaintiff".[4] His Honour also observed to the effect that, generally speaking, whether a prima facie defence on the merits had been shown was a more "cogent" consideration than a satisfactory explanation of the failure to appear and the delay in making the application. These are orthodox views.

[14] Although the primary judge did go on to consider whether the appellant had a real prospect of successfully defending the claim, he prefaced his reasons in this regard with the observation that he would "make some brief comments on that second point" having just said that he did not need to "embark upon an examination of the evidence in relation to the second point given [his] findings on the first".

[15] The primary judge then found, rightly, that the defence did not comply with r 166(5) of the UCPR and that the consequence of non-compliance was a deemed admission of the matters denied in the defence. He found that because of the deemed admissions the appellant had not provided any defence to the claim and therefore had failed to show why the judgment should not be maintained. He further found that, even without the deemed admissions, the appellant had not articulated any legal basis on which it was entitled to maintain possession of the panorama. He noted that the appellant had not alleged a lien in his defence or counterclaimed for outstanding storage fees. Such findings and conclusions on the part of the primary

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2 *Reserve Vault Pty Ltd v Barrier Reef Arts Pty Ltd & Ors* [2011] QCA 216 at 3-4.

3 [1983] 2 Qd R 441.

4 At 449.

judge were correct but, even if the primary judge is to be taken to have separately found that the appellant did not show a real prospect of defending the respondents' claims, the exercise of his discretion miscarried. It was exercised by reference to an erroneous test and it cannot be said that the primary judge's decision was unaffected by the error. Accordingly, it falls to this Court to exercise the discretion afresh.

The primary judge erred in failing to set aside the judgment on the basis that the order erroneously directed the appellant to deliver up possession of the goods to "the plaintiffs"

[16] The appellant's proposition, which is not encompassed in the grounds set out in the Notice of Appeal, is that the 9 June order was defective in ordering delivery up of the panorama "to the plaintiffs" as it was not alleged that the second respondent had any right to possession of any part of the panorama.

[17] I doubt the validity of the proposition advanced by the appellant. The claim includes a claim by all respondents for delivery up of the panorama. The Statement of Claim alleges that it was the second respondent which entered into the agreement with the appellant for the storage of the panorama. The Statement of Claim also expressly alleges a duty for the panorama to be delivered to the second respondent on demand.

[18] However, having regard to my conclusions in respect of the other grounds of appeal, there is no utility in dealing with this point.

The primary judge erred in failing to afford the appellant procedural fairness

[19] It was argued that procedural fairness was denied in the following respects:

(a) failure to offer the appellant an adjournment;

(b) failing to advise the appellant to seek legal assistance;

(c) failing to adequately explain to the appellant that it was required to demonstrate a sufficient basis to set aside the summary judgment and in turn a prima facie defence on the merits;

(d) failing to ensure that a lack of skill and objectivity on the part of Mr Sands, who represented the appellant, did not prevent the appellant from claiming defences that were open or potentially open on the material before the Court;

(e) failing to advise the appellant to give oral testimony as to the matters contained in paragraph 4 of the defence;

(f) applying the pleading rules appertaining to defences rigidly when the appellant was self-represented.

[20] The substance of the argument advanced by counsel for the appellant was as follows. There was no evidence to suggest that Mr Sands was an experienced litigant, that he understood the Rules of Court, the *Storage Liens Act* 1973 or the applicability of that Act to his case. The evidence suggested to the contrary.

Although the primary judge provided considerable assistance to the appellant, the assistance was not sufficient to ensure a fair hearing. During the hearing of the application, the primary judge said to Mr Sands:

> "…you have to provide to the Court a reasonable explanation for your non-appearance on the date that the application for summary judgment was heard. You also have to demonstrate to the Court why an injustice has been occasioned by the nature of the order that was made that day."

[21] This explanation was misleading or insufficient or both.

[22] Sub-ground (e) may be disposed of at the outset. No good purpose would have been served by advising Mr Sands to call oral evidence in respect of the argumentative matter in paragraph 4 of the defence which did not make out an arguable defence.

[23] The position in relation to sub-ground (a) is not as clear, but in view of the conclusions I have reached in respect of this and the previous ground of appeal, it is unnecessary to explore the merits of the subsidiary arguments advanced on behalf of the appellant. I shall instead refer briefly to the background facts before exploring why, in my view, the appellant was denied procedural fairness. Mr Sands had ample time in which to prepare for the hearing. He did not apply for an adjournment, but at an early stage of the hearing the primary judge had intimated that he "was not minded to adjourn" the matter.

[24] The appellant claimed that Mr Sands presented as an inexperienced litigant. As the respondents pointed out, he was not a litigant. He was permitted to appear on behalf of the appellant as a result of an indulgence granted by the primary judge. There is no evidence of his lack of experience in litigation, but there is no reason to suppose that he was lacking in commercial sophistication. He was a director and shareholder of the appellant which, according to him, operated a "very high security storage facility" in the former Reserve Bank building in Brisbane.

[25] It appears that the appellant, through Mr Sands, made a conscious choice to proceed with its application without legal assistance. After the close of evidence, Mr Sands revealed that he had made a telephone call some time in the course of the day with a view to obtaining legal assistance, but he had been unsuccessful. As mentioned earlier, he did not seek to have the matter adjourned, but the primary judge's remarks may have led him to conclude that any adjournment application would be unlikely to succeed.

[26] The primary judge's explanation that the appellant "**also** [had] to demonstrate … why an injustice has been occasioned by the nature of the order" was not only wrong in principle, it was opaque (emphasis added). It was unlikely to have alerted Mr Sands to the need to show a real prospect that the appellant could defend the respondents' claims for delivery of possession. That Mr Sands was not so alerted is apparent from his concentration during the hearing on questions of service. It is necessary to keep these matters in mind when considering the primary judge's course of conduct during the hearing.

[27] Counsel for the respondents placed reliance on the observation of this Court in *Pavlovic v Commissioner of Police*[5] that "It is well established that the fundamental

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5 [2007] 1 Qd R 344 at [22].

importance of the neutrality of the trial judge in the contest between adversaries means that the judge should refrain from giving a party advice as to how to run his case".[6] It was submitted that as the appellant had not adverted to the existence of a lien in his defence or claimed for unpaid storage fees it was not the judge's role to advise about these omissions or the possibility of remedying them.

[28] The assistance which should be provided by a judge to a litigant in person "depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case".[7] It is often difficult for a judge to evaluate these matters and, having done so, render assistance to a litigant in person without straying from a position of strict neutrality and prejudicing the legally represented party.

[29] The primary judge was placed in an awkward position but, in my respectful opinion, his erroneous statement of law coupled with the unhelpful statement to the effect that the applicant had to demonstrate an injustice "by virtue of the order for summary judgment", constituted a denial of procedural fairness resulting in a miscarriage of justice.

[30] It should have been apparent to the primary judge from the material placed before him that the appellant had a prima facie claim for storage charges of at least $22,400 at the time of summary judgment, calculated on the second respondent's alleged agreement to pay $500 a month plus GST, commencing in approximately June 2007. Included in the respondents' material before the primary judge was an offer by Mr Hall to pay the appellant a further $15,000 in satisfaction of its claims.

[31] It should have been apparent also that there was a real possibility that the storage charges payable to the appellant were secured by a lien over the panorama. Exhibited to Mr Hall's affidavit was a copy of a document entitled "Power of Sale – Notice" sent by the appellant to the respondents' solicitors on 23 December 2010. It gave notice of the appellant's intention to sell the panorama by public auction if storage charges were not paid within 30 days. The document asserted that it was "…the required written notice to the owner, transferee, representatives and/or any other person who has an interest in the goods". It was obvious enough from this document and from other evidence before the primary judge, including an email of 8 December 2010 from Mr Sands to Mr Hall, that the appellant was asserting a legal entitlement to retain the panorama as security for unpaid storage charges coupled with a statutory right to sell the goods in order to recover the amount of those charges.

[32] Had the primary judge informed Mr Sands of the need to show an arguable defence, it is impossible to conclude that the focus of the hearing in questions of service would have remained unchanged and that Mr Sands would not have adverted to the appellant's claims. He may also have sought an adjournment to obtain legal assistance. It was not inevitable that the primary judge would have granted an adjournment, but having regard to the obvious merits of the appellant's position, it can hardly be said that an adjournment on the basis that the appellant pay the respondents' costs, even on the indemnity basis, was unlikely. The primary judge's error thus materially disadvantaged the appellant.

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6 See also *Mbuzi v Hall & Anor* [2010] QSC 359 at [25].

7 *Abram v Bank of New Zealand* [1996] ATPR 41-507 at 42-347, referred to with approval in *Platcher v Joseph* [2004] FCAFC 68 at [104].

[33] The primary judge appears to have proceeded on the assumption that the appellant could succeed in establishing an arguable case on the merits only by pleading such a case or by properly articulating the legal basis for the defence. Much of his Honour's discussion of what he referred to as "the second point" related to the manifest deficiencies in the appellant's pleaded defence. His Honour's approach was too narrow. The discretion to set aside a judgment under Part 2 of Chapter 9 of the UCPR is broad. Rule 302 relevantly provides that "The court may set aside … a judgment given on an application under this part against a party who did not appear on the hearing of the application".

[34] The rule does not prescribe or confine the matters to which a court may have regard in deciding whether to set aside a judgment. The absence of a pleaded defence which is arguable on its face is no doubt a relevant consideration where a defence has been filed, but so too is the evidence of facts which on their face give rise to an arguable defence. Such evidence will normally be afforded substantially more weight than uncorroborated allegations in a defence.

[35] For the above reasons I would order that:

(a) the appeal be allowed;

(b) the judgments and orders of the District Court pronounced and made on 9 June and 4 August 2011 be set aside except in so far as they relate to costs;

(c) the costs of the appeal be the parties' costs in cause;

(d) the security for costs given by the appellant pursuant to the order made on 30 August 2011 be discharged; and

(e) the appellant file and serve an amended defence and counterclaim, if any, within 14 days of today's date.

[36] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour.

[37] **DAUBNEY J:** I respectfully agree with the reasons for judgment and the orders proposed by Muir JA.