SUPREME COURT OF QUEENSLAND

CITATION:	*ANZ Banking Group Ltd v Lomas & Ors* [2012] QSC 124
PARTIES:	**AUSTRALIAN AND NEW ZEALAND BANKING GROUP LIMITED (ABN 11 005 357 522)** (plaintiff) v **DOUGLAS JOHN LOMAS IN HIS OWN CAPACITY AND AS TRUSTEE OF THE CENTRE MANAGEMENT TRUST** (first defendant) and **GAIL VERONA LOMAS** (second defendant) and **DOUGLAS JOHN LOMAS** (first plaintiff by counterclaim) and **GAIL VERONA LOMAS** (second plaintiff by counterclaim) and **FOURMILE HOLDINGS PTY LTD ABN 33 133 365 161** (third plaintiff by counterclaim) and **AUSTRALIAN AND NEW ZEALAND BANKING GROUP LIMITED (ABN 11 005 357 522)** (defendant by counterclaim)
FILE NO/S:	BS3188/11
DIVISION:	Trial
PROCEEDING:	Application for summary judgment
DELIVERED ON:	9 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2012
JUDGE:	Margaret Wilson J
ORDER:	**Application for summary judgment dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS –

SUMMARY JUDGMENT – where plaintiff made an application for summary judgment pursuant to an undated guarantee and indemnity – where principal debtor was in default under the terms of its facility with the plaintiff – whether the instrument of guarantee attached to the particular debt for which the defendants were sued – whether the defendants had any real prospects of defending the plaintiff's claim – whether there was need for a trial

Uniform Civil Procedure Rules 1999 (Qld) r 292,

Agar v Hyde (2000) 201 CLR 552.
Coldham-Fussell v Commissioner of Taxation [2011] QCA 45.

COUNSEL: D de Jersey for the applicant plaintiff
A J H Morris QC and L Jurth for the respondent defendants

SOLICITORS: Minter Ellison Lawyers for the applicant plaintiff
Worcester and Co for the respondent defendants

[1] **MARGARET WILSON J:** In this application the plaintiff seeks summary judgment against the defendants in the sum of $2,180,958.09, together with interest and costs. The claim is made pursuant to an undated guarantee and indemnity.

[2] It was conceded that the principal debtor Worthgold Pty Ltd is in default under the terms of its facility with the plaintiff. The only issue on the application was whether the instrument of guarantee attaches to the particular debt for which the defendants are sued.

The law

[3] Rule 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides:

> "**292 Summary judgment for plaintiff**
>
> (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
>
> (2) If the court is satisfied that:
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

The power to enter summary judgment is exercised cautiously, and recent authorities have emphasised the need for a high degree of certainty about the

ultimate outcome of the proceeding: *Agar v Hyde*;[1] *Coldham-Fussell v Commissioner of Taxation*.[2]

[4] On a plaintiff's application for summary judgment the plaintiff bears the onus of satisfying the court that the defendant has no real prospect of defending all or part of its claim and that there is no need for a trial of the claim or the part of it. When a plaintiff has established a prima facie entitlement to judgment, the evidentiary burden shifts to the defendant, but the overall burden remains on the plaintiff.

The facts

[5] In December 2007 the plaintiff made a loan facility in an amount of $7 million available to Worthgold Pty Ltd. The defendants signed a guarantee on 14 December 2007 under which their liability was limited to $7 million.

[6] By letter dated 31 March 2008 the plaintiff offered to increase the amount of the facility to $8 million. Worthgold Pty Ltd, by its sole director the second defendant, accepted the offer that day.

[7] The plaintiff agreed to provide that accommodation by a variable business rate loan and a fixed rate commercial bill. In December 2008 these were converted into an overdraft facility.

[8] The letter of 31 March 2008 set out the security the plaintiff would require, including:

> "(a) Individual Guarantee and Indemnity from Gail Verona Lomas and Douglas John Lomas in his own capacity and as trustee for The Centre Management Trust in favour of ANZ in respect of the obligations of Worthgold Pty Ltd A.C.N. 124 129 979 limited to $8,000,000.00 – already held"

All of the other securities listed in that part of the letter were also described as "already held".

[9] Under the heading "Details", the guarantee on which the plaintiff sues provides:

> **THIS INDIVIDUAL GUARANTEE AND INDEMNITY**… is given…
>
> to [the plaintiff]…
>
> by [the defendants]…
>
> in respect of money owed to [the plaintiff] by [Worthgold Pty Ltd]…
>
> under the **GUARANTEED ARRANGEMENTS**, being each credit contract, as changed or replaced, <u>that [the defendants] agree or have agreed in writing is or will be covered by this Guarantee</u>. It <u>includes</u> each credit contract referred to below (if any).

(Emphasis added.)

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1 (2000) 201 CLR 552.

2 [2011] QCA 45 at [98] – [102].

There is then a panel, designed for completion by insertion of identifying particulars of credit contracts. No credit contracts are identified in the panel. Then the following appears:

> **LIABILITY** My liability under this Guarantee is limited:
>
> To the following principal amount $8,000,000.00.
>
> **CODE OF BANKING PRACTICE**
>
> The applicable provisions of the Code of Banking Practice apply to this Guarantee.

[10] There is no evidence precisely when the guarantee was signed – specifically whether it was before or after the letter of offer. The most the bank officer who witnessed the defendants' signatures can say is that it was on or before 31 March 2008 and certainly before 3 April 2008.

Discussion

[11] As senior counsel for the defendants submitted, unless the agreement between the plaintiff and Worthgold Pty Ltd was a "Guaranteed Arrangement" within the meaning of the guarantee, the defendants are not liable for the amount owing by the company.

[12] Clause 1.1 of the guarantee provides:

> "**1.1 Guarantee**
>
> (a) By signing this Guarantee, I guarantee that the Customer will, on time:
>
> (i) pay to ANZ all the Guaranteed Money; and
>
> (ii) perform the Guaranteed Arrangements.
>
> (b) I enter into this Guarantee in return for ANZ:
>
> (i) giving or continuing to provide credit to the Customer; or
>
> (ii) not taking immediate action against the Customer to enforce the Guaranteed Arrangements."

[13] Clause 2.1 provides:

> "**What is the *Guaranteed Money*?**
>
> The ***Guaranteed Money*** means all money owing to ANZ for any reason under the Guaranteed Arrangements:
>
> (a) by the Customer alone, or together with me or one or more others;
>
> (b) now or in the future;
>
> (c) actually or contingently (money is 'contingently' owed where the Customer has an obligation to pay ANZ if something happens or is discovered).

> It includes amounts that would have been owed, and that would have been Guaranteed Money, but for some reason described in clause 3."

In the definitions clause (clause 20.1), "Guaranteed Money" is defined by reference to clause 2.1, and "Guaranteed Arrangements" are defined by reference to the Details Page.

[14] Counsel for the plaintiff submitted that the guarantee secures all present and future obligations of Worthgold Pty Ltd to the plaintiff, including the variable business rate loan and the fixed rate commercial facility. He relied on this passage from O'Donovan and Phillips *The Modern Contract of Guarantee* (3rd ed at 19):

> "A guarantee, like any other contact, may be void because the terms of the guarantee are uncertain.[3] The tendency, however, has been for the courts to interpret the guarantee with regard for the fact that it is a commercial document,[4] and there are few cases where a guarantee has been held void on this basis. **Thus, if a guarantee is given in consideration of further advances being made to the principal, there is no necessity to specify the details of the amount of the advances or the time at which they will be made.[5]** As has been seen, the guarantee will be enforceable as soon as a bone fide advance is made.[6]" [Emphasis added]

[15] In the course of oral submissions, the point in issue was narrowed to this: in order to establish that the debt is covered by the guarantee, the plaintiff must be able to point to something in writing by which the defendants agreed that the loan facility agreement of 31 March 2008 be covered by the guarantee. It is not necessary that it be listed in the panel on the Details Page, because of the use of "includes" in the sentence immediately before the panel.

[16] The plaintiff relied on an undated acknowledgement signed by the defendants, which appears at the back of the letter of 31 March 2008. (It appears from the footer that it was prepared at the same time as the letter of offer and printed as part of the same document.) It is in these terms:

> "In respect of securities given or to be given where the liability is limited, the following guarantor acknowledges that the securities secure all present and future obligations of the Client(s) to ANZ, including obligations in respect of the Facilities. However, ANZ's right to enforce any security may be limited according to the conditions of that security.
>
> **SIGNED** by
>
> ……*G Lomas*…… ……*DJL*……..…..

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3 *Oldershaw v King* (1857) 2 H& N 517; 157 ER 213.

4 See the general principles of construction set out below in Chapter 5, and, in this context, *Caltex Oil (Aust) Pty Ltd v Alderton* (1964) 81 WN (Pt 1) (NSW) 297; *Broadlands Finance Ltd v Williamson* (unreported, NZ High Ct, 7 February 1984).

5 *White v Woodward* ((1848) 5 CB 810; 136 ER 1097. See also *Simpson v Manley* (1831) 2 Cr & J 12; 149 ER 5, where the consideration was the "giving of credit", and this was interpreted to mean a fair and reasonable credit. See also below, pp 83/84 and especially *Vetro Glass Pty Ltd v Fitzpatrick* [1963] 63 SR (NSW) 697.

6 Ibid.

Signature of Gail Verona Lomas	Signature of Douglas John Lomas in his own capacity and as trustee for the Centre Management Trust"

[17] Counsel for the plaintiff submitted this acknowledgement shows objectively that the parties intended that the guarantee be in respect of the facility in question. He relied especially on the words "all present and future obligations". He submitted that the last sentence is a reference to the fact that the guarantee may be limited in amount, and conceded that it may refer to other conditions such as a requirement for a demand before enforcement.

[18] Senior counsel for the defendants submitted that even if by that acknowledgement the defendants agreed to give some form of guarantee at some future time, nothing in it could be construed as constituting their written agreement that the credit contract constituted by their acceptance of the offer "is or will be covered by this Guarantee" as required by the guarantee. He submitted that it is necessary to look to the terms of the guarantee, and that, unless there is something in writing to the effect that the particular credit contract reflected in the letter of offer was a "Guaranteed Arrangement", the debt was not covered by the guarantee. I accept that submission.

[19] Further, senior counsel for the defendants submitted, the securities referred to in the acknowledgement were securities "already held". In so far as the plaintiff contends that the undated guarantee on which it sues was "already held" within the meaning of paragraph (a) set out in paragraph [8] above, it bore the onus of establishing that that was so. There is presently no evidence on which the court could be satisfied that the guarantee sued upon was a guarantee "already held" when the letter was issued. I do not accept counsel for the plaintiff's submission that this is not a matter which could be expected to be explored further at a trial because if there were evidence available to be led by the defendants, they could have been expected to lead it on this application. In my view, the defendants did not have any evidentiary onus in this regard.

[20] Further, as counsel for the defendants submitted, in the absence of any evidence directly on the point, it is inherently unlikely that the defendants signed the guarantee before receiving the letter of offer. This is underscored by the guarantee's being expressed to be subject to the "Code of Banking Practice" ("the *CPB*"), the plaintiff's being obliged to provide the defendants with copies of relevant credit contracts (*CPB* cl 28.4), and the plaintiff's being obliged not to ask the defendants to sign the guarantee, nor to accept it, unless they had been supplied with the relevant credit contracts under CPB cl 28.4 and unless they had been given until the next day to consider all relevant credit contracts (*CPB* cl 28.5).

Conclusion

[21] I am unpersuaded that the defendants have no real prospect of defending the plaintiff's claim or that there is no need for a trial.

[22] Accordingly, the application for summary judgment should be dismissed. I will hear the parties on costs.