SUPREME COURT OF QUEENSLAND

CITATION:	*Tynan & Anor v Filmana Pty Ltd & Ors* [2013] QSC 32
PARTIES:	**DAVID TYNAN and JUDITH GARCIA TYNAN** (Plaintiffs) v **FILMANA PTY LTD ACN 080 055 429** (first defendant) AND **ANNA-MARIA SCIACCA** (second defendant) **AND** **PHILIPPO SCIACCA** (third defendant)
FILE NO/S:	BS 5923 of 2012
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	26 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2013
JUDGE:	Jackson J
ORDERS:	**1. The judgment of the court is that the plaintiffs do recover damages to be assessed against the defendants; and** **2. The defendants pay the plaintiffs' costs of the application to be assessed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – Where plaintiffs apply for summary judgment against defendants in respect of liability – – Whether to give judgment on part of the claim for damages for breach of contract to be assessed *Rules of the Supreme Court* (Qld), o 13, r 3; o 18, r 1 *Supreme Court of Queensland Act 1991* (Qld), s 118E *Uniform Civil Procedure Rules 1999* (Qld), r 292, r 366, r 483, r 493 *Uniform Civil Procedure Rules 2005* (NSW), r 13.1 *Associated Bulk Carriers Ltd v Koch Shipping Inc* [1977] 2 All ER 254

Foran v Wight [1989] HCA 51; (1989) 168 CLR 385, cited
Producers Co-operative Distributing Society Ltd v Ace Packing Company Pty Ltd [1961] VicRep 15; [1961] VR 85, cited
Stainer v Traggett [1955] 3 All ER 742; [1955] 1 WLR 1275, cited

COUNSEL: P H Morrison QC and BWJ Kidston for the plaintiffs
B D O'Donnell QC for the defendants

SOLICITORS: Mahoney Lawyers for the plaintiffs
Tucker & Cowen for the defendants

[1] **JACKSON J**: The plaintiffs ("the vendors") apply for summary judgment against the first defendant ("the purchaser") and the second and third defendants ("the guarantors") pursuant to *UCPR* 292 "in respect of liability". Alternatively, the vendors apply for an order pursuant to *UCPR* 483 for the separate determination of "the question of liability".

[2] The proceeding is one started by claim. The vendors claim the sum of $2,769,559.43 together with interest to the date of judgment (as a sum owing under contract) or damages for breach of contract and interest on any payment or award of damages under statute. The same claim is made against the purchaser and the guarantors.

[3] By a contract in writing made on or about 3 October 2010 the vendors agreed to sell land at 29 Lawrence Street, St Lucia in the State of Queensland to the purchaser for the purchase price of $7,000,000 ("the 2010 contract"). The settlement date was 12 months from the "contract date" which was specified as 9 October 2010. Settlement was, therefore, to be effected on 10 October 2011.

[4] By separate guarantees made on or about 9 October 2010 and 24 December 2010, the guarantors guaranteed to the vendors the obligations of the purchaser under the contract for purchase of the land. The parties entered into a number of presently irrelevant variation agreements.

[5] From a time in August 2011 (the exact date is not material) the parties entered into negotiations to rescind the 2010 contract by agreement and to replace it by a new contract. Again, for present purposes, most of the precise details of the negotiations are not material.

[6] There is no dispute the negotiations proceeded from 15August 2011 on the basis of the vendors' lawyers statement that the "correspondence should not be seen in any way as an indication by us or our clients that they will grant any extension of time for settlement. All of their rights under the [2010] contract are reserved."

[7] On 7 September 2011, the vendors' lawyers wrote "pending the execution of the Deed of Rescission, new contract and accompanying documents our clients reserve all of their rights".

[8] By 16 September 2011, the terms of any rescission or new contract had not been agreed. Further points of difference were discussed by correspondence.

[9] On 29 September 2011, the vendors' lawyers wrote to the purchaser's (and guarantors') solicitors attaching drafts of a deed of rescission, new contract, special conditions, guarantee and indemnity, acknowledgement and consent to guarantee, mortgage, and authority to agent to release deposit which were "for review purposes only and not for signing. We reserve the right to make changes to the documents before signing."

[10] On 4 October 2011, the vendors' lawyers sought a response no later than the following day to the documents they had sent on 29 September 2011.

[11] On 6 October 2011, responding to the vendors' lawyer's correspondence of 29 September 2011, the purchaser's lawyers sought further changes.

[12] Also on that day, the vendors' lawyers wrote to the purchaser's lawyers confirming the vendors' agreement to what had been sought and confirming a discussion that there was agreement on the terms of the "extension" with the documents then to be signed.

[13] On 6 October 2011, the vendors' lawyers forwarded, by courier, to the purchaser's lawyers, a letter attaching a deed of rescission in triplicate, new contract in triplicate, mortgage in triplicate, acknowledgement and consent to guarantee in triplicate and authority to the agent to release the deposit.

[14] The attached draft deed of rescission referred to the 2010 contract, which was defined as "the Contract" and provided in cl 2.1 and 3.6 as follows:

> "2.1 The Contract will remain binding on the parties until such time as the Replacement Contract becomes binding on the parties.
>
> …
>
> 3.6 The parties acknowledge that no party will be bound by, liable for or subject to any obligation arising in accordance with this Deed or any negotiations, actions, or omissions including the payment or non-payment of any monies by a party to any other until such time as:
>
> (a) this Deed has been executed by all parties; and
> (b) the Replacement Contract has been entered into by the parties to it; and
> (c) the Buyer and Seller become bound by the Replacement Contract."

[15] The "Replacement Contract" was defined to be the new contract between the seller and the buyer with respect to the property in the form that was attached to the deed. The text of the draft deed could not have been clearer in stating that the 2010 contract remained on foot until the deed and accompanying documents were executed. There is no dispute that they were not executed.

[16] In these circumstances, the agreed date for settlement under the 2010 contract, 10 October 2011, came and went. Neither of the parties attended for settlement and there is no suggestion that either of them was ready to settle or complete the 2010 contract on that day.

[17] On 14 October 2011, a meeting occurred between David Tynan, the vendors' solicitor, the purchaser's solicitor and the guarantors. There is a dispute about what occurred at the meeting. David Tynan and the vendors' solicitor contend that the purchaser's solicitor and the guarantors acknowledged at the meeting that the 2010 contract remained on foot and the vendors reserved their rights under it. That is of no consequence, as I presently view the matter, because the purchaser's and guarantors' contention is that the existing or original contract was not mentioned at a without prejudice discussion about proposed terms of the proposed new contract.

[18] On 17 October 2011, the vendors' lawyers wrote to the purchaser's lawyers that the vendors rejected the purchaser's and guarantors' proposal at the meeting of 14 October, stated that the 2010 contract remained on foot, that the vendors had at all times been and remained ready and willing to transfer the property to the purchaser in accordance with the contract, and gave "notice that our clients require that settlement of the contract take place on 16 November 2011, a date 30 days from the date that this notice is given".

[19] The purpose of the notice was to make time of the essence for the proposed settlement on 16 November 2011. The letter included a statement that if the purchaser did not effect settlement on that date the vendors would treat the 2010 contract as at an end.

[20] On 30 October 2011, the vendors' lawyers enquired of the purchaser's lawyers as to the purchaser's intention to settle the contract on 16 November 2011. In particular, they sought advice as to whether the purchaser had the means and intended to settle the 2010 contract and stated that, if settlement was not effected, the vendors intended to take steps to have the property marketed for sale by auction prior to the end of the year.

[21] On 3 November 2011, the vendors' lawyers again enquired of the purchaser's lawyers as to the purchaser's intentions and stated that the vendors remained ready and willing to be able to complete the sale on 16 November 2011.

[22] On 3 November 2011, the purchaser's lawyer advised the vendors' lawyers that "our client will not be in a position to settle on 16 November 2011".

[23] On 9 November 2011, the vendors' lawyers enquired of the purchaser's lawyers whether they would like to make arrangements for production of the transfer documents at the Office of State Revenue for stamping before settlement.

[24] On 9 November 2011, the purchaser's lawyers advised the vendors' lawyers that the purchaser would not require production of the transfer documents prior to settlement and that their client's position remained the same as at 3 November.

[25] On 11 November 2011, the vendors' lawyers sought from the purchaser's lawyers confirmation that the purchaser would not be tendering for settlement on 16 November 2011 and did not require the vendors to vacate the property by that date.

[26] On 14 November 2011, the purchaser's lawyers wrote to the vendors' lawyers that the purchaser would not be in a position to settle on 16 November 2011, did not require the vendors to tender at settlement, and did not require the vendors to vacate the property in anticipation of settlement taking place.

[27] On 15 November 2011, the purchaser's lawyers wrote to the vendors' lawyers advising as to the attempts that the purchaser was making in order to obtain funds over the succeeding months. There was no suggestion in that correspondence that the 2010 contract was not on foot or that the date for settlement of 16 November 2011 had in any way been varied.

[28] At 9:57am on 16 November 2011, the vendors' lawyers sent a facsimile to the purchaser's lawyers terminating the 2010 contract, forfeiting the deposit and reserving the vendor's rights. Later that day, the purchaser's lawyers wrote to the stakeholders, who were holding the deposit, confirming "that the contract in this matter has been terminated by the seller" and requesting the release of the deposit and all interest thereon to the vendors.

[29] The purchasers and guarantors raise a number of grounds of opposition to the application for summary judgment including a number of grounds raised by the second further amended defence and counterclaim ("the defence").

The original purchase contract was abandoned

[30] Paragraph 10 of the defence alleges that by conduct of the vendors and the purchaser the original purchase contract was abandoned. The particulars rely upon the fact of the negotiations for a fresh contract and that neither the vendors nor the purchaser made an attempt to settle the 2010 contract on 10 October 2010. In my view, the purchaser has no reasonable prospect of success on that defence for the reason that the negotiations, as they are summarised above, were conducted in writing and explicitly on the footing that until a new contract was signed the 2010 contract was binding. In that context, the failure of the parties to settle the contract on the agreed date of 10 October 2011 did not constitute an abandonment of the 2010 contract at all. It was merely a failure by both parties to settle on the agreed date.

Entry into a new contract discharging the original purchase contract

[31] Paragraph 10A of the defence alleges that the vendors and the purchaser entered into a fresh agreement for the sale of the property over a period ending on 6 October 2011. Again, in my view, having regard to the facts as set out above, the purchaser and guarantors have no reasonable prospect of success on that ground of defence. As at 6 October 2011, there is no basis in the facts which I can see for the contention that a new contract had been concluded or that the 2010 contract had been rescinded by agreement, express or implied.

No termination for actual breach

[32] Paragraph 17(d) of the defence alleges that no actual breach of contract had occurred at the time the vendors' lawyers' letter of termination dated 16 November 2011 was sent by facsimile. The contention is that, on the assumptions that completion was due on 16 November 2011, and that time was of the essence, the purchaser's obligation to complete the contract pursuant to cl 5.1 was one that could be performed between 9:00am and 5:00pm. Notwithstanding that, notice of termination given at 9:57am on that day. The notice was premature for a notice of termination relying upon an actual breach for failure to complete the contract on the agreed date. In my view, the purchaser and the guarantors do have a real prospect

of succeeding in that defence. That would be a defence to the vendors claim for sums payable as liquidated sums under cl 9 of the REIQ Terms of Contracts for Houses and Residential Land. But it would not operate as a defence to the alternative claim for damages for breach of contract at common law for the reasons discussed below.

Repudiation as an anticipatory breach of contract

[33] Paragraph 16(a) of the defence denies that the purchaser repudiated the 2010 contract, based on a number of alleged factual matters. Paragraph 16(b) additionally alleges that the purchaser was acting in the belief that the 2010 contract had been discharged. In my view, the matters relied upon as grounds for the denial of the allegation of repudiation do not disclose a real prospect of success by the purchaser or guarantors on that issue. In the clearest possible terms, the purchaser's solicitors intimated that it would be pointless for the vendors to attend at settlement or to vacate the property in preparation for settlement because the purchaser was not in a position to settle. Those intimations were of an intention not to perform the original purchase contract in accordance with its terms, and on the basis that it was on foot. It amounted to an anticipatory breach of contract and repudiation in accordance with the ordinary principle[1]. Whether or not Philippo Sciacca mistakenly believed that the 2010 contract had been discharged and that taking steps towards the proposed completion of that contract was pointless is irrelevant to the proper conclusion to be drawn from the undisputed facts set out above.

[34] Once it is accepted, as I have found, that the 2010 contract was on foot, there is no possible finding of ambiguity in the vendors conduct by their lawyers' correspondence from 17 October 2011 to 16 November 2011. At all times, they insisted that the contract was on foot and that the purchaser was required to settle. Equally, the purchaser's lawyers' response to the vendors' solicitors' correspondence was unequivocal. It intimated without a shadow of doubt that the purchaser did not intend to perform a contract on 16 November 2011, which amounts to a repudiation. The purchaser and guarantors have no reasonable prospect of success in their denial of the purchaser's repudiation.

Readiness and willingness

[35] The purchaser and guarantors also deny that the vendors were ready and willing to complete the original purchase contract. Although I note there was no direct evidence from the vendors that they were in fact ready and willing or could have completed the 2010 contract until the purchaser dispensed with any further requirement that the vendors settle the original purchase contract on 16 November 2011, there is no evidence which I consider suggests that the purchaser and guarantors have any real prospect of success on that issue. The purchaser had intimated that the vendors need not comply with their concurrent obligations to complete the contract on 14 November 2011.

[36] The vendors' lawyers' facsimile terminating the contract at 9:57am on 16 November 2011 was effective at common law to discharge the parties from future performance in response to the purchaser's anticipatory breach of contract and repudiation.

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1 *Foran v Wight* [1989] HCA 51; (1989) 168 CLR 385

[37] The purchasers and guarantors counsel's submissions also purported to raise as a ground of opposition that the vendors were not ready and willing on 10 October 2011. However, in my view, that point is misconceived. The vendors do not claim to have terminated the original purchase contract on 10 October 2011 or seek to recover damages for the purchaser's breach of contract on 10 October. In any event, the point is not pleaded.

Guarantor's liability

[38] A point which does not appear to be raised in the defence but which is relied upon in the guarantor's outline of argument is that on the proper construction of the guarantees they do not extend to the purchaser's liability to the vendors for damages on termination of the 2010 contract for repudiation in the form of anticipatory breach. Simplifying, the guarantors rely upon the provision of the guarantee that:

> "The guarantor will be liable if the buyer **breaches** the contract as though the guarantor was named in the contract as, and had signed the contract as, the buyer and the guarantor must pay any money for the seller's loss **due to the buyer's breach**." (original emphasis)

[39] The question which is raised is one of construction of the guarantees. In my opinion, the suggested construction is untenable and the guarantors have no real prospect of success in their defence on that ground, because of the words "as though the guarantor was named in the contract as, and had signed the contract as, the buyer". If there were any reason otherwise to think that the breaches referred to in that clause would not extend to an anticipatory breach of contract amounting to repudiation, in my view those words make it perfectly clear that the intention of the parties was that the guarantors be placed in the same position in terms of their liability for the purchaser's breach of contract as if they had been the buyer under the contract. The guarantors do not contend that on termination of the contract, by the vendors for anticipatory breach amounting to a repudiation by the purchaser, the vendors would not be entitled to damages for breach of contract against the purchaser.

Judgment for damages to be assessed in respect of a part of the claim may be granted under *UCPR* 292

[40] The last point of the purchaser and guarantors is more difficult. They contend that, having regard to the claim, judgment is given "ordering the defendants pay the amount found to be due or no judgment should be given. It would not, for example, be appropriate to order the defendant to pay a sum of money to the plaintiff, the amount of which is later to be determined."

[41] They also submit that the power to give judgment under *UCPR* 292(2) in respect of "part of the plaintiff's claim" does not authorise a judgment on the issue of liability.

[42] In my opinion, that submission is not well founded, if it is meant to prevent the court from giving judgment for damages to be assessed on a summary judgment application. In general, it is not appropriate for the court to make a determination on a question of "liability" on an application for summary judgment. The vendors pointed to no authority or analysis of the rule either in the context of the *UCPR* or historically which would support such an outcome. However, the same practical

result can be obtained if the court has power to grant an interlocutory judgment for damages to be assessed.

[43] As a matter of history, in Queensland, *UCPR* 292 was preceded by order 18, rule 1 of the *Rules of the Supreme Court* which also provided for judgment on a claim or "part of a claim", but that rule was restricted to a claim which was specially endorsed on the writ of summons, relevantly being a claim for a debt or liquidated demand.

[44] However, summary judgment rules in other places operated more widely. For example, summary judgment rules applicable in the past in Victoria were contained in order XIV of the *Rules of the Supreme Court* of Victoria. Those summary judgment rules extended to a claim for unliquidated damages and expressly authorised the making of an order granting leave to enter an interlocutory judgment with damages to be assessed. However, in *Producers Co-operative Distributing Society Ltd v Ace Packing Company Pty Ltd*[2] the question was raised whether a plaintiff with a claim for unliquidated damages may obtain leave to enter final judgment for a particular sum or amount of unliquidated damages. Sholl J held:

> "In my opinion, the effect of the Rules is that he cannot. He can obtain only leave to enter an interlocutory judgment for damages to be assessed. Having done that, he must proceed, by way of the provisions of order XIV rule 7A to have the damages assessed in accordance with the provisions of order XXXVII rules 3-9 …
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> The consequence of holding that a plaintiff under order XIV could obtain leave to enter final judgment for unliquidated damages would be to make it possible to turn the summons into an enquiry as to damages, which in my opinion was never intended …."

[45] However, the authority to give an interlocutory judgment was express under those rules. Similarly, r 13.1 of the current *Uniform Civil Procedure Rules 2005* (NSW) provides that the courts in that State may give judgment "on the claim" or "that part of the claim" as the case requires and that without limiting the generality of the power to give such judgment "the court may give judgment for the plaintiff for damages to be assessed".

[46] The question I am considering would not arise under the form of the current *Civil Procedure Rules* in England. However, order 14 rule 3 of the former *Rules of the Supreme Court* provided that on the hearing of an application for summary judgment under those rules the court may give judgment "on that claim or part as may be just" referring to an application relating to a claim or a particular part of a claim indorsed on the writ of summons. It appears that the reference to "part of a claim" in the rules was intended to negative *Stainer v Traggett*[3]. But the more important point is that the White Practice, for years[4] carried a note that:

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2 [1961] VicRep 15; [1961] VR 85

3 [1955] 3 All ER 742; [1955] 1 WLR 1275

4 Between 1965 and 1999; and see *Associated Bulk Carriers Ltd v Koch Shipping Inc* [1977] 2 All ER 254

> "If unliquidated damages are claimed and the defendant fails to establish a right to defend, interlocutory judgment will be given for the damages to be assessed."

[47] In my view, *UCPR* 292 is not intended to apply for the purpose of the determination of the question of liability without a judgment on the claim or part of the claim resulting. The operation of the rule is, however, met by a request for judgment for damages to be assessed. I am conscious that there is no express provision in the *UCPR* for the assessment of damages upon a judgment of that kind. However, the court has a wide power to make provision for appropriate directions (notwithstanding the repeal of s 118E of the *Supreme Court of Queensland Act 1991* (Qld)) under *UCPR* 366.

[48] During argument, it was proposed that it would be possible on the determination of the liability issues previously discussed to conclude that the vendors' termination of the contract was valid and to make a declaration accordingly. I do not express an opinion on whether that could be done, in an appropriate case, but it would not achieve a judgment on any existing claim or part of a claim in the proceeding in the present case.

[49] The result which follows may seem unusual, but in my view it follows from the circumstance that the determination of the liability questions or issues previously discussed does entitle the vendors to a judgment on part of the claim as it is presently formulated for damages for breach of contract as a judgment for damages to be assessed. The vendors submitted that if the court were prepared to give judgment on the claim for damages for breach of contract, they would prepare to elect not to proceed on their alternative claim for the sum due under clause 9 of the REIQ conditions.

Determination of separate questions

[50] In the alternative to their application for summary judgment, in respect of liability the vendors applied for an order that the court decide the question of liability separately and before the trial of the other issues in the proceeding pursuant to *UCPR* 493. Having regard to my decision on the application for summary judgment, it is not strictly necessary to express a view upon this application. However, in case it should matter at some point, I will do so briefly.

[51] The purchaser and guarantors opposed a separate trial in respect of liability on the ground that the efficient management of the litigation would be better served by a single trial in respect of all issues. They submitted that neither the issues of liability nor the issues relevant to an assessment of loss or damage are particularly complicated or lengthy to try and there is nothing unmanageable about dealing with all the issues in one trial. They pointed to the significant disadvantages that can result from fragmentation of a proceeding, including separate appeal processes, as well as the need to call the same witnesses more than once and the possibility of embarrassment because of findings which are made in the trial of the separate questions and the trial of the balance of the issues in the proceedings.

[52] The vendors' contentions in support of the application for separate determination are that there will be substantial savings of time and money if liability is determined

separately prior to the trial. They rely on an affidavit of Mr Redburn in support of that contention.

[53] However, at the end of the day Mr Redburn's opinion is that the issue of liability would be capable of being decided within a one to one and a half day hearing whereas a trial of the whole proceeding would take four to six days. In my view, the advantages of a separate trial of issues on liability and a one day hearing as opposed to a trial of all issues in four days are not so apparent as to warrant the determination of the question of liability in advance of other issues at a trial of all issues in the proceeding. The same applies to the difference between his greatest estimates of two days for liability and six days for all issues.

[54] I would have thought that the trial of all issues in the proceeding could be set down for a period of five days or less and there is no significant delay in the court calendar for a civil trial which is otherwise ready for hearing being set down for a period of that sort.

[55] In those circumstances, in my view it is not appropriate that there be a separate determination of the questions of liability.

[56] In reaching that view I have taken into account the views that I have expressed on the questions of or grounds of defence which have been raised in the context of the hearing of the summary judgment application, as set out above.

Conclusion

[57] In the result, in my view, the vendors' application should succeed to the extent of a judgment for damages to be assessed. There is no reason why costs should not follow the event, so far as I can see, but I will hear the parties on costs.

[58] I will also hear the parties on the precise form of the judgment to be made.