SUPREME COURT OF QUEENSLAND

CITATION:	*GMW Group Pty Ltd (Receivers and Managers Appointed) (in liquidation) & ors v Michael Saadie in his own right and trading as GMW1 & ors [No 2]* [2013] QSC 71
PARTIES:	**GMW GROUP PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 103 796 881** (First Plaintiff) and **PAUL ANDREW BILLINGHAM AND MICHAEL GERARD MCCANN** (Second Plaintiff) and **WESTPAC BANKING CORPORATION LTD ACN 070 457 141** (Third Plaintiff) v **MICHAEL SAADIE IN HIS OWN RIGHT AND TRADING AS GMW1** (First Defendant) and **JOSE MARTIN** (Second Defendant) and **JOSE GUERREIRO** (Third Defendant)
FILE NO/S:	BS 370 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	22 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2012
JUDGE:	McMurdo J
ORDER:	**1. Pursuant to s 1317E of the *Corporations Act 2001* (Cth), it is declared that each of the defendants**

contravened s 180 of the *Corporations Act*, by causing property of the first plaintiff, namely five gaming machine licences and the net proceeds of sale of those licences, to be lost to the first plaintiff and appropriated in favour of persons other than the first plaintiff and with no benefit to it.

2. **Judgment for the first plaintiff against the first defendant in the sum of $226,730 together with interest on that sum at 10 percent from 23 January 2012 being an amount of $26,400.**

3. **Judgment for the first plaintiff against the second defendant in the sum of $226,730 together with interest on that sum at 10 percent from 23 January 2012 being an amount of $26,400.**

4. **Judgment for the first plaintiff against the third defendant in the sum of $226,730 together with interest on that sum at 10 percent from 23 January 2012 being an amount of $26,400.**

5. **Judgment for the third plaintiff against the first defendant in the sum of $14,243,018.71.**

6. **Judgment for the third plaintiff against the second defendant in the sum of $14,243,018.71.**

7. **Judgment for the third plaintiff against the third defendant in the sum of $14,243,018.71.**

CATCHWORDS: PROCEDURE – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where third plaintiff demanded payment from defendants under guarantees – where defendants allege extension of loan facility – where first defendant received proceeds from sale of company's gaming machine licences – where plaintiffs apply for summary judgment against first defendant under r 292 of the *Uniform Civil Procedure Rules 1999* – whether any evidence to support defendants' assertions about extension of loan facility – whether any evidence licences were held on trust by company for benefit of first defendant – whether defendants breached duties as directors of company

PROCEDURE – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – DEFAULT JUDGMENT – where proceedings started by originating application but ordered proceedings to continue as of started by claim – whether service proved

Uniform Civil Procedure Rules 1999 (Qld) rr 14, 137, 281, 282, 283, 284, 287, 288, 292
Corporations Act 2001 (Cth) ss 9, 181, 1317E

Gaming Machine Act 1991 (Qld) s 92

COUNSEL: VG Brennan for the plaintiffs

C J McKenzie (solicitor) for the defendants

SOLICITORS: Henry Davis York for the plaintiffs

Raj Lawyers (as town agents for Consolidated Lawyers) for the defendants

[1] The plaintiffs have applied for summary judgment, under UCPR r 292, against the first defendant. The other defendants have not filed a notice of intention to defend and the same relief is sought against them by way of judgments in default of a defence. (The defendants have not always had the same legal representation, which may explain why only one of them has pleaded to the Statement of Claim.) At the commencement of the hearing of these applications, a solicitor representing all three defendants applied for an adjournment. For reasons then given, I refused the adjournment. The solicitor, who had been instructed only on the eve of the hearing, then withdrew and the applications were heard without any argument or evidence to resist them. I then had the benefit of detailed submissions from counsel for the plaintiffs which, for the most part, I have accepted.

[2] In 2008, Westpac lent money to GMW, secured by a charge granted by GMW and guarantees and indemnities given by each of the defendants. The first defendant was a director of GMW from May 2007 until September 2010. As I will discuss, he remained active in GMW's business. The second and third defendants were directors from 2003 until GMW went into liquidation in late 2011. The second plaintiffs are receivers who were appointed to GMW by Westpac in December 2010. A few days later GMW went under voluntary administration and was subsequently subject to a Deed of Company Arrangement until its liquidation.

[3] Westpac seeks a judgment for the amount owing by each defendant under his guarantee. The first defendant admits that Westpac lent money in the amounts, at the times and upon the terms which it alleges. He admits that he gave a guarantee by which he could be called upon to pay GMW's debt to Westpac, if it defaulted. But he denies that Westpac was entitled to make a demand under his guarantee when it did so on 3 November 2010, because he denies that GMW was then in default.

[4] The first defendant also pleads some matters going to the amount of GMW's indebtedness to Westpac. However, even on the face of the first defendant's pleading, there is no apparent defence in relation to those matters going to the amount of the debt. In paragraph 7(c), he pleaded that Westpac's claim made "no allowance for credits received through the sale of properties over which the [debt] was secured, the details of which are not known to the first [defendant] despite requests being made to the second and third [defendants] for such details." That plea does not identify the properties. And the evidence showing the calculation of the debt shows that credit has been given for the sale of certain properties.

[5] By paragraph 7(d) of his Defence, the first defendant disputed a component of the debt pleaded by Westpac, which was for "enforcement costs" totalling $1,436,176.20. However, that amount is not sought by Westpac in these

applications for judgment, as is made clear in the affidavit of Mr Reilly[1] at paragraphs 15 and 16.

[6] In paragraph 7(e), the first defendant pleaded that "further money was transferred from [GMW's] Westpac cheque account by [the third defendant] without the authority of [GMW] in the amount of at least $80,000." Perhaps that reference to the third defendant (more precisely a reference to the third respondent as the parties had been named from the proceeding being commenced by an Originating Application) is a mistake and it is an intended reference to Westpac as the third plaintiff. But quite apart from that problem, the allegation is vague and completely unparticularised and, of course, there is no evidence to support it.

[7] Paragraph 7(f) alleges that:

> "… Upon [the first defendant] making enquiries with Michael Stackpool of [Westpac] about transactions in the accountant statements (sic) showing a number of transactions where monies had been remitted to accounts held with foreign financial institutions receivers and managers were appointed within 24 hours."

On any interpretation, this plea does not raise, upon its face, any defence to all or part of Westpac's claim.

[8] I return to the question of whether there is a case to be tried to the effect that GMW was not in default when Westpac made its demand upon the guarantors. It is common ground on the pleadings that when the funds were advanced by Westpac, they were due for repayment on 31 July 2010. Westpac says that after that date, there was a default by the borrower upon which it was able to make demand upon the guarantors. Westpac also pleads that there was a further default, involving an enforcement warrant issued by a third party on 16 August 2010. But the first defendant pleads that there was an agreement made between GMW and Westpac which made irrelevant each of those suggested defaults. The first defendant's case is that it was agreed between the first defendant representing GMW and Mr Hallam representing Westpac, in discussions between them in the period from May to July 2010, that for a certain consideration the Westpac facility would be extended for a period of a further year from 31 July 2010. There is no evidence to support that plea. Westpac relies upon an affidavit from Mr Hallam, who says that he was not authorised to make such an agreement on behalf of Westpac and that he did not purport to do so. Moreover, the first defendant's plea is at odds with the documentary evidence of what occurred between the parties in the latter half of 2010.

[9] The first of these documents is a letter from Westpac to GMW and the guarantors dated 14 October 2010, which was countersigned by each of the addressees thereby agreeing to its terms. In paragraph 2.1 of that letter, it was recorded that the parties agreed "that the term of the facilities … have expired" and that the amounts outstanding were "therefore overdue for payment," constituting a default. (The letter also recorded agreement that there had been the further default pleaded by Westpac, involving the third party creditor.) In paragraph 2.3, the parties agreed that Westpac might, among other things, require the principal and all other amounts outstanding to be paid by GMW and demand payment from the guarantors. By

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1 Court file number 54.

paragraph 3.1, there was an agreed forbearance by Westpac until 31 October 2010 upon certain terms. One such term was that GMW was to provide to Westpac a "debt repayment plan" by 31 October 2010. According to Mr Reilly's affidavit, GMW failed to do so.

[10] On 3 November 2010, Westpac sent a demand for payment to each of GMW and the defendants, requiring payment of all sums owing to Westpac under the relevant facilities by 12 November 2010.

[11] On 9 November 2010, Westpac wrote to GMW and the defendants, extending the time for repayment to 19 November 2010. On 17 November 2010, lawyers acting for GMW and the defendants wrote to Westpac requesting an extension of the time for repayment. That request was not granted.

[12] On 25 November 2010, Westpac wrote to GMW and the defendants. Again, the addressees countersigned the letter. Westpac there wrote that the amounts were overdue, the time for repayment on 19 November having passed.

[13] On 3 December 2010, the second and third defendants, on behalf of GMW, wrote to Westpac, providing details of sales and proposed sales of property whereby the debt would be reduced and asking for additional funding. On 7 December 2010, Westpac wrote to GMW and the defendants saying that they remained in default, and that all amounts owing under the facilities were overdue and that Westpac required immediate repayment of the sum of $12,317,211.99.

[14] This chain of correspondence proves Westpac's case, which was that it made a valid demand upon the guarantors on 3 November 2010. It is irreconcilable with the defendants' pleaded case that there had been an agreed extension for 12 months from 31 July 2010.

[15] Westpac has thereby established that the first defendant has no real prospect of successfully defending its claim and that there is no need for a trial. The indebtedness as at the date of the hearing was proved in the sum of $10,313,364. There will be a judgment for the third plaintiff against the first defendant in this amount together with interest. According to an affidavit of a solicitor for the plaintiffs, the amount owing by the guarantors as at 21 March 2013 was $14,884,331. However that includes enforcement costs which, as already stated, were not pressed at the hearing. Deducting that figure results in an amount of $14,243,018.71, for which Westpac should be given judgment.

[16] I turn to GMW's claim against the first defendant. Its case is that the defendants together effected a misappropriation of five gaming machine licences which had been issued under the *Gaming Machine Act 1991* (Qld). The facts alleged by the plaintiff are largely admitted by the first defendant. He caused a bank account to be opened under the business name "GMW1", which he had registered in July 2011 as its proprietor. He and the second defendant, on behalf of GMW, appointed the Public Trustee of Queensland to sell these licences. They were sold on 22 November 2011 for a sum which, net of commission, yielded proceeds of sale of $226,730. He caused that sum to be paid into the GMW1 account. Those proceeds were withdrawn from the account by 23 December 2011. The ultimate destination of some of the funds is unknown but a substantial part has been paid to, or for the benefit of, the first defendant.

[17] The Statement of Claim alleges that each of the defendants was thereby in breach of his fiduciary duty owed to GMW. Paragraph 4 of the Statement of Claim alleges that the first defendant was at material times a de facto director, as defined in s 9 of the *Corporations Act 2001* (Cth), which the first defendant admits by his pleading. GMW further pleads that this conduct in respect of the licences and their proceeds of sale was a breach by each of the defendants of his duty to GMW under s 180 of the *Corporations Act*, as a result of which loss and damage has been suffered in the amount of $323,900, being the proceeds of sale of the licences before deducting the agent's commission. However, the amount for which GMW seeks summary judgment (and a default judgment against the second and third defendants) is "at least the sum … received for the gaming [licences]", for "damages or equitable compensation."[2] Therefore, it is the amount net of commission which is sought.

[18] The pleaded defence is that GMW was but a trustee of the gaming licences and that they were always beneficially owned by the first defendant. The plea of this trust is unparticularised. For example it is not alleged that he provided the funds for their acquisition.

[19] For GMW it is submitted that such a trust would involve, at least in this case, a contravention of the *Gaming Machine Act* in this way. Section 92 of that Act requires an applicant for a gaming machine licence to provide an affidavit which discloses information about persons who are likely to benefit from the conduct of gaming by the applicant or who could be influential in relation to that conduct. It is submitted that s 92 required the application for these licences to disclose the trust which is now pleaded by the first defendant, if it existed. It was not disclosed. Therefore it is said that this trust should not be given effect.

[20] However it is unnecessary to determine whether s 92 was breached, and if so, its impact upon any such trust. The position is that there is no evidence at all to support this alleged trust. Moreover, the pleading does no more than assert a legal relationship, namely a trust, without pleading the facts from which that arose. Therefore there is no justification for a trial to investigate this assertion, if it were possible to do so fairly given the absence of any pleaded facts.

[21] Once the allegation of a trust is put on one side, it plainly appears that the defendants breached their obligations under s 180(1) of the *Corporations Act*. As that is a civil penalty provision,[3] there must be a declaration of a contravention[4] and compensation for damage suffered by GMW may be ordered against the defendants.[5] Accordingly there will be a declaration and a judgment for the first plaintiff against the first defendant in the sum of $226,730 together with interest on that sum at 10 percent per annum from 22 January 2012.[6]

[22] As for the judgments sought against the second and third defendants, the plaintiffs have established that the Statement of Claim was duly served upon them, by being emailed to solicitors who were then acting on their behalf, on 23 January 2012. That was sufficient to constitute ordinary service according to UCPR

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2 Plaintiffs' written submissions, para. 65.
3 s 1317E.
4 s 1317E(1).
5 s 1317H(1).
6 Being the date of the Statement of Claim and from which interest is sought in the plaintiffs' submissions.

r 112(1)(f)(iii). But it was not personal service upon those defendants as is required for an originating process. This case was commenced by an Originating Application which was filed on 12 January 2012. On the following day, the Originating Application was personally served on the second defendant.[7] It was personally served on the third defendant on the night of 12 January 2012.[8]

[23] On 17 January 2012, a judge ordered that Westpac be joined as a third applicant and that the applicants file and serve a Statement of Claim by 23 January 2012. The Statement of Claim was duly filed and served. That order did not expressly provide that the proceedings should continue as if commenced by a claim: see UCPR r 14(2). But that must be considered to be the effect of the order for a statement of claim.

[24] On 21 February 2012, the proceeding was placed on the Commercial List and orders were made which included an order that each defendant was to file his Defence and Counterclaim, if any, by 14 March 2012. There was then no appearance for the second and third defendants. But the solicitor then acting for them had consented to the orders and communicated that consent to the Court.[9]

[25] The default judgments are sought under Division 2 of Chapter 9 of the UCPR. By r 281(1), this division applies if a defendant in a proceeding started by a claim has not filed a Notice of Intention to Defend and the time allowed under r 137 to file the notice has ended. As I have said, the proceeding, although not actually commenced by a claim, was ordered to continue as if started by a claim. The time prescribed by r 137 was 28 days after the day the claim was served. Here no claim was served. But in a case where there is an order for the proceeding to continue as if commenced by a claim, that 28 day period must be taken to have run from the service of the Statement of Claim, subject to any extension of that time as was given by the order of 21 February 2012. The result is that Division 2 of Chapter 9 applies. Rule 282 requires proof of service of a claim. But again, where no claim has been filed, it is proof of the service of the Statement of Claim which will engage a relevant rule here.

[26] The plaintiffs submit that each of the causes of action for which it should be given a default judgment is one for a debt or liquidated demand and is thereby within r 283. I accept that this is so for Westpac's claim. But it is not the case for the compensation or damages claim made by GMW. That cause of action would be within r 284. The present applications therefore seem to be within r 287. If the claim by GMW is not within r 287, then there is a power to give judgment by default under r 288.

[27] The defendants are taken to have admitted each of the allegations in the Statement of Claim. As should appear from the reasons for giving summary judgment, Westpac should have a judgment consistently with the Statement of Claim but reduced in amount as Westpac seeks. There will be judgment for the third plaintiff against the second and third defendants in the same sum as Westpac's judgment against the first defendant. There should also be declarations and a money judgment against the second and third defendants, as there will be against the first defendant.

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7 Affidavit of Mr Wellmeela, court file number 40, para. 2.

8 Affidavit of Mr Catchpoole, court file number 14, para. 5(d).

9 Ex TDW7 to the affidavit of Mr Williams filed 25 September 2012.