SUPREME COURT OF QUEENSLAND

CITATION:	*RB Lease Pty Ltd v Heron* [2013] QCA 181
PARTIES:	**RB LEASE PTY LTD** ACN 144 560 056 (appellant) **v** **JOHN SIMON HERON** (respondent)
FILE NO/S:	Appeal No 9535 of 2012 SC No 3891 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2013
JUDGES:	Holmes JA and Daubney and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The judgment and costs order below are set aside.** **3. The respondent is to pay the appellant's costs of the application and of this appeal.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the appellant company as assignee of the lender's rights under a loan agreement sued the respondent for the amount owed under his guarantee of the agreement – where the agreement provided for an advance to be made by direction – where the respondent, having filed an affidavit deposing that the borrower had not received the moneys to be advanced under the agreement, applied for summary judgment under r 293 of the *Uniform Civil Procedure Rules* – where a director of the appellant exhibited to an affidavit a statement of account under its name showing the loan advance and payments made in respect of it, without explanation of the source of the information contained it – where the appellant's director deposed that he anticipated obtaining through disclosure by

the respondent and the liquidators of the borrower company documents proving the making of the advance – where the primary judge found that the appellant had not proved that the advance was made and gave judgment for the respondent – whether the statement of account provided some evidence, albeit of slender weight, of an advance – whether on the evidence before him, the primary judge could be satisfied that the appellant had no real prospect of success, and that there was no need for a trial

Corporations Act 2001 (Cth), s 286, s 1305
Uniform Civil Procedure Rules 1999 (Qld), r 293, r 295

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, cited
Bolton Properties Pty Ltd v J K Investments (Australia) Pty Ltd [2009] 2 Qd R 202; [2009] QCA 135, cited
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, cited
Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) & Anor [2003] 1 Qd R 259; [2002] QCA 224, cited

COUNSEL: R Derrington QC, with M Cooke, for the appellant
P Davis QC, with D de Jersey, for the respondent

SOLICITORS: Thynne and Macartney for the appellant
Minter Ellison for the respondent

[1] **HOLMES JA**: The appellant, RB Lease Pty Ltd, sued the respondent, Mr Heron, for an amount of $1,451,738.00 with interest, as the amount owed under his guarantee of a loan agreement. The loan agreement was between Cutforth Pty Ltd and Great Southern Finance Pty Limited. It was pleaded by the appellant, but not admitted by Mr Heron, that Great Southern Finance had assigned its rights under the loan agreement and the guarantee to RB Lease.

[2] It was common ground that the loan agreement was made for the purposes of a tax minimisation scheme involving timber plantations, which had collapsed. The responsible entity for the timber plantation project was Great Southern Managers Australia Limited. The scheme entailed the advance of money by Great Southern Finance to investors in the project by paying fees to Great Southern Managers Australia Limited, the amount of that payment being claimed by the investor as a tax deduction. Woodlots were to be issued to the investor, who would then make repayments to Great Southern Finance.

[3] Mr Heron obtained summary judgment against RB Lease under r 293 of the *Uniform Civil Procedure Rules* 1999, essentially on the basis that RB Lease had not proved that it had, as pleaded, advanced the principal sum under the loan agreement. RB Lease appeals against that judgment on a number of grounds, contending that the primary judge erred in his approach, in principle, to the application for summary judgment; in refusing to admit parts of the affidavit evidence which RB Lease relied on; in his approach to the evidence; and, in the alternative, in refusing RB Lease's request for an adjournment of the application.

The pleadings

[4] The second amended statement of claim pleaded: the loan agreement under which Great Southern Finance agreed to advance the principal sum of $1,101,000 by way of loan to Cutforth; that Mr Heron had signed an application for the loan both as director of Cutforth and as guarantor; that one of the terms of the application gave Great Southern Finance a power of attorney to sign the loan agreement and the guarantee on behalf, respectively, of the borrower and guarantor, which duly occurred; that the principal sum had been advanced to Cutforth; that Great Southern Finance's rights under the loan agreement and guarantee had been assigned to RB Lease; that Cutforth had defaulted in payment from mid 2008, notice of demand having been given to it, and to Mr Heron under the guarantee; and that the principal and interest remained outstanding. That pleading, filed on 10 August 2011, was met by a defence in which Mr Heron, *inter alia*, denied the allegation that Great Southern Finance had advanced the principal sum to Cutforth.

The material filed on the summary judgment application

[5] In August 2012, Mr Heron applied for summary judgment, with alternative applications that the proceeding be transferred to the Supreme Court of Victoria and that RB Lease provide security for his costs. He deposed in an affidavit that Cutforth had never received the principal sum under the loan agreement.

[6] RB Lease filed an affidavit from its director, Mr Wunsch, which contained the following paragraphs material to this appeal:

> "3. On or about 30 November 2010, the plaintiff entered into an agreement with Great Southern Finance Pty Limited (In Liquidation) ACN 009 235 143 (**'GSF'**) and its liquidators, Darren Weaver, Martin Jones, Andrew Saker and James Stewart (the **'Liquidators'**), pursuant to which GSF agreed to sell, transfer, assign and deliver to the plaintiff its legal and beneficial right, title and interest in the debt owing by the first defendant and second defendant to GSF.
>
> ...
>
> 6. I have reviewed the plaintiff's records relating to the debt assigned with respect to the first and second defendant. The relevant records/documents that show the terms of the relationship between GSF [Great Southern Finance] and the defendants, and then between the plaintiff and the defendants are the documents referred to in this Affidavit Paragraphs 7 to 18 of this affidavit set out circumstances surrounding the debt, to the best of my knowledge and belief.
>
> 7. On or about 31 March 2006, GSF entered into a loan agreement with the first defendant (the **'Loan Deed'**) and guarantee with the second defendant (the **'Guarantee'**) pursuant to which $1,101,000.00 was advanced to the first defendant.
>
> ...
>
> 9. The purpose of the Loan Deed was to fund the purchase of 367 woodlots at the cost of $1,101,000 in the project called

Great Southern Plantations 2005 ARSN 112 744 877 (the **'Plantations Project'**).

10. The Plantations Project was established by Great Southern Managers Australia Limited (now in liquidation) ACN 083 825 405 (**'GSMAL'**) as a vehicle for investment in plantation forestry throughout Australia.

...

16. To give effect to the Application and so that the defendants could use the Plantations Project as an investment/tax minimisation strategy, a loan account was opened by GSF (**'Account'**) and the advance of $1,101,000 (the **'Advance'**) was given to the first defendant on 1 July 2005 and comprised of:

    (i) GSF's costs and expenses relating to the loan set out in clause 7 of the Loan Deed (**'Costs and Expenses'**); and

    (ii) Fees payable by the first defendant to GSMAL under the Plantations Agreement it entered into with GSMAL with respect to the purchase of the woodlots (**'Fees payable to GSMAL'**),

17. Pursuant to clause 2 of the Loan Deed, the Advance to the first defendant was directed to satisfy the Costs and Expenses (of GSF) and the Fees payable to GSMAL (to have an investment/allocation of woodlots in the Plantations Project).

18. The first defendant was allocated woodlots numbered 43369 - 43735 by GSMAL upon payment of the Fees payable to GSMAL. The first defendant then had the benefit of the investment in the Plantations Project and could use the investment to claim tax deductions as described above and in the PDS (subject to its individual circumstances).

...

22. I have been informed by Elizabeth Abernethy, whom I know from my own experience to be a lawyer in the employ of the plaintiff's solicitors, Thynne & Macartney, and I believe that Thynne & Macartney have requested documents from the Liquidators with respect to, inter alia, the above advance, however, due to the current application the plaintiff has not called up those documents. In any event, I believe that documents relating to the said advance should be in the power and possession of the second defendant but have not been exhibited to the second defendant's affidavit material."

Mr Wunsch exhibited to his affidavit, among other things, the application for finance, the loan deed, a product disclosure statement for the timber plantation project and a document headed "rbfinance".

[7] The loan deed made between Great Southern Finance as lender and Cutforth as borrower contained the following clause:

> "2 Provision of facility
>
> (a) The parties have agreed that the Lender will lend the Funds to the Borrower at the date on which the Fees are payable as specified in Item 5 of the Schedule.
>
> (b) The Borrower Irrevocably directs the Lender to advance the Funds on the Date of Advance by satisfying:
>
> (1) the Costs and Expenses; and
>
> (2) the Fees payable under the Agreement or a portion of them equal to the balance of the Funds after the payment of the Costs and Expenses…"

[8] The "Costs and Expenses" were defined elsewhere in the deed as meaning various fees and penalties arising from delay and enforcement costs, while the "Fees payable under the Agreement" were, rather unhelpfully, defined as "the Fees payable by the Borrower to GSMAL [Great Southern Managers Australia Limited] under each Agreement…". An "Agreement", where a timber plantation was concerned, was a "plantations land management agreement". No such agreement was in evidence, although it was apparent from the product disclosure statement that the borrower had to pay fees of $3,000 per "woodlot" consisting of .33 hectares. The application for term finance showed that Cutforth was seeking 367 such lots, at a cost of $1,101,000.

[9] The "rbfinance" document, Mr Wunsch deposed, was a copy of an ordinary book of account of RB Lease, and the entries in it were made in the usual course of the latter's business. It purported to be a statement of account, commencing with the loan advance of $1,101,000 on 1 July 2005 and showing interest accruing and repayments made. It identified "RB Finance" as "Lender", gave the account name "Cutforth Pty Ltd" and was addressed to "The Directors, Cutforth Pty Ltd". (Mr Wunsch did not explain the relationship between RB Lease and RB Finance, but the former is named in the proceedings as trustee for the latter.) The document bore a contract number and an allotment number. The allotment number corresponded with the number appearing on the schedule to the loan deed and, as counsel pointed out here, the contract number matched the loan identification number on correspondence which Great Southern Finance had sent to Mr Heron and to Cutforth.

Arguments and rulings on the summary judgment application

[10] On the hearing of the application for summary judgment, counsel for Mr Heron identified the real issue as being

> "whether the present plaintiff has any prospect on the material before your Honour of proving at trial that there was in fact a payment made by Great Southern Finance to Great Southern Management [sic]."

He objected, successfully, to paragraph 3 of Mr Wunsch's affidavit, on the basis that it did not exhibit the assignment agreement or identify the provisions relied on,

and thus did not comply with r 295(3) of the *Uniform Civil Procedure Rules*. (A copy of the assignment, with the purchase price of the rights and benefits assigned redacted, was, however, exhibited to another affidavit). Those parts of paragraphs 7, 16 and 17 which referred to the advance to Cutforth were struck out as hearsay.

[11] As to paragraph 18, counsel for RB Lease pointed, for evidentiary support, to the fact that the loan deed included an acknowledgement that the principal sum was borrowed to acquire the charged property which, by schedule, was identified as 367 woodlots numbered in a range between 43369 and 43735. His Honour, noting that the loan deed recorded that the purpose of the loan was to enable the allocation to be made, but not that it in fact took place, struck out the reference to allocation of woodlots.

[12] After those rulings on evidence, counsel for Mr Heron submitted that RB Lease could not prove that the advance was made and that the suggestion in paragraph 22 of Mr Wunsch's affidavit that documents might be available from the liquidator did not warrant an exercise of discretion against entering judgment. Counsel for RB Lease argued that his client ought not be denied an opportunity to re-plead so as to make it clear that the money was advanced, not directly to Cutforth, but at Cutforth's direction pursuant to the loan deed, for the purpose of acquiring the woodlots as the deed provided. The "rbfinance" document showed that Cutforth had made repayments in a manner consistent with the existence of the loan agreement. In response, it was argued for Mr Heron that the loan account, at best, showed that Cutforth might have a cause of action for money not received, and that re-pleading would not assist, because RB Lease could not prove that the advance was made.

The primary judge's reasons for granting judgment

[13] The learned primary judge commenced his reasons by setting out the test under r 293. He noted that it had been clear since the defence was filed and served and, more particularly, since the swearing of Mr Heron's affidavit, that it was denied "that the money had passed". His Honour made this observation:

> "When parties come to a summary judgment application, both sides must come fully armed and ready to fight. They must put their best foot forward."

[14] The primary judge went on to remark that the absence of evidence that RB Lease was entitled to bring the action as an assignee was important, but that he preferred to rest his decision on the dispute concerning whether there was an advance. The striking out of parts of Mr Wunsch's affidavit had led to the absence of any evidence that there was any money advanced. The statement of account exhibited to Mr Wunsch's affidavit could not be accurate, because it described RB Finance as the lender; the basis of the figures in the account was not disclosed; and it did not establish the making of the advance. His Honour accepted that RB Lease had a cause of action, but, he said, what was being considered was "whether or not [RB Lease] has any real prospect of succeeding on all or a part of [its] claim". RB Lease's failure to seek documents from the liquidators for presentation at the hearing was sufficient reason to deny any adjournment.

[15] The primary judge expressed himself "satisfied, on the basis of the sworn evidence, that no money was advanced". In the absence of any evidence establishing the

advance, RB Lease had, his Honour said, no real prospect of succeeding on its claim against Mr Heron. He gave judgment for Mr Heron.

The submissions on appeal

[16] The appellant submitted that the primary judge had incorrectly regarded it as necessary for RB Lease to establish, at the time of the hearing of the application, that it had a prima facie case against Mr Heron. His reference to the parties becoming "fully armed" and putting "their best foot forward" indicated a view that it was necessary for RB Lease to establish, by evidence which would be admissible in a trial, that Great Southern Finance had, in fact, advanced the funds to Cutforth. That view had resulted in his refusal to accept evidence which attested that material might be available to show the loan transaction took place; his refusal to grant an adjournment to allow RB Lease to put forward further and better material; and his refusal to grant an adjournment to allow amendment of the pleadings.

[17] There was a need for a trial: the evidence showed that Cutforth had paid interest on the loan. Mr Heron had deposed that Cutforth had not received the principal sum, but it did not follow that it was not advanced. The deed provided for an advance by direction of the funds in satisfying the costs and expenses and the fees payable under the agreement. To conclude that RB Lease would not be able to establish its claim at a trial, the primary judge would have had to be confident that interlocutory processes would not result in discovery of relevant material; a conclusion which could not properly have been reached. The effect of granting summary judgment was to deprive RB Lease of access to documents likely to be in the possession of Cutforth, Mr Heron or the liquidators, which could be obtained through disclosure.

[18] The "rbfinance" loan account should have been accepted as correct and admissible. Mr Wunsch had deposed to it as being taken from RB Lease's books and records maintained in the usual course of business, and it identified, on its face, a loan transaction in respect of which interest had accrued. The applicant pointed to s 1305 of the *Corporations Act* 2001 (Cth) which provides:

> "(1) A book kept by a body corporate under requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.
>
> (2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1)."

(Section 286 of the Act requires a company to keep written financial records which correctly record and explain its transactions and financial position and performance.) The document was sworn to be one kept by RB Lease; there was a presumption, not rebutted, that it was a book kept by the company under a requirement of the *Corporations Act*. It was, accordingly, *prima facie* evidence of its contents.

[19] The respondent submitted that the primary judge had properly excluded the relevant parts of Mr Wunsch's affidavit as hearsay, because he was a director not of Great Southern Finance but of RB Lease, which was not involved in the advances. None of the documents he had produced was evidence that the advance had actually been made; at best, they were evidence of an agreement that the advance would be made. The "rbfinance" document was prepared by RB Lease, not the lender, and

Mr Wunsch could not swear from his own knowledge anything about the circumstances of the proposed loan. The judge had rightly observed of the "rbfinance" document that Mr Wunsch had not given any explanation of how it came into being; on its face, it asserted that the advance was made by RB Finance in 2005, which could not be right, and the document merely asserted as hearsay that there was a loan. In any event, although Cutforth may have proceeded to make payments as if there were an advance made, that did not prove that it was, in fact, made.

[20] The respondent had adduced admissible evidence that no funds were advanced to Cutforth as alleged, which was not contradicted by any admissible evidence from RB Lease. The appeal, in part, was against the refusal of an application for an adjournment, with which the court would not readily interfere: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*.[1] There was no material before the primary judge to show that any utility would be served in adjourning the application. There was no explanation for RB Lease's failure to pursue relevant documents from the liquidator.

Discussion

[21] There are two limbs to r 293(2), which permits the court to give summary judgment for a defendant: the judge must be satisfied that the plaintiff has no real prospect of succeeding on its claim and that there is no need for a trial of the claim. If the court reaches that state of satisfaction, it has a discretion to give summary judgment. It is not necessary that the defendant establish that the claim is "bound to fail"; [2] the inquiry is whether there exists a real, as opposed to a fanciful, prospect of success.[3]

[22] In *Agar v Hyde*,[4] Gaudron, McHugh, Gummow and Hayne JJ spoke of the caution which a court should exercise before dealing summarily with a proceeding:

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[5]

[23] The approach of the judge in the present case may, in my view, have been somewhat too robust. It is unlikely to be possible for a plaintiff responding to a summary judgment application to adduce evidence in admissible form which proves its case in its entirety; but what is in issue on such an application is not the defendant's liability, but whether the plaintiff has reasonable prospects of establishing it. It fell to the appellant here to show, not that it could succeed on its claim at the time of the summary judgment application, but that there was a real prospect that it would at trial. For that purpose, it might well suffice to outline the evidence to be obtained and to identify sources from which it was obtainable.

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1 (1981) 148 CLR 170 at 177.

2 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 234; *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] 2 Qd R 202 at 206, 216.

3 *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259 at 264.

4 (2000) 201 CLR 552.

5 At 575-576.

[24] RB Lease's preparation for the summary judgment application was lamentable, and the notion of refraining from obtaining relevant documents from the liquidators because of the application was absurd. Nonetheless, I do not think it could properly be said that it would not be able to prove that the advance was made. The primary judge erred in reaching a state of satisfaction on the basis of Mr Heron's affidavit that no money was advanced, because it did not go so far. What was deposed was simply that Cutforth had not received the principal sum, which was an outcome consistent with the advance by direction provided for in the loan deed. The pleading was misleading in its reference to an advance to Cutforth, but it is plain that counsel for Mr Heron on the summary judgment application appreciated the significance of the advance by direction clause in the loan deed; he identified the issue as whether RB Lease had any prospect of proving a payment by Great Southern Finance to Great Southern Managers.

[25] Although the "rbfinance" document was of questionable weight in the absence of explanation of its sources, it provided some evidence suggesting the existence of an advance. It was possible that better documentation of the advance would emerge on discovery. It could not be said that there was no evidence of an advance, or, in those circumstances, that there was no need for a trial. In my respectful view, the learned primary judge erred in giving summary judgment on that state of affairs.

[26] The appeal should be allowed and the judgment and costs order given below in the respondent's favour set aside. The respondent should pay the appellant's costs of the application and of this appeal.

[27] **DAUBNEY J:** I respectfully agree with Holmes JA.

[28] **PETER LYONS J:** I agree with the reasons of Holmes JA and the orders her Honour proposes.