SUPREME COURT OF QUEENSLAND

CITATION:	*Thomas v Octobay Pty Ltd as Trustee for the FNQ Mezz Trust* [2013] QCA 321
PARTIES:	**MATTHEW EDWARD THOMAS** (applicant) **v** **OCTOBAY PTY LTD ACN 010 838 516 AS TRUSTEE FOR THE FNQ MEZZ TRUST** (respondent)
FILE NO/S:	Appeal No 4237 of 2013 SC No 11357 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2013
JUDGES:	Gotterson and Morrison JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Refuse the applications.** **2. The applicant pay the respondent's costs.**
CATCHWORDS:	APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN REFUSED – where the applicant was the director of a company – where the applicant executed a personal guarantee in favour of the respondent to repay monies – where the guarantee was called up but not honoured – where the respondent applied for summary judgment on both the claim and counterclaim – where the primary judge allowed summary judgment to a limited extent on the condition the applicant pay $270,000 as security to permit the matter to trial – where the respondent has entered judgment – whether there is a good arguable case – whether the extent of delay is explained – whether the applicant will be disadvantaged by the making of the order – whether there is some competing disadvantage to the respondent which outweighs the disadvantage suffered by the applicant APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF

TIME – WHEN REFUSED - where the applicant was the director of a company – where the applicant executed a personal guarantee in favour of the respondent to repay monies – where the guarantee was called up but not honoured – where the respondent applied for summary judgment on both the claim and counterclaim – where the primary judge allowed summary judgment to a limited extent on the condition the applicant pay $270,000 as security to permit the matter to trial – where the respondent has entered judgment – whether there is a good arguable case – whether there is a good arguable case – whether the extent of delay is explained – whether the applicant will be disadvantaged by the making of the order – whether there is some competing disadvantage to the respondent which outweighs the disadvantage suffered by the applicant

APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – APPLICATION FOR SUBSTITUTION OF PARTIES – WHEN GRANTED – where Octobay Pty Ltd no longer has any interest – where Western Gateway Pty Ltd is directly affected

Uniform Civil Procedure Rules 1999 (Qld)

Di Iorio v Norris [2010] QCA 191, cited
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Raschilla & Anor v Westpac Banking Corporation [2010] QCA 255, cited
Spencer & Anor v Hutson & Ors [2007] QCA 178, cited

COUNSEL: The applicant appeared on his own behalf
M R Byrne for the respondent

SOLICITORS: The applicant appeared on his own behalf
Mullins Lawyers for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by McMeekin J and with the reasons given by his Honour.

[2] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Justice McMeekin. I agree with those reasons and with the orders proposed.

[3] **McMEEKIN J:** Matthew Thomas is the proposed appellant ("the applicant"). He appears unrepresented.

Background Facts

[4] The applicant executed a personal guarantee in favour of the respondent Octobay Pty Ltd ("Octobay") which was then acting as the trustee for the FNQ Mezz Trust. Octobay had advanced monies to a company of which the applicant was the director. The guarantee by its terms secured the performance of the obligation to repay these monies.

[5] Western Gateway Pty Ltd ("the respondent"[1]) has now replaced Octobay as the trustee of the FNQ Mezz Trust. An order was made on the hearing of the application substituting the respondent for Octobay as the respondent is a person directly affected by the application and proposed appeal and Octobay no longer has any interest in either.[2]

[6] There was default by the primary debtor. The guarantee was called up but not honoured. These proceedings were commenced. The applicant defended and counterclaimed. The respondent applied for summary judgment on both the claim and counterclaim. The primary judge declined to grant summary judgment on the respondent's claim, allowed summary judgment to a limited extent in respect of the counterclaim, but as a condition of permitting the matter to go to trial required that the applicant pay into court, or otherwise provide security, in the sum of $270,000. In default of providing the security the orders provided that the respondent was at liberty to enter judgment for the amount claimed.

[7] The point of the amount required as security was to protect the respondent "against the further damage that it will suffer by reason of the delay" until hearing, namely the interest to which it would become entitled under the terms of the guarantee. There is no dispute about the amount assessed as fairly representing the likely further damage.

[8] No appeal was brought within the 28 day period allowed under the rules. The respondent has entered judgment. The applicant seeks:

(a) An extension of time within which to appeal;
(b) A stay of enforcement of the judgment entered;
(c) That the order of the primary judge imposing the condition that he provide security be set aside; and
(d) That the matter be remitted back to the trial division for hearing of the proceedings on its merits.

Relevant Principles

[9] Similar considerations apply to both the applications for extension[3] and stay of enforcement[4]. The relevant considerations are:

(a) Whether there is a good arguable case;
(b) The explanation for and extent of any delay;
(c) Whether the applicant will be disadvantaged by the making of the order;
(d) Whether there is some competing disadvantage to the respondent which outweighs the disadvantage suffered by the applicant.

A Good Arguable Case

[10] On any appeal the essential question would be whether the primary judge's decision to impose the condition for security that he did was a legally flawed exercise of his discretion. On these applications the issue is whether there is a good arguable case that the decision was wrong in this sense. It is not in issue

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1 I will use the term as encompassing the relevant trustee at the time.
2 See r 750 UCPR.
3 *Di Iorio v Norris* [2010] QCA 191 at [4].
4 *Raschilla v Westpac Banking Corp* [2010] QCA 255.

that the primary judge had the power to impose the condition: see rr 292 and 298 *Uniform Civil Procedure Rules* 1999 ("UCPR").

[11] I cannot see that the primary judge's decision was wrong, let alone that there is a good arguable case that he was wrong.

[12] The factors that motivated his approach were:

(a) The respondent demonstrated that it was entitled to judgment on the basis of the executed documents that it proved. The fact of execution and the effect of the written terms of the documents were not in dispute;

(b) The only basis on which the respondent could be denied its judgment was that for some reason it should be held that the written terms were not effective in setting out the true agreement between the parties;

(c) To demonstrate that the written agreements did not set out the true agreements the applicant alleged an oral variation agreement or alternatively misleading and deceptive conduct;

(d) There were two problems with the alleged oral variation argument - there was a lack of direct evidence to support the applicant's claims and the oral terms relied on were inconsistent with the written contracts despite being entered not long before;

(e) There is high authority against allowing a party to a written agreement to avoid its effect: *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at [32]-[33] - hence there was no real prospect of success based on any contemporaneous or prior inconsistent oral agreement;

(f) As well there were difficulties with the case based on misleading and deceptive conduct in terms of proof and causation sufficient for the primary judge to describe the applicant's claims as "shadowy".

[13] The arguments that the applicant advances do not touch on the points that justified the primary judge's approach. Many of the submissions advanced the proposition that there was enough shown to justify there being a trial. That is not helpful. That was precisely what his Honour decided.

[14] The only real issue of fact that could possibly be in contention is the primary judge's characterisation of the defence and counter claim as "shadowy". But that description was fully justified.

[15] The applicant seeks to avoid the effect of a guarantee entered into by him on 12 January 2010 by which he agreed that the "guarantee previously executed by him remains in full force and effect and extends to the Borrower's obligations under the Facility as varied by this letter".[5] The applicant seeks to argue, contrary to the guarantee that he signed, that the guarantee did not remain in force and did not extend to all of the "Borrower's obligations". He does so in reliance on alleged representations made the prior November or December to the effect that the guarantee would be a non recourse arrangement. That claim has obvious inherent improbabilities.

[16] As well, and contrary to the applicant's assertions, the detail of the conversations relied on and the particulars of the occasions on which the representations were

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5 AB 230.

made are not explained. A failure to descend to such precise particulars, particularly in the face of the respondent's overwhelming case on the documents produced, merited the trial judge's concern and description.

[17] The applicant argues that he had available evidence to support his claims, including corroborative eye witness testimony to certain conversations, but could not advance his proofs for various reasons. The primary judge knew that was his assertion. No doubt that was one reason why the primary judge was cautious in his approach to the summary judgment application. The fact remains however that the evidence was never proffered.

[18] In all the circumstances the defence and counter claim proffered fully merited the primary judge's description as being "shadowy".

[19] Other complaints are made but they do not go to the substance of the matter.

[20] A complaint is made about non compliance with the rules relating to service of a summary judgment application. Given that the applicant was successful in staving off summary judgment it is difficult to see the relevance. Assuming some relevance there is nothing in the complaint. Eight business days notice is required[6] and the applicant complains that he barely had one business days notice.

[21] In fact the summary judgment application was filed on 3 October and was eventually determined on 19 November. There was an amendment to the application made on 8 November – four days, not business days, before the initial hearing date and 11 days before the final hearing date. But notice of the proposed amendment had been given by email of 23 October.[7] That amendment added nothing significantly to the arguments – it was to add an application for summary judgment in relation to the counterclaim. The applicant had previously supplied a draft of the defence and counterclaim and eventually filed the document on 25 October and so after the original summary judgment application.

[22] The arguments in relation to each application, that is the right to summary judgment whether on the defence or the counterclaim, were effectively the same. When pressed at the hearing of the application to explain any disadvantage accruing to him by reason of the timing of the notice of amendment the applicant conceded that there was no such disadvantage.

[23] The primary judge in fact adjourned the matter for a week to enable the applicant to put forward what further evidence that he could. There is no prejudice shown brought about by the length of notice that the applicant had of the amended application.

[24] The applicant complains of the late delivery of particulars by the respondent as in some way impacting on his capacity to put forward his defence. This complaint is difficult to follow at several levels. Why particulars of the plaintiff's case would assist the defendant to plead a contrary case asserting distinct oral agreements and representations which were denied as having occurred by the respondent is not easy to follow.

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6 Rule 296 *Uniform Civil Procedure Rules* 1999.

7 AB 848.

[25] In the course of his oral argument the applicant complained that the particulars did not reveal to whom the monies advanced were paid and by whose authority. That is so and unsurprising. The request for particulars did not seek that information. As the respondent pointed out the applicant informed the primary judge that he had "no issues" with the particulars supplied.[8]

[26] The particulars requested and supplied largely reflected information previously set out in affidavits filed and served by the respondent on about 4 October. The parties are in dispute about when service of the request was affected and that dispute is not possible to resolve. What is clear and uncontentious is that particulars were given two days before the applicant filed his amended defence and counter claim, three weeks before the initial hearing before the primary judge and four weeks before the final hearing.[9] The applicant had ample time to adjust and present his case.

[27] The gravamen of the applicant's complaint is that the imposition of the condition that he provide security effectively stifles the litigation as he is impecunious. The applicant sought and obtained leave at the hearing of this application to file and read an affidavit by himself sworn two days before the hearing in which he asserts that he is now, and was at the time of the hearing before the primary judge, impecunious. No such submission was made to the primary judge.

[28] The applicant complains that he was not given any opportunity to make submissions or provide evidence to the primary judge that he was impecunious. That is simply not accurate. The issue was squarely raised by the primary judge with counsel for the respondent and a discussion ensued as to what amount might represent the prospective further loss to the respondent. The primary judge then discussed the issue with the applicant. The applicant said nothing then about impecuniosity or stifling litigation. His explanation now is that he was ignorant of the law. It seems odd, to say the least, that it would not occur to any lay person to say to a judge, when advised that the judge was contemplating ordering that he pay security in the sum of $270,000, to inform the judge that he didn't have that amount of money or any amount like it. What "law" one need know to make so obvious a point is not clear.

[29] In the course of argument the applicant maintained that he did not comprehend what it was that the primary judge was proposing when he spoke of security. That is not possible to accept. The primary judge discussed at some length with counsel for the respondent the rate at which interest was accruing on the respondent's case. When invited to respond the applicant made two points one of which was that the respondent already had security over the company's assets.[10] It is self evident that in context the response indicates a very clear understanding that the payment of further monies was under discussion. The primary judge then pointed out that there was no evidence that those assets of the company would be sufficient to discharge the debt. Again it is self evident that it was assets other than the company's assets that was the focus – whose assets but the applicant's?

[30] The respondent argues that the applicant is no novice when it comes to litigation. He has completed a law degree, has represented a company of which he was the

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8 See AB 8/3.

9 See the applicant's affidavit of 12 November 2012 at para 3 – AB 844, 848.

10 See AB 47-48.

director in proceedings before the Court of Appeal, and is or has been involved in several proceedings before this Court and the Federal Circuit Court. The primary judge observed that the applicant had "shown some aptitude in responding to the application and in preparing relevant documents".[11] I would make the same observation regarding the applicant's appearance on this application. At the very least the applicant was well aware that he had every right to speak up and inform the primary judge of relevant matters and he demonstrated in his appearances in these proceedings that he was not shy in doing so.

[31] The relevant principles for the setting aside of a discretionary judgment are not in doubt and were explained in *House v The King*.[12] The applicant must show that the primary judge misunderstood the law, misapprehended the facts, or that the exercise of the discretion was so unreasonable that there must have been some such misunderstanding or misapprehension. I cannot see that the applicant has any prospect of making out any of those grounds on an appeal.

Delay

[32] I turn then to the question of delay. It is a substantial one – about five months. That lengthy delay must be assessed against the background that from the respondent's perspective its prospective loss of interest was running at $30,000 per month, a matter well known to the applicant given the express discussion with the primary judge. It should have been obvious to the applicant that he should not tarry.

[33] The applicant did not appeal the judgment below. He does not say that he was ignorant of the fact that there was such a thing as an appeal process. He had in fact brought an appeal during 2012 in another matter: *Thomas v St George Bank*.[13] Effectively he says he did not realise that an appeal was the correct process.

[34] What the applicant did do was apply in the trial division for a stay of enforcement of the decision of the primary judge and other orders. That application was filed on 18 December 2012, the day that the security was due to be provided. It came on for hearing on 14 January 2013. The respondent then argued successfully that the applicant's then application was misguided and that he ought to have first appealed the decision.[14] Philippides J evidently agreed and dismissed the application.

[35] Following the dismissal of his application on 14 January 2013 the applicant did nothing until 10 May 2013 when the present stay application was filed. The reasons given to explain this long delay are entirely unconvincing. In summary they are that the applicant is a self represented litigant, that he has no financial capacity to instruct lawyers, that he has the care of a two year old son, and that he has been busy with other litigation.[15]

[36] In the meantime the respondent had entered the judgment that it was entitled to under the orders of the primary judge, filed a bankruptcy notice against the

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11 See para [15] of the Reasons at AB 1037.
12 (1936) 55 CLR 499 at 505.
13 CA 9453/12 filed 19 October 2012.
14 See AB 1019 at para 17-18.
15 Affidavit of the applicant filed 10 May 2013 at AB 1049 para 15

applicant and then served the notice. Service of the notice was affected on 22 April 2013.

[37] As the respondent submits it is difficult to avoid the inference that it was the service of the bankruptcy notice that prodded the applicant into action and that to that point the delay was quite deliberate. It was certainly not through ignorance of a need to bring an appeal.

[38] This Court has previously held that an unexplained and lengthy delay, with the consequent inference of a deliberate decision not to proceed with an appeal, should result in a refusal of an extension unless "it was demonstrably necessary to prevent an injustice": *Spencer v Hutson*.[16] No such necessity appears here.

[39] Given that the respondent has pursued its rights and incurred further costs while the applicant stood by for so long is good reason against the exercise of the discretion in favour of the applicant.

Comparative Disadvantages

[40] A comparison of the disadvantages to each side if these applications were acceded to certainly does not favour the applicant.

[41] If the condition for security was removed and the trial of the proceedings allowed to proceed the respondent would be faced with the incurring of substantial further costs and, according to the applicant, if successful, have no prospect of recovery of any judgment as the applicant has no assets. As well the interest would continue to accumulate at a rate of more than $30,000 per month. Any trial would be many months away.

[42] Against that the applicant presumably will be bankrupted. That is a serious matter and has reputational consequences. But given the applicant's impecuniosity it will not significantly disadvantage him in a financial sense.

Conclusion

[43] Given the poor prospects of success of any appeal and the lengthy and essentially unexplained delay I would refuse the applications and order the applicant to pay the respondent's costs.

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16 [2007] QCA 178 at [31] per Keane JA (Williams and Jerrard JJA agreeing)