SUPREME COURT OF QUEENSLAND

CITATION:	*Boral Resources (Qld) Pty Ltd v Middleton & McLauchlan* [2014] QSC 195
PARTIES:	**BORAL RESOURCES (QLD) PTY LIMITED** **ACN 009 671 809** (plaintiff) **v** **WILLIAM JOSEPH MIDDLETON** (first defendant) **LACHLAN McLAUCHLAN** (second defendant)
FILE NO/S:	9459 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2014
JUDGE:	Martin J
ORDER:	**1. That judgment be entered for the plaintiff; and** **2. That the plaintiff bring in minutes of order**
CATCHWORDS:	GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – CONSTRUCTION AND EFFECT – EXTENT OF LIABILITY – LIMITATION OF AMOUNT - where the defendants were directors of a company, and entered into a guarantee in respect of certain obligations owed by that company – where the guarantee purported to charge interests in real property held by both defendants – where the company defaulted on its obligations, and the plaintiff called upon the guarantee – whether the guarantee was enforceable against the second defendant according to its terms – whether the charging clause was an unenforceable penalty *Uniform Civil Procedure Rules* 1999 (Qld), rr 166(1), 166(5) *Allen's Asphalt Pty Ltd v SPM Group Pty Ltd* [2010] 1 Qd R 202; [2009] QCA 134, followed *Boral Bricks Pty Ltd v Davey* [2010] QSC 131, referred to *Boral Resources (Qld) Pty Ltd v Andrews* [2010] QSC 491,

referred to
Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79; [1914] UKHL 1, cited
Legione v Hately (1983) 152 CLR 406; [1983] HCA 11, cited
Shiloh Spinners v Harding [1973] AC 691; (1973) 1 All ER 90, cited
Stern v Macarthur (1988) 165 CLR 489; [1988] HCA 51, cited
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315; [2003] HCA 57, cited

COUNSEL: S J Webster for the plaintiff
L A Jurth for the second defendant

SOLICITORS: James Conomos Lawyers for the plaintiff
Quinlan Miller Treston for the second defendant

[1] The plaintiff seeks to enforce a guarantee given by the second defendant in support of a credit account created by Boral Limited for Dumaresq Constructions Pty Ltd ("Dumaresq").

[2] The first defendant did not take part in the trial, judgment having been entered against him earlier.

[3] The plaintiff's entitlement to sue, as a related body corporate of Boral Limited, was admitted.

Background

[4] On 29 June 2003 Mr McLauchlan and the first defendant applied to Boral for it to create a credit account in the name of Dumaresq. At that time, both those men were directors of Dumaresq.

[5] Each of them executed a "Credit Application Form" and a "Personal Guarantee and Indemnity Agreement". A limit of $20,000 was contemplated.

[6] The terms of the Credit Application are controversial in only one respect; namely, as to whether the credit to be allowed by Boral was so limited. This is considered below.

[7] On 6 February 2006 Mr Middleton, on behalf of Dumaresq, wrote to Boral and sought an increase in Dumaresq's credit limit to $100,000. On the same day, Boral replied and agreed to the increase.

[8] On 13 July 2006 Mr McLauchlan resigned as a director of Dumaresq.

[9] By 31 August 2010 Boral had supplied goods to Dumaresq to the value of $94,315.25 and had not been paid. Neither the amount nor the failure to pay is challenged.

The credit application

[10] The Credit Application Form is a standard form document created by Boral. The details of the customer and the directors are completed in handwriting in what, apart from two entries, appears to be by the same hand.

[11] The disputed section is headed "Credit amounts required". It begins: "Enter an estimated amount required per month for each Boral business where credit is requested," and goes on to list ten categories. Three of these categories were completed in handwriting:

(a) "Asphalt" is filled in with the amount of $1,500.00, but that amount is struck out;

(b) "Concrete" is filled in with the amount of $15,000.00, but that amount is struck out;

(c) "Formwork/Scaffolding" is filled in with the amount of $15,000.00; and

At the end of the 10 categories is a handwritten entry: "O/All Limit Concrete $20k".

[12] The status of the note about "O/All Limit" assumed considerable importance in this case. One limb of the second defendant's case is that, if he was subject to the guarantee, then it was limited to $20,000. He argues that the "O/All Limit" note forms part of the contract between Boral and Dumaresq and that it constitutes an express stipulation for a limit on the liability under the guarantee. That is, the defendant submits, the guarantee is not, as the plaintiff contends, an "all monies" guarantee.

Does the "O/All Limit" note form part of the credit contract? And, what does it mean?

[13] The plaintiff argues that the note forms part of the credit contract and, in support of that, relies on what he says are deemed admissions in the pleadings. The relevant parts of the pleadings are:

> "**SECOND FURTHER AMENDED DEFENCE AND COUNTERCLAIM OF THE SECOND DEFENDANT**
>
> …
>
> 2C. The Application relevantly contained the following express term: 'O/All Limit Concrete $20k' (hereinafter '**the Limitation Term**').
>
> 2D. The Limitation Term:
>
> (a) was handwritten on the Application;
>
> (b) was so written:
>
> (i) by an employee of Boral Resources, further or alternatively Boral Limited, full particulars whereof Mr McLauchlan cannot provide until completion of all interlocutory steps, including disclosure; and
>
> (ii) with the consent of Mr McLauchlanand (sic) Middleton (hereinafter, collectively, 'the Guarantors');
>
> (c) upon its proper construction, had the meaning and effect that the amount of credit to be provided under

the Facility was limited to the amount of $20,000.00 (hereinafter 'the Credit Amount Limit').

…

2F. At the time Mr McLauchlan signed the Guarantee, he well knew of the Limitation Term."

"REPLY TO SECOND FURTHER AMENDED DEFENCE OF THE SECOND DEFENDANT

…

5. As to the allegation in paragraphs 2C of the Defence, the Plaintiff:

(a) admits the allegation insofar as the Application (as that term is defined in the Defence) contained a handwritten notation that stated 'O/All Limit Concrete $20k'; and

(b) otherwise denies that the notation constituted an express term of the contract because it is untrue for the reasons pleaded in paragraph 0 (sic, 6) herein.

6. As to the allegation in paragraph 2D of the Defence, the Plaintiff:

(a) admits the allegation insofar as the Application (as that term is defined in the Defence) contained a handwritten notation that stated 'O/All Limit Concrete $20k';

(b) does not admit that the handwritten notation was written by an employee of Boral Resources, or alternatively, Boral Limited (as those terms are defined in the Defence) with the consent of the First Defendant on the basis that, having made reasonable enquiries, the Plaintiff remains uncertain as to the truth or otherwise of the allegation;

(c) denies that, upon a proper construction, the handwritten notation had the meaning and effect that the amount of credit to be provided under the Facility was limited to the amount of $20,000.00 (defined in the Defence as the 'Credit Limit Amount') on the basis that it is untrue because, and the Plaintiff says, that:

(i) the Credit Limit Amount was an indicative limit as to the amount of credit that would become the subject of the Facility; and

(ii) the proper construction of the terms of the Facility is that its terms would apply to all credit extended by the Plaintiff to the Company.

Particulars

The Application provided *inter alia 'The terms and conditions set out in this form will apply to credit extended by* [the Plaintiff] … and your singed application will be evidence of your agreement to that effect.'

…

7. the Plaintiff denies the allegation in paragraph 2F of the Defence on the basis that the Facility did not contain the alleged Limitation Term for the reasons pleaded in paragraph (b) [sic, 6] herein."

[14] Mr McLauchlan contends that the response by the plaintiff to the defence is only partial in many relevant respects. It is silent as to the allegation that the limitation term was written on the application with the consent of Mr McLauchlan and, therefore, pursuant to r 166(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) that allegation is taken to be admitted.

[15] The allegation that Mr McLauchlan signed the guarantee while aware of the limitation term is, Mr McLauchlan argues, not responded to meaningfully in the reply and is not accompanied by a direct explanation for the party's belief that the allegation is untrue. Therefore, it is said, the allegation is taken to be admitted pursuant to r 166(5) of the UCPR.

[16] Notwithstanding that it was obvious that this argument was going to be advanced Boral did not apply to amend its pleadings. The Rules cannot be denied their operation. The allegation is deemed to be admitted with the consequence that the "O/All Limit" note forms part of the credit contract.

[17] The second defendant submits that the proper construction of the words "O/All Limit Concrete $20k" is that it means: "Overall Limit Concrete $20,000". That was not argued to be incorrect.

[18] The second defendant then draws from that that the true meaning and effect of that term is that the amount of credit to be provided under the facility was limited to the amount of $20,000. That, though, does not address the meaning to be given to the words "Enter an estimated amount required **per month** for each Boral business where credit is requested". The $20,000 limit could be read as being a limit per month and not a total limit for the amount of credit to be provided. This is important because the prospect of accounts not being paid within the period provided under the credit account is recognised in one of the terms of the credit account. Clause 2(a) provides that an amount not paid by the due date will, at the discretion of the supplier, be subject to an interest charge. Thus, an amount greater than $20,000 could accumulate over more than a month.

[19] "Overall" could also mean that the entries for "asphalt" and "concrete" were combined. It is, in the end, unnecessary to decide this because of the extension of credit I refer to below.

Increase in the credit limit

[20] Whether it was a condition of the credit account or not, the parties recognised that there was a monthly limit of $20,000 being applied. So much is obvious from the correspondence concerning an increase. The request for an increase to $100,000 was made on behalf of Dumaresq on 6 February 2006 and was agreed to on the same day by Boral.

[21] Clause 3 of the guarantee provides:

> "Both my indemnity and my Guarantee are continuing security and will not be affected (whether or not I have notice of the following matters).
>
> (a) If the Supplier:
>
> ...
>
> (iii) Varies the terms of the Customer's account, or the arrangements between the Supplier and the Customer are changed in any other way (even if this increases my liability under this Guarantee and Indemnity)."

[22] That is an express recognition that the guarantee was not limited to $20,000 in circumstances where there had been a variation of the arrangements between Dumaresq and Boral. It follows that Mr McLauchlan's exposure to liability was increased in accordance with the lift in the credit limit.

The "penalty" clause

[23] The second defendant pleads that clause 9 of the guarantee constitutes an unenforceable penalty. That clause provides:

> "The Guarantor hereby agrees to charge all their equitable interest in freehold or leasehold property. The Guarantor agrees to deliver to the supplier, within seven (7) days of demand, a properly executed Memorandum of Mortgage in a form approved by the Supplier and which includes a covenant providing that interest may be charged on all outstanding monies at rates set from time to time by Section 94 of the Supreme Court Act 1970 (NSW), and otherwise in accordance with Memorandum Q860000, registered at the office of the Registrar General in Sydney.
>
> If the charge created by this clause is or becomes void or unenforceable, it may be severed from this agreement without any effect on its validity; and the Guarantor will not be exonerated in whole or part. Nor will the Supplier's rights, remedies or recourse against the Guarantor or any other Guarantor in any way be prejudiced or adversely affected by such severance."

[24] The plaintiff has, in reliance on that clause, lodged a caveat over property owned by Mr McLauchlan. In this action, it seeks a declaration that it has an equitable interest over that property and seeks an order for the possession and sale of it.

[25] This clause is not unusual in guarantees for liabilities of this kind. The second defendant submits that this clause:

> "(a) is grossly unfair and draconian;
>
> (b) is against equity and good conscience;
>
> (c) would operate to effect a consequence disproportionate to any possible damage caused by any possible breach – the plaintiff's interests (if any) are adequately protected by a money judgment against Mr McLauchlan which it is then entitled to enforce;
>
> (d) is, accordingly, to be regarded as in substance a penalty or in the nature of a penalty; and

> (e) therefore 'should be disregarded for the purpose of determining the rights which equity will treat as subsisting'."[1]

[26] The first matter to be considered is whether or not this clause is a "penalty" within the true meaning of that term. One of the essential elements of a penalty is that it is a payment of money stipulated *in terrorem*. This is to be contrasted with liquidated damages, which is a genuine, covenanted pre-estimate of damage.[2] Both penalties and liquidated damages clauses relate to the consequences of a breach.

[27] Clause 9 of the guarantee is not a penalty clause. It is unrelated to a breach of the contract of guarantee. It is does not take effect on breach but on entry into the contract.

[28] The second defendant argued that the credit application and the guarantee should be regarded as being the same document. While they were executed at the same time, the credit account application is a contract between Dumaresq and Boral, whereas the guarantee is, of course, a contract between Boral and the first and second defendants. A breach by Dumaresq of its obligations under the credit account contract *may* result in the guarantee being called upon. The charging of the guarantor's property and the requirement to deliver to Boral a mortgage in the form described is a requirement which exists irrespective of any breach. It is not something which can be regarded as being stipulated *in terrorem* because the breach which might give rise to the guarantee being called upon would be a breach by a different party to a different contract. In any event, the security provided by clause 9 is no different from the further security frequently required by suppliers of credit or moneylenders to further secure a guarantee.

[29] A clause in terms very similar to clause 9 was considered in *Allen's Asphalt Pty Ltd v SPM Group Pty Ltd.*[3] Muir JA (with whom Daubney J agreed) said:

> "[48] Clause 2(c) contains an agreement by the appellant to charge all its 'equitable interest in freehold or leasehold property'. It commences with the words 'The Customer agrees to charge' and it identifies the property to be charged. There is no good reason for qualifying the first sentence of clause 2(c) by reference to the obtaining a Memorandum of Mortgage with express enforcement provisions should the respondent deem such further protection necessary or desirable. It is unlikely, in my view, that the contractual intention behind clause 2(c) was that the respondent be denied the protection of a charge after supplying goods until such time as a Memorandum of Mortgage was demanded or entered into. That would tend to ensure, contrary to the appellant's interests, that the respondent would call for the execution of a Memorandum of Mortgage immediately in the event of default or even before that. **The charging provision is extremely broad in its ambit but that is not an impediment to its validity or enforceability**." (emphasis added)

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1 This is a reference to the decision of Guadron J in *Stern v Macarthur* (1988) 165 CLR 489.

2 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79.

3 [2010] 1 Qd R 202.

[30] That reasoning has been applied to similar charging clauses in guarantees in *Boral Resources (Qld) Pty Ltd v Andrews*[4] and *Boral Bricks Pty Ltd v Davey.*[5] The clause is not a penalty.

Relief from forfeiture

[31] The enforcement sought by the plaintiff in this case does not involve any circumstances which might give rise to a sustainable claim for relief against forfeiture. Relief will generally be available only where a party can demonstrate either:

(a) Fraud, mistake, accident or surprise which render reliance on a contractual right unconscientious;[6] or

(b) In the case of a security, where a party has tendered performance or payment of the thing secured;[7]

[32] None of those matters is pleaded or established.

[33] Clause 9 is nothing more than a standard charging clause designed to further secure a guarantee.

Order

[34] I give judgment for the plaintiff and direct it to bring in minutes of order.

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4 [2010] QSC 491.

5 [2010] QSC 131.

6 *Legione v Hately* (1983) 152 CLR 406; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315.

7 *Shiloh Spinners v Harding* [1973] AC 691; *Legione v Hately* (1983) 152 CLR 406.