SUPREME COURT OF QUEENSLAND

CITATION:	*Westpac Banking Corporation v Leckenby & anor* [2015] QSC 363
PARTIES:	**WESTPAC BANKING CORPORATION** ABN 33 007 457 141 (plaintiff) **v** **MARK DONALD LECKENBY** **(ALSO KNOWN AS MARK LECKENBY)** (first defendant) **ENERGY MAXIMISER PTY LTD** ACN 140 832 186 (second defendant) **ICOMMS CONSULTING PTY LTD** ACN 101 631 270 (third defendant)
FILE NO/S:	BS No 10597 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	10 December 2015
JUDGE:	Martin J
ORDER:	**1. Application allowed.** **2. Applicant is to bring in a minute of order reflecting these reasons.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSOR – SUMMARY JUDGMENT – where the plaintiff entered into a loan agreement which was guaranteed by the defendants – where the plaintiff seeks to recover the amount owing under the loan from the guarantors – where the applicant plaintiff applies for summary judgment – where the respondent defendants resist the application on the basis that the first defendant raises by way of set-off, a counterclaim – where there is a suspension clause in relation to the set-off – whether the set-off can be relied upon – whether it is appropriate to grant summary

judgment in circumstances where case flow directions have been made

Uniform Civil Procedure Rules 1999, r 292

Capital Finance Australia Ltd v Airstar Aviation Pty Ltd [2004] 1 Qd R 122
Norman; Re Forest Enterprises Ltd v FEA Plantation Ltd (2011) 280 ALR 470

COUNSEL: MJ Luchich for the plaintiff
RJ Anderson QC for the defendants

SOLICITORS: Minter Ellison for the plaintiff
Grasso Searles Romano Lawyers for the defendants

[1] In June 2011, Westpac Banking Corporation ('Westpac') lent money to Auzion Enterprises Pty Ltd ('Auzion Enterprises') . The loan was secured by a guarantee from each of the first, second and third defendants. That is not admitted on the pleadings, but the applicant's unchallenged evidence supports that conclusion. Westpac pleads, and supports with sworn evidence, that in December 2013 Auzion Enterprises was in default. The defendants do not admit this allegation – on the basis that they do not have sufficient information to enable them to plead.

[2] In its Claim, Westpac seeks to recover the amount owing under the loan from the guarantors. In this application it seeks judgment against the guarantors pursuant to rule 292 of the *Uniform Civil Procedure Rules* 1999.

[3] The defendant's resist the application on only these bases:

(a) the first defendant raises, by way of set-off, a counterclaim that is not the subject of any denials by the plaintiff,

(b) disclosure, even of matters relevant to Westpac's own case, has not yet occurred, but the parties have agreed that it occur in early 2016, and

(c) the parties have agreed to a mediation in April 2016.

The set-off

[4] Mr Leckenby pleads in his counterclaim that Westpac acted contrary to instructions and in breach of its duty which, together with other matters, establishes a cause of action for which he is entitled to damages in an amount sufficient to defeat, or at least reduce, Westpac's claim. He argues that Westpac has not denied the allegations but has only pleaded non-admissions and, so, cannot be heard on this application to say that it could defeat the counterclaim. This is the set-off which Mr Leckenby submits is sufficient to show that summary judgment should not be pronounced.

[5] In answer to this argument, Westpac relies upon clause D5 of the conditions of the guarantee. It provides:

> "D5 SET OFF
>
> If any one or more of you have any money in any account with the Lender or are owed money by the Lender, the Lender can use it to pay amounts payable or secured under a Document, but need not do so. If the Lender does this, the balance of your account will reduce by the amount used for this purpose.
>
> To the maximum extent allowed by law you give up any right to set off any amounts the Lender owes you (*for example credit balances in your accounts or any deposit subject to a Deposit Security*) against amounts you owe under the Lender Arrangements.
>
> You will pay money you are required to pay under this document without deducting amounts you claim are owed to you by the Lender or any person (*for example, an amount in your deposit account*)."

[6] This is the type of clause commonly called a "suspension clause". It is not expressed as clearly as some suspension clauses are because it appears in the "Memorandum of Common Provisions General Conditions Booklet". That Memorandum forms part of any mortgage, charge, deposit security, security document, guarantee and indemnity or facility agreement which refers to it. In other words, it is a collection of generic clauses which are expressed in a way which is designed to apply to each of those different types of relationships. The Lender referred to in clause D5 is defined to be the "bank, lender or mortgagee" and the word "Document" is defined to include a guarantee and indemnity.

[7] This type of clause has been considered in a number of cases. In *Capital Finance Australia Ltd v Airstar Aviation Pty Ltd* [1], Holmes J considered a suspension clause which provided:

> "10. Guarantor must not exercise any right of set-off, withholding, deduction or counterclaim which reduces or extinguishers the obligation of the Customer or Guarantor to pay the money…"

[8] Her Honour considered the construction of clauses of this nature and said:

> "[13] In *The 'Fedora'*, the guarantees under consideration provided that amounts payable by the guarantor were to be paid 'in full, free of set off or counter-claim'. The guarantors sought to raise cross-claims for damages in respect of the creditor bank's alleged negligence in realisation of securities. The English Court of Appeal held that claims in negligence were not exempt from the operation of the clause, pointing out :

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1 [2004] 1 Qd R 122.

> '(1) that the commercial purpose of the transaction is that, upon default by the borrower the bank should be paid quickly, and (2) that the natural meaning of the words is that all set offs and counter-claims are excluded.'

The guarantors were still able to prosecute their claims to judgment; they were:

> "merely prevented from holding up payments admittedly due under the guarantees while disputed cross-claims are litigated".

The bank was entitled to summary judgment.

[14] In *Coca-Cola Financial Corporation v Finsat International Ltd & Ors* the Court of Appeal again had before it a provision for payment 'free and clear of any right of set off or counter-claim'. There was an argument that the clause was concerned only with the mechanics for making a payment rather than the extent of the guarantor's obligations. The court held that the words defined the extent of the obligation to pay. A second argument that it was against public policy to permit parties to contract out of a right to set off one debt or claim against another was also rejected, Neill LJ observing:

> "I can see no reason in principle why parties who are in a general contractual relationship cannot isolate one contract or one aspect of their dealing and provide that their rights in relation thereto are to be treated separately from their other dealings".

Again, the result was summary judgment for the plaintiff.

[15] Closer to home, White J in *Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd t/a Betta Machinery Sales* had to consider a similar clause providing for payment 'free of any set-off or counterclaim', in that case in a dealership agreement rather than in a guarantee. The defendant sought to rely on defences of misrepresentation and set-off, and also argued that the creditor could not rely on the clause excluding set-off because by its conduct it had caused the debtor's breach of the agreement. Her Honour concluded that damages, not rescission, were the obvious remedy if the debtor company was successful, and that the clause, which was clear in its terms, precluded any claim for such relief in the counter-claim and set-off.

[16] Finally, in *GE Capital Australia v Davis & Ors*, Bryson J had to consider the cross-claim of guarantors in the context of a guarantee containing a clause precluding the guarantor, without the creditor's consent, from raising 'a defence, set off or counter-claim' available to itself, the debtor or any co-surety. While he concluded that the guarantors had, apart from that clause, rights in respect of diminution in the value of a security by reason of default or neglect by the creditor, those rights were suspended by the effect of the clause as long as the guaranteed money remained unpaid. Although such provisions were to be construed strictly against the interest of the creditor there was no ambiguity in the language of the provision:

> 'The guarantors have unequivocally agreed to the effect that they will not make such claims as they now make in their cross-claim unless and until they have paid the whole of the guaranteed moneys, which they have not done'.
>
> *The effect of cl 10*
>
> [17] The clause here is equally unambiguous. Its effect is to preclude the defendants here from setting off any claim for damages against their liability for the monies guaranteed. Those claims must be dealt with independently of this proceeding. However, there are matters raised in the counter-claim which are, as Ms Skennar submitted, more properly matters of defence: allegations of misrepresentation or misleading conduct, and breaches of conditions which may lead to vitiation of the guarantees or discharge of the guarantors' liability under them. The counter-claim should be struck out, because insofar as it constitutes a true counter-claim, the respondent defendants have contracted not to bring it, and the balance contains pleading not properly the subject of counter-claim. But the latter, going to invalidity or complete discharge of the guarantees, could properly be repleaded in the defence." (citations omitted)

[9] Her Honour drew a distinction between matters which are the province of a counterclaim and a set-off and those which are more properly pleaded in the defence, for example, an assertion that the guarantee is invalid for some reason. In this case, there is no such case being conducted. The guarantee is not attacked, rather, the conduct of the lender is the subject of criticism.

[10] The appropriate way of construing these types of clauses was considered by the Full Court of the Federal Court of Australia in *Norman; Re Forest Enterprises Ltd v FEA Plantation Ltd* [2] in which the court said:

> "[197] The modern approach to construction of commercial contracts is to interpret them in a way which is consistent with business commonsense: *Investors Compensation Scheme Ltd v West Brunswick Building Society* per Lord Hoffman. Lord Hoffman's remarks were quoted with approval by Gleeson CJ, Gummow and Hayne JJ in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* .
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> [198] The principle of objectivity in the interpretation of contracts stated by the High Court is to the same effect. It emphasises that the meaning of the words is to be determined by what a reasonable person would understand by the language in which the parties have expressed their agreement, in the light of the surrounding circumstances and object of the transaction: *Pacific Carriers Ltd v BNP Paribas*; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*; see also *International Air Transport Association v Ansett Australia Holdings Ltd* per Gleeson CJ." (citations omitted)

[11] In clause D5 the expression "any amounts the Lender owes you" is used. That makes immediate sense when applied to a borrower who might also have another account in credit with the lender. Indeed, that is the example given in the clause. But, the purpose of

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[2] (2011) 280 ALR 470.

this entire document is to act as a set of common provisions which are to be applied to a number of different types of financial arrangements or securities. The surrounding circumstances, and the object of the transaction, suggests that when this clause is to be used with respect to a guarantee then the expression "any amounts the Lender owes you" should be construed in the light of that type of arrangement.

[12] Mr Leckenby argues that he is entitled to set off whatever sum is found to be owed to him by Westpac on the basis of his counterclaim. If Mr Leckenby were to be successful in his counterclaim then Westpac would owe him money. That "money" would fall within the description of an amount owed by the Lender to him. Clause D5 is not restricted to money which is owed at the time of the demand by Westpac. The clause is designed and is intended to operate in a way that allows the bank to recover what is owed to it without deduction but does not prevent, in this case, a guarantor from pursuing whatever rights that guarantor might have after satisfying the requirements of the guarantee.

[13] Clause D5 operates to prevent Mr Leckenby from resisting the claim under the guarantee by way of a counterclaim or set-off.

Discretionary matters

[14] The other matters relied upon by Mr Leckenby can be dealt with together. In earlier interlocutory proceedings, orders were made for the disclosure of material and for the parties to proceed to a mediation. It is submitted that those matters render it inappropriate to order summary judgment. It is said that they underscore the need for a cautionary approach to this application.

[15] The applicant has demonstrated by unchallenged evidence that Auzion is in default and that the respondents have guaranteed the relevant debt. The material relied upon by the applicant satisfies me that there is no real prospect of the respondents successfully defending all or part of the applicant's claim, and that there is no need for a trial of the claim.

[16] The fact that after the parties agreed to orders for disclosure and for participation in a mediation the plaintiff brought this application is unusual but, without more, does not demonstrate that summary judgment is inappropriate.

Conclusion

[17] The applicant has demonstrated that this is a case in which summary judgment should be allowed and I will make orders to that effect.