SUPREME COURT OF QUEENSLAND

CITATION:	*Wallace v Rural Bank Limited* [2014] QSC 186
PARTIES:	**CHARLIE WALLACE** (applicant/defendant) **v** **RURAL BANK LIMITED ACN 083 938 416** (respondent/plaintiff)
FILE NO:	7928 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	18 August 2014 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	21 May 2014
JUDGE:	Daubney J
ORDER:	**The application is dismissed with costs**.
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – STAYING PROCEEDINGS – where the applicant seeks a stay of proceedings pending appeal – where the applicant seeks to stay the default judgment and enforcement warrants issued in reliance of the default judgment – whether the applicant can demonstrate a good arguable case on appeal – whether the applicant will be disadvantaged if a stay is not ordered – whether the competing disadvantage to the respondent if the stay is granted does not outweigh the disadvantage suffered to the applicant if the stay is not granted *Elphick v MMI General Insurance Limited & Anor* [2002] QCA 347, followed *Rashchilla & Anor v Westpac Banking Corporation* [2010] QCA 255 *Rural Bank v Wallace* [2014] QSC 87, cited
COUNSEL:	P King for the applicant M Gynther for the respondent
SOLICITORS:	John Walker Lawyers for the applicant

Corrs Chambers Westgarth for the respondent

[1] HIS HONOUR: The applicant/defendant, Mr Charlie Wallace ("Mr Wallace"), is the registered owner of two properties in North Queensland known as "Newburgh" Station and "Coronation" Station.

[2] This proceeding arises out of the default in repayment by Mr Wallace of moneys owed to the respondent/plaintiff ("the Bank") pursuant to a number of trading and loan facilities he held with the Bank. As security for those loans, Mr Wallace granted the Bank a livestock mortgage and registered mortgages over the land. On 31 August 2012, the Bank commenced the present proceeding against Mr Wallace, claiming payment of moneys owing and for recovery of possession of Newburgh Station and Coronation Station. Initially, Mr Wallace filed a conditional notice of intention to defend, but later abandoned that position. The matter went to the Financial Ombudsman Service from about October 2012 until about November 2013, but no resolution was achieved.

[3] On 6 January 2014, the Bank appointed receivers and managers of the real property. It is uncontentious that those receivers were appointed in the capacity as agents for Mr Wallace. On 9 January 2014, those same receivers were appointed over the balance of the mortgaged property under the livestock mortgage.

[4] On 10 January 2014, the Bank obtained default judgment in this proceeding against Mr Wallace. Mr Wallace had, in early January 2014, engaged a solicitor, Mr Brown.

[5] On 17 February 2014, the receivers entered the two properties, as agent for Mr Wallace, taking over management of the livestock on the properties under the livestock mortgage.

[6] On 20 February 2014, Mr Wallace executed a deed of agreement and occupation licence. The occupation licence was in respect of the homestead on the Newburgh Station. Those documents were in the form of deeds.

[7] On 28 April 2014, Atkinson J heard and determined an application by Mr Wallace to set aside the default judgment - see *Rural Bank v Wallace* [2014] QSC 87.

[8] After setting out a brief history of the matter, her Honour noted that the first argument advanced for Mr Wallace was that the judgment by default was irregularly obtained and should be set aside *ex debito justitiae*. That argument was based on an assertion that, in contravention of *UCPR* r 389, the plaintiff had not given one month's notice of intention to proceed before the default judgment was obtained. Her Honour referred to a dispute on the evidence before her concerning whether a notice of intention to proceed had been sent to Mr Wallace. Her Honour said that the fact that Mr Wallace said that he did not receive the notice of intention to proceed does not mean that it was not sent, but noted that there had been no request to cross-examine him, and found that she had to "accept for the purposes of this application that [Mr Wallace] did not receive it". On that basis, her Honour found that she was "drawn to the conclusion that one month's notice was not given strictly in accordance with the rule". She then said:

> "Normally, one might expect that this would lead to the judgment being set aside. However, in this case, there is a complete answer to that. Mr Wallace signed a deed of agreement with the Rural Bank whereby he agreed that he would not apply to set aside the judgment and/or the enforcement warrant, and that the deed might be pleaded as a full and complete defence, response, or answer to any application by Mr Wallace to set aside the judgment or the enforcement warrant."

[9] Justice Atkinson then referred to attempts on behalf of Mr Wallace to persuade her that there was "an arguable case that there was unconscionable dealing in the method by which the Bank made that agreement with Mr Wallace", and held that there was nothing at all to suggest unconscionable dealing. Her Honour said:

> "Mr Wallace is a person of full capacity. True it is that receivers were residing on the property at the time, as they were entitled to do to manage the property, having been regularly appointed to do so. Mr Wallace received legal advice. He made a decision, presumably reluctantly, to sign that deed. But sign it he did. In my view, it is not arguable that the plaintiff took unconscientious advantage of Mr Wallace in requesting that he sign the deed, and it is a complete answer to this application."

[10] Her Honour dismissed the application with costs.

[11] On 8 May 2014, Mr Wallace filed a notice of appeal against the judgment of Atkinson J.

[12] The present application, in the form as filed, sought a range of orders that, as was conceded in argument before me, were simply not available or were otherwise untenable. For example, the application sought an order to stay the orders made by Atkinson J, i.e. to stay an order dismissing an application. It also sought what were, in effect, injunctions against parties who had not been served.

[13] In the course of argument before me, it emerged that what Mr Wallace really sought was a stay, pending appeal, of the default judgment and the enforcement warrants which had been issued in reliance on that default judgment. Counsel for the respondent Bank was content to proceed with the hearing on that basis.

[14] The contemporary approach to an application for a stay pending appeal was summarised by Jerrard JA in *Elphick v MMI General Insurance Limited & Anor* [2002] QCA 347 (omitting citations):

> "To succeed on an application for a stay the applicants must show good reason for a stay to be granted and that it is an appropriate case in which to grant a stay. Those authoritative decisions in this court establish that an applicant should demonstrate:
>
> - A good arguable case on appeal.
> - That the applicant will be disadvantage if a stay is not ordered.
> - That competing disadvantage to the respondent should the stay be granted, does not outweigh the disadvantage suffered by the applicant if the stay not be granted."

[15] See also *Raschilla & Anor v Westpac Banking Corporation* [2010] QCA 255.

[16] For the purpose of ascertaining whether Mr Wallace had demonstrated that he has a "good arguable case" on appeal, significant time was devoted in the course of the hearing before me to analysing the grounds of appeal articulated in the notice of appeal filed on 8 May 2014. It became apparent in the course of argument that numerous of the grounds of appeal are baseless; for example, one of the grounds of appeal is that Atkinson J "erred in holding that the [default judgment] was regularly obtained". Even a cursory perusal of her Honour's judgment reveals that she made no such finding.

[17] Considerable time was also spent in argument on the merits or otherwise of a draft defence and counterclaim which had been exhibited to an affidavit by Mr Wallace's

current solicitor. Leaving to one side the fact that scant evidence was adduced to support the allegations made in that draft pleading, this argument was directed to an argument that Atkinson J erred when she said at the conclusion of her reasons for judgment that in any event she was "far from satisfied that were Mr Wallace given leave to defend the action, that his defence has any prospects of success". As argument before me unfolded, however, it became common ground that it is not necessary for me to delve into this argument. The parties accepted, for the purposes of the present application, that the ratio of her Honour's decision was that the default judgment had been irregularly entered but that Mr Wallace's entitlement to have the judgment set aside *ex debito justitiae* had been (to employ the term used by Mr Wallace's counsel) "gazumped" by the terms of the deed of agreement. Thus, it was common ground for present purposes that the only relevant question is whether Mr Wallace has a good arguable case on appeal that her Honour erred in not disregarding the terms of the deed of agreement.

[18] For completeness, however, I should note that the arguments arising out of the draft defence and counterclaim included contentions that alleged equitable interests of Ms Lamb (Mr Wallace's former de factor partner) in the relevant properties have been adversely affected by the Bank's conduct and by the entry of the judgment in this proceeding. Despite those arguments, there was no application by or on behalf of Ms Lamb to protect her alleged interests.

[19] The deed of agreement, which had been signed by Mr Wallace on 20 February 2014, expressly recited the default judgment which had been obtained on 10 January 2014 and the enforcement warrant taken out in pursuance of that judgment and then, in the operative part of the deed, provided:

> "7 No application to set aside Judgment and/or Enforcement Warrant.
>
> In consideration of the Bank entering into this Deed and granting the Occupation Licence to Wallace, Wallace agrees and undertakes that he will not apply to set aside the Judgment and/or the Enforcement Warrant.
>
> 8 Bar to application to set aside Judgment and/or Enforcement Warrant.

> This deed may be pleaded as a full and complete defence, response or answer to any application by Wallace to set aside the Judgment and/or the Enforcement Warrant."

[20] As Atkinson J, in my respectful opinion, completely correctly observed, this deed on its face constituted a complete answer to the application to set aside the default judgment, regardless of whether that judgment had been regularly or irregularly obtained.

[21] Counsel for Mr Wallace argued that her Honour arguably erred in failing to consider whether or not it was equitable to permit an estoppel to be raised against Mr Wallace's case in respect of the irregularly entered judgment. The argument was that the deed of agreement was premised on the Bank obtaining an order for possession as a consequence of an irregularly entered judgment, and that Atkinson J:

> "…ruled that the applicant was estopped by a term of the [deed of agreement] from applying to set aside the irregularly entered judgment by default but failed to consider whether or not the applicant was entitled to rely upon the equitable defence that 'a person who comes to equity must come with clean hands'".

[22] There are a number of problems with this submission. First, Atkinson J did not make the ruling which counsel contends she made. Her Honour said nothing about the deed of agreement giving rise to an estoppel. Her judgment clearly gave effect to the unequivocal terms of the contract evidenced by the deed of agreement. Secondly, and consequently, as her Honour's judgment was not founded in equitable but in contractual principles, the invocation of the "clean hands" rule is misconceived. Thirdly, the transcript of the proceeding before Atkinson J was in evidence before me. I have reviewed that transcript, and seen that this argument was not in any way advanced before her Honour. The "unconscionable dealing" argument to which her Honour referred in her judgment concerned an argument by Mr Wallace that the Bank had, by its previous conduct and dealings, indicated an intention not to rely on the remedies available under the securities. That is quite different from the argument now sought to be advanced. It is difficult to see how her Honour can be criticised for not considering and dealing with an argument which was not put to her. Finally, there is the obvious point that the unequivocal terms of the deed of agreement, which speak for themselves, provide a complete answer to this argument.

[23] Counsel for the applicant also sought to reprise the argument that it would be unconscientious for the Bank to rely on the clear terms of the deed of agreement on the basis that Mr Wallace lacked proper legal advice at the time he signed it. That argument was succinctly dealt with by Atkinson J. Moreover, an email from the solicitor Mr Brown to Mr Wallace (and Ms Lamb) dated 19 February 2014 was tendered before me. That email contained express advice on the terms of the deed before it was signed by Mr Wallace. The advice explained unequivocally the effect of the relevant clauses of the deed. The advice given to Mr Wallace by his solicitor in that regard was:

> "That means that once the deed is signed, we are prevented from trying to defend the original claim and statement of claim, but we are not prevented from taking action against the bank or the receivers for unconscionable conduct, selling without regard to value, etc."

[24] In the face of that email, one struggles to see how it could sensibly be said that Mr Wallace lacked advice as to the effect of the deed he eventually signed.

[25] In all the circumstances, I am not persuaded that the applicant has demonstrated a good arguable case on appeal to challenge the proposition that the deed of agreement was a complete answer to the entitlement to have an irregularly entered default judgment set aside.

[26] Turning to the other relevant considerations, it can be accepted for present purposes that Mr Wallace will suffer a disadvantage if a stay is not ordered – that is the ineluctable consequence of the sale of property by the receivers. There is also evidence, and the respondent Bank accepted, that even if sales are achieved at best possible market conditions, there is still likely to be a shortfall between the moneys received from the sale of secured assets and the debt owed by Mr Wallace. This is clearly relevant to the question of the competing position of the parties pending appeal - from the Bank's perspective, it appears likely that it will be owed money, even if the enforcement warrants are executed. Mr Wallace also raises an express concern that he may be sent into bankruptcy. Whilst that consequence may follow from his indebtedness to the Bank, it is not clear how an order for possession of the properties, or indeed the sale of the properties by receivers, impacts on the state of his personal solvency other than by realising the potential to reduce the quantum of his indebtedness.

[27] For the reasons I gave earlier, I do not consider that it can in any way be said that, on the material before me, the applicant has demonstrated that he has a "good arguable case" on appeal on the relevant question argued before me. On the contrary, for the reasons given above, the case appears weak. That consideration needs to be balanced against the consequences of not ordering a stay, particularly in the circumstance to which I have referred where it appears likely that, even after execution, there will be a debt owing to the Bank. In my view, those considerations do not outweigh, in the present circumstances, the fact that the Bank has the benefit of the judgment Atkinson J and that Mr Wallace has not demonstrated a good arguable case for the appeal against that judgment.

[28] In all the circumstances, the application for a stay pending appeal should be dismissed.

…

[29] **HIS HONOUR**: The application is dismissed with costs.