SUPREME COURT OF QUEENSLAND

CITATION:	*Bernstrom v National Australia Bank Ltd* [2002] QCA 231
PARTIES:	**ANITA BERNSTROM** (plaintiff/appellant) **v** **NATIONAL AUSTRALIA BANK LIMITED** ACN 004 044 937 (defendant/respondent)
FILE NO/S:	Appeal No 9031 of 2001 SC No 52 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	28 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2002
JUDGES:	McMurdo P, Cullinane and Jones JJ. Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT EVIDENCE – GENERAL – RESPECTIVE FUNCTIONS OF JUDGE AND JURY – ADMISSION OF EVIDENCE - where appellant defaulted on mortgage repayments – where respondent gave notice of intention to exercise power of sale under mortgage – where appellant contends respondent agreed not to exercise power of sale in a meeting with appellant and her son and daughter-in-law – where respondent branch manager made notes of meeting– where notes reveal no agreement – where court informed by respondent's counsel that appellant's son agreed respondent's notes accorded with his recollection of the meeting – where appellant did not object – whether learned primary judge departed from rules of evidence in accepting out of court statement - whether learned primary judge erred in entering summary judgment

Uniform Civil Procedure Rules 1999 (Qld), r 292, r 293(2), r 493(3)

Alexander v Arts Council of Wales [2001] 1 WLR 1840, considered
Foodco Management Pty Ltd & Diaz Keinert Pty Ltd v Gomai Travel Pty Ltd [2001] QSC 291, considered
Swain v Hillman [2001] 1 All ER 91, applied

COUNSEL: J T Bradshaw for the appellant
R I M Lilley for the respondent

SOLICITORS: Thompson & Royds for the appellant
Roberts Nehmer McKee acting as Town Agents for Thynne & Macartney for the respondent

[1] **McMURDO P:** I have read the reasons for judgment of Jones J in which the facts and issues are set out.

[2] As to the appellant's first contention, the appellant's difficulty is that he agreed at the hearing to the course to which he now objects. Although it is unusual to accept evidence from the Bar table, Mr Bradshaw, who represented the appellant at first instance and in this appeal, led the learned primary judge to understand that he agreed with the course proposed by the respondent's counsel. Indeed, it seems clear that course was adopted to assist the appellant as Mr Buckley did not wish to wait at court to be cross-examined because of his other commitments. In those circumstances, the appellant cannot not now complain about the reception of evidence from the Bar table that Mr Buckley agreed with the significant portion of Mr Matson's statement.

[3] Once that evidence is admitted, it is clear that any agreement made with the respondent at the meeting with Mr Buckley was only to extend arrangements until 31 December 2000, when a full review of the appellant's financial circumstances was to be undertaken. There was then simply no evidence of the agreement pleaded by the appellant in her statement of claim. She had no defence to the respondent's counter-claim. The learned primary judge rightly entered summary judgment.

[4] It follows that the appeal should be dismissed with costs.

[5] **CULLINANE J:** I have read the reasons for judgment of both McMurdo P and Jones J in this matter. I agree with what each says and the orders proposed.

[6] **JONES J:** This is an appeal from a decision of the Chief Justice entering summary judgment for the defendant pursuant to Rule 293(2) of the *Uniform Civil Procedure Rules* (UCPR).

[7] The appellant brought a claim to prevent the defendant, the National Australia Bank Ltd ("the bank"), from exercising a power of sale of her premises which had been mortgaged to the bank. The mortgages secured advances made by the bank to the appellant.

[8] In the action the bank counterclaimed seeking payment of arrears of principal and interest and possession of the subject premises. The mortgage agreements identified the bank's right to foreclose in the event of default.[1]

[9] The plaintiff's claim was based entirely upon there being an agreement identified in paragraph 1 of the Statement of Claim which read:-

> "1. The National Australia Bank in 2000 did enter into an agreement with Anita Bernstrom, Harold Butler [sic] and Shane Butler [sic] (her sons) that they would desist from efforts to foreclose upon two mortgages held by her with the National Bank provided certain monies were paid into the bank."[2]

[10] The appellant alleges that this agreement was struck in the course of a conversation held on 1 November 2000, between the bank's representative Mr. Matson, on the one hand, and the appellant, her son Shane Buckley and Mrs. Buckley, the wife of the appellant's son Harold, on the other.

[11] The bank denied that there was any such agreement and sought the early termination of the proceeding by applying for summary judgment.

[12] The only ground upon which the appellant could have resisted the entry of summary judgment was to show that there was some evidence that such an agreement was made. The learned hearing judge found that there was no agreement or promise on the part of the bank not to enforce the right to which it was entitled following upon the default.[3].

Background facts

[13] The appellant has been a customer of the bank since 1995. In November of that year the appellant borrowed from the bank $225,000 on a Home Loan Contract. The contract provided for repayments by monthly instalments and further provided for the payment on demand of the entire balance of the loan plus interest and fees on the occurrence of certain events which included default.[4] The material before the learned chamber judge disclosed that there had been default on the part of the appellant and that the balance owing, as at 22 March 2001, was $112,726.24 for principal and $462.70 for interest.

[14] In September 1998 the bank advanced to the appellant $160,000 on a Business Combination Loan contract. That contract similarly provided for payment on demand of the entire balance together with interest and fees to be paid on the occurrence of default.

[15] In May 2000 the bank provided an overdraft facility to the plaintiff with a limit of $20,000 to expire on 31 July 2000, but had granted further extensions resulting in an expiry date of 31 January 2001.

[16] The two loans and the overdraft facility were secured by mortgages over property owned by the appellant described as Lot 1 of RP 737060 County Nares Parish Cairns Title Reference 21186150.

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1 See ex "RLI5" to the affidavit of Mr. Isherwood filed 23 Aug 2001 – clause 9

2 Record p 164

3 Record p 7/10

4 Clause 2 exhibit RLI 2 to affidavit of Rex Isherwood filed 23 Aug 2001

[17] In October 2000 the appellant was in default of the terms of the overdraft facility and did not pay the outstanding balance when demanded. Thereupon the bank gave notice of its intention to exercise a power of a sale under the mortgage. In order to avert this impending sale of the property Mr. Shane Buckley and daughter-in-law, Mrs. Buckley, met with the branch manager of the bank, Mr. Matson, on or about 1 November 2000. The former agreed to make certain payments to the bank to assist the appellant in meeting the demands of the bank. It is upon the terms of this conversation that the appellant/plaintiff relied to establish the agreement that the bank would not exercise its power of sale.

[18] The bank denied that any such agreement was reached or that it agreed to waive its rights. The bank's version of the discussion is set out in a diary note of the meeting made by Mr. Matson and dated 16 November 2000.[5]

[19] The application for summary judgment by the bank was supported by evidence contained in the affidavits by Mr. Rex Leonard Isherwood and an affidavit by David Riggs. These affidavits set out the history of the bank's dealings with the plaintiff and exhibited relevant financial documents, mortgages and copies of correspondence passing between it and the appellant.

[20] On behalf of the appellant, a handwritten affidavit by Shane Buckley was filed on the morning of the hearing of the application. I shall set out its terms in full. [6]

> "Along with my mother Anita Bernstrom and my sister inlaw Annette Buckley we met with Eric Matson 1st Nov 20... of the National Australia Bank at the Bunda Street branch to discuss details of our pending involvement for my brother Harold Buckley, his wife Annette Buckley and myself to assist in the repayments of my mothers mortgage and business loan. During this discussion I asked Eric Matson in what way we could ease the pressure of the N.A.B. high repayments on my mothers loans. He proceeded to explain how by reducing the overdraft and meeting the regular repayments each month, would take the pressure off my mother. I asked Eric Matson if $15000 would be sufficient enough to pay off the overdraft, he declined my offer, telling me not to leave myself short of money. I told him we needed to do something and I had the money readily available. We then negotiated on a payment of $10,000 off the overdraft, which he told us, would be sufficient enough along with regular repayments off the two loans, from my mother brother, his wife and myself. I deposited a cheque of $10,000 into the overdraft account that same day and made regular repayment myself of a $1000 each month along with my families repayments up until the 30-3-2001 including a repayment of $1600 in October 2000, a total of $17,600 only to read a letter from the N.A.B. arranging proceedings to forclose on the loans if not paid in full."

[21] No other evidence was adduced by or on behalf of the appellant detailing any terms of the alleged agreement upon which her cause of action was based.

[22] The affidavits of Mr. Isherwood and Mr. Riggs clearly established the appellant's default in the loan repayment, the failure on the part of her sons to make the agreed

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5 Record p 73 Ex "RLI17" to affidavit of Isherwood sworn 20 Aug 2001

6 Record p 160

level of payments and the bank's prima facie right to possession and sale in circumstances of default.

[23] On the case put to him the learned hearing judge was entitled to find that there had not "been any agreement or promise on the part of the bank not to enforce the rights it may now enforce following upon default".[7]

[24] The appellant here raises some ten grounds of appeal which may be considered by reference to the two points raised in the appellant's Outline of Argument, namely:-

> 1. That the learned chamber judge erred in the manner in which he received evidence about the discussion between the appellant, her son and daughter-in-law with Mr. Matson on 11 October 2000; and
>
> 2. That His Honour ought to have determined, on the material before him, there were issues to be tried.

Receipt of evidence by the chamber judge

[25] The appeal record details the remarks made during the course of his Honour's hearing of argument. Before the hearing, however, there was an earlier mention of the application during the callover of the matters listed for that day. Details of what happened at that callover and at the discussion thereafter are set out in an affidavit of Leeanne Bou-Samra, solicitor and town agent for the bank's solicitors. The affidavit of Ms Bou-Samra was read on the appeal, notwithstanding the objection of the appellant counsel, because it is relevant to an understanding of these circumstances which give rise to the appellant's principal ground of appeal. This affidavit was filed on or about 23 November 2001 with the express purpose of being used at the hearing of the appeal.

[26] It appears that the affidavit of Shane Buckley, relied upon by the appellant at the hearing of the claim, was served on the bank's legal representatives at approximately midday on the day of the hearing. When the matter was called on for hearing counsel for the respondent advised the Court that Mr. Buckley would be required for cross-examination. When that witness indicated he had available only limited time to appear, the learned hearing judge inquired of the reason for cross-examination and suggested that the need for cross-examination might be obviated if the representatives of both parties were to discuss with that witness the evidence he might give in relation to the issue. The matter was stood down to allow that discussion to take place. The appellant's counsel, Mr. Bradshaw, was present whilst it did. During the course of that discussion Mr. Matson's notes of the October meeting (ex RLI 17) were shown to Mr. Buckley.

[27] The transcript of the proceedings thereafter shows that on the resumption of the hearing Counsel appearing for the bank advised the Court that the factual issue which would have necessitated the cross-examination had been resolved. He identified the relevant part of Mr. Matson's note and told the court "Mr. Buckley says that (the note) accords basically with his recollection of the conversation".[8]

[28] The identification of the relevant part of that note together with the statement that that same part accorded with Mr. Buckley's recollection of the conversation was made in open court in the presence of the appellant's counsel. In the circumstances

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7 Record p 7/10

8 Record p 3/20

in which the matter had been stood down to allow discussion with Mr. Buckley, this could only have led his Honour to the view that the appellant agreed with the statement that was being made to the Court. In the ensuing argument his Honour was asked to rely upon Mr. Buckley's adoption of the contents of Mr. Matson's note, as well as on Mr. Buckley's own affidavit, to determine the effect of the conversation between the appellant and members of her family with Mr. Watson on 11 October 2000. No objection was taken by the appellant's counsel. The only point made on the appellant's behalf was that if there was a need to cross-examine Mr. Buckley there were facts to be determined and therefore the matter should proceed to trial.

[29] On this appeal counsel for the appellant has argued that the procedure at first instance showed an extraordinary departure from the rules of evidence in that his Honour had received from counsel reference to out-of-court conversations. He has claimed further that he had not objected to such a departure because to do so would be to acknowledge the legitimacy of the procedure. Such contentions are plainly incorrect. By Rule 439(3) of the UCPR, a party who receives an affidavit less than two business days before the hearing is entitled to expect that the deponent will attend court and will be available for cross-examination. The learned hearing judge did have the power to dispense with the attendance of the deponent or to direct that the affidavit be used without the deponent being cross-examined, but no such dispensation was sought. Mr. Buckley was released from the obligation to be available for cross-examination because he had agreed with the accuracy of the notes of the conversation about which he was to be cross-examined. The Court was entitled to expect that appellant's counsel understood the basis upon which Mr. Buckley had been released from his obligation. The Court was also entitled to regard that counsel's lack of objection, when the bank's counsel recounted the circumstances to the learned hearing judge as an agreement that Mr. Buckley's recollection of the conversation accorded with Mr. Matson's notes. In such circumstances it cannot be found that there had been any departure from the rules of evidence.

[30] The notes of Mr. Matson were in any event unchallenged and could be relied upon by the learned chamber judge as part of the bank's records and to be given by him such weight as he saw fit. There was nothing in Mr. Buckley's affidavit which directly conflicted with Mr. Matson's notes. Neither in Mr. Buckley's affidavit nor in Mr. Matson's notes was there any suggestion of an agreement in the terms set out in the statement of claim. That was the state of the evidence upon which the application for summary judgment had to be determined.

Were there issues to be tried?

[31] Counsel for the appellant contended that the question as to whether the agreement alleged in the Statement of Claim had been reached with Mr. Matson, could be determined only upon trial. He referred to the facts that the bank's note was made some 16 days after the interview and that Mr. Buckley was a labourer and not versed in banking procedure. Consequently, he argued, there might be more evidence available going to this issue. He pointed out that Mr. Buckley's affidavit established that there was a meeting, that some agreement had been reached and that monies had been paid by the appellant's sons pursuant to that agreement. He argued that a trial was necessary to establish the full terms of the agreement.

[32] The only point of difference from his case and the case made on behalf of the bank is the assertion that the bank's note set out the full terms of the agreement. It was, as his Honour found, incumbent upon the appellant to put before the court her evidence as to the terms of the agreement. This was not done but, more importantly, there was no challenge by Mr. Buckley to the version of events in the bank's note. There was nothing in the note to suggest anything more than an extension of the overdraft terms in exchange for financial assistance from family members.

[33] Mr. Bradshaw of Counsel for the appellant also argued at the hearing of the appeal that there was no default on her part because the bank was "double dipping".[9] This so-called double dipping he attributed to the fact that funds paid into the appellant's overdraft account had been transferred by the bank to reduce the debt in the other loan accounts thereby creating default in the overdraft account.

[34] The bank had sole control over the overdraft account. But the evidence shows that all of the appellant's accounts were in default at the time; that the payments to be made by the appellant's family members did not continue at the agreed level; and that the bank had express authority to transfer funds from the overdraft account to the other accounts. Mr. Lilley of Counsel for the bank identified that, by 28 February 2001, there would have been arrears in the loan account of $2,852.00 without the transfers from the overdraft account.[10]

The relevant law

[35] The question is whether the learned hearing judge was in error in entering summary judgment. Rule 293(2) of UCPR relevantly provides:-

> "(2) If the court is satisfied that –
> (a) The plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
> (b) There is no need for a trial of the claim or the part of the claim;
> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[36] This new rule results, not only in a change in terms, but also reflects a change in the philosophy from that embodied in the former rules and in the propositions identified in *Fancourt v Mercantile Credits Ltd*[11]. Wilson J considered this new rule in *Foodco Management Pty Ltd & Diaz Keinert Pty Ltd v Gomai Travel Pty Ltd*[12] and found guidance in the approach taken by the Court of Appeal in the United Kingdom in *Swain v Hillman*[13]. The latter case considered an equivalent rule in the United Kingdom, namely, R. 24.4 of the Civil Procedure Rules. That rule is couched in terms which are almost identical with r. 293(2) of the UCPR. The U.K. Court of Appeal also made reference, in the same case, to R 3.4 which provides for the court to strike out a statement of case if it appears that it discloses "no reasonable grounds for bringing or defending a claim". That latter rule has its equivalent in the UCPR r 171.

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9 Transcript p 5/45
10 Transcript p 15/30
11 (1983) 154 CLR 87 at 99
12 [2001] QSC 291
13 [2001] 1 All ER 91

[37] In *Swain* Lord Woolf said concerning the relevant rules:-

> "…the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word ' real' distinguishes fanciful prospects of success or …they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."[14]

Of the rationale for those new rules, His Lordship said:-

> "It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position . Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."[15]

[38] This statement by Lord Woolf is clearly consonant with the philosophy of the UCPR as set out in Rule 5. It is this philosophy which underpins the change in approach reflected in the new rules. These remarks apply with equal force to both rr. 292 and 293 of the UCPR.

[39] It is of assistance to note that even more recently, in *Alexander v Arts Council of Wales*[16] the Court of Appeal (UK) examined the limits of the application of CPR 24.4. That case raised the question of whether summary judgment could be entered in a defamation case where there were issues fit to be placed before a jury. CPR 24.4 specifically states that "the Court may give summary judgment…in any type of proceedings." However there remains a qualification imposed by the recognition of the respective functions of the judge and the jury, in particular, of the making by the judge of an evaluative decision on an issue which should be left to the jury. The power to enter summary judgment exists where the judge concludes that the evidence, taken at its highest, is such that a properly directed jury could not possibly reach the necessary factual conclusion.[17] This case recognized the more liberal approach to the determination of summary judgment applications identified in *Swain's* case.

[40] In my view, the reasoning of the Court of Appeal (UK) in *Swain* should be adopted as setting the proper test for applications pursuant to rr 292 and 293 of the UCPR.

Conclusion

[41] In this case there was not placed before the learned hearing judge any evidence to support the existence of an agreement in the terms set out in paragraph 1 of the appellant's Statement of Claim nor was any such evidence presented on appeal. Moreover it is highly improbable that a bank would forego such an important right on the basis of a simple agreement to rectify an existing default. It is even less

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14 *Swain* (supra)

15 *Swain* (supra) at p 94

16 [2001] 1 WLR 1840

17 Ibid per May LJ at pp 1852-3; per Lord Woolf at p 1857

likely it would forego such a right notwithstanding further default, which in this case was established on the evidence.

[42] On the material before him the learned hearing judge was correct in his assessment that it was difficult to see how the appellant's case "could possibly get to first base". I am in respectful agreement with this assessment. This, to my mind, meets the test required by r. 293(2) as explained by Lord Woolf in *Swain v Hillman*. The appellant quite clearly had no prospect of succeeding in the action.

[43] I would therefore dismiss the appeal with costs.