

SUPREME COURT OF QUEENSLAND

CITATION: *Forsyth & Anor (as trustees for the C&S Forsyth Superannuation Fund) v Gibbs* [2008] QCA 103

PARTIES: **GRAHAM COLIN FORSYTH AND MICHELLE FORSYTH (as trustees for the C&S FORSYTH SUPERANNUATION FUND)**
(plaintiffs/appellants)
v
RALPH ROBERT TERRANCE GIBBS
(defendant/respondent)

FILE NO/S: Appeal No 10873 of 2007
SC No 8436 of 2006

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 2 May 2008

DELIVERED AT: Brisbane

HEARING DATE: 17 April 2008

JUDGES: McMurdo P, Keane and Fraser JJA
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Appeal allowed**
2. Orders of the Supreme Court set aside.
3. Judgment for the appellants in the sum of \$340,591.33 together with interest at the rate of 16 per cent from 20 September 2007
4. Respondent to pay the appellants' costs of the appeal and of the action to be assessed on the standard basis

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – where the appellants brought an action against the respondent for the recovery of a debt – where the respondent does not dispute the evidence of the debt adduced by the appellants – where the respondent sought to resist the appellants' application for summary judgment on the grounds of his entitlement to an equitable set-off against the debt – whether the claimed equitable set-off is a sufficient basis upon which an application for summary judgment can be refused

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – CROSS CLAIMS: SET-OFF AND COUNTERCLAIM – SET-OFF – WHAT MAY BE SET-OFF – EQUITABLE SET-OFF – where the respondent seeks to rely upon an equitable set-off against the appellants' claim – where the foundation of the set-off relied upon is said to be a claim in negligence by the respondent against a third corporate entity and the male appellant personally – whether there is a sufficient factual nexus between the respondent's claim in negligence and the appellants' claim to justify the imposition of the former as an equitable set-off against the latter

Uniform Civil Procedure Rules 1999 (Qld), r 173(1), r 292

Hill Corcoran Constructions Pty Ltd v Navarro & Anor [\[1992\] QCA 017](#); Appeal No 44 of 1991, 6 March 1992, applied *Hill v Zymack* (1908) 7 CLR 352; [1908] HCA 13, cited *Indrisie v General Credits Ltd* [1985] VR 251, applied *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439, distinguished
Piggott v Williams (1821) 56 ER 1027, applied
Preston v Strutton (1792) 145 ER 797, cited
United Dominions Corporation Limited v Jaybe Homes Pty Ltd [1978] Qd R 111; SC No 262 of 1975, 1 May 1975, applied

COUNSEL: K C Fleming QC for the appellants
 F H Dawson for the respondent

SOLICITORS: Kelly & Down for the appellants
 Thompson McNichol for the respondent

- [1] **McMURDO P:** I agree with Keane JA.
- [2] **KEANE JA:** The appellants are the plaintiffs in an action brought in their representative capacity as trustees of a superannuation fund for the recovery of a debt alleged to be due to them for moneys lent to the respondent, the defendant in the action. The parties executed a loan agreement on 21 July 2003. The advances of the loan moneys were alleged to have been made between 11 August 2003 and 1 April 2005. The loan agreement provided for the payment of interest at the rate of 16 per cent. The respondent admitted in his defence that, with some minor qualifications, the loans had been made and not repaid.
- [3] On 13 September 2007, the appellants brought an application for summary judgment in the action pursuant to r 292 of the *Uniform Civil Procedure Rules 1999 (Qld)* ("the UCPR"). The appellants' evidence was that the total amount owing in respect of loans made to the defendant was \$340,591.33 together with interest accruing since 20 September 2007.
- [4] The respondent did not dispute the evidence adduced by the appellants, but resisted the appellants' application for summary judgment on the basis that he was entitled in equity to set-off against the appellants' claim amounts said to be recoverable by the

respondent from G & S Forsyth Pty Ltd, a company of which the male appellant is a director, and the male appellant personally.¹

- [5] In this regard, the respondent alleged that, commencing in July 2004, G & S Forsyth Pty Ltd, acting through the male appellant, acted as his finance broker in arranging loans from a third party, Union Fidelity Capital Funding Pty Ltd ("UFCF"). The respondent alleged that, by reason of the negligence of the male appellant and G & S Forsyth Pty Ltd, or the contravention of s 52 of the *Trade Practices Act 1974* (Cth), the respondent incurred liabilities to UFCF. Further, the respondent alleged that, because the respondent was obliged to satisfy his liabilities to UFCF, he was unable to meet his contractual obligations to other parties so that he suffered further losses and so was unable to repay the appellant's loans. In the alternative to the asserted right to set off those liabilities and losses against the appellants' claim, the respondent asserted that the appellants are estopped from recovering the debt owed to them by the respondent.
- [6] The transactions to which the respondent refers in relation to his claims against the male appellant and G & S Forsyth Pty Ltd occurred at different times, and obviously involved different parties, to the loans on which the appellants sue. The transactions to which the respondent refers were not alleged in the respondent's pleading, or by any evidence, to have been either integral or even collateral to the loans on which the appellants sue.
- [7] The learned primary judge dismissed the appellants' application for summary judgment. Her Honour said:
- "To grant the relief sought by the plaintiffs I would need to form a conclusion as to the merits of the set-off claim without having a trial to investigate factual issues such as the precise content of the matters in the set-off claim that are said by the defendant to go to the root of the plaintiff's claim. There may be a sufficient closeness of connection between the defendant's set-off claim and the subject matter of the plaintiff's claim that may make it unfair for the plaintiff's claim to proceed without allowance being made for the defendant's claim. I accept the defendant's submission that Mr Forsyth was the defendant's broker. He had previously arranged finance for the defendant to purchase a number of properties. As lender and broker he had an intimate knowledge of the defendant's business. He was called upon to assist with refinancing and there is an issue as to whether, by his advice, the defendant suffered significant financial losses.
- Accordingly, I am not satisfied that it can be said that the set-off claim is so clearly untenable that it cannot possibly succeed. Accordingly, the application should be dismissed at this point."
- [8] In my respectful opinion, the learned primary judge erred in proceeding on the footing that an investigation of the factual issues involved in the respondent's claims

¹ It should be noted that there was no suggestion that the respondent could rely upon a set-off at common law. Any such endeavour might have been doomed to failure because the respondent's cross-claims are not for liquidated amounts and, by reason of s 7 of the *Imperial Acts Application Act 1984* (Qld) which terminated the application in and for Queensland of the Statutes of Set-off, 2 Geo II c 22 and 8 Geo II c 24: see Derham, *Recent Issues in Relation to Set-off* (1994) 68 ALJ 331 at 344. Now see r 173(1) of the *Uniform Civil Procedure Rules 1999* (Qld).

against the male appellant and G & S Forsyth Pty Ltd was necessary in order to determine whether there was a "sufficient closeness of connection between the [respondent's] set-off claim and the subject matter of the [appellants'] claim". The absence of any sufficient connection is manifest. The respondent's claims against G & S Forsyth Pty Ltd and the male appellant arise quite separately from the appellants' claim to repayment of their loan to the respondent. Those claims cannot be relied upon to establish an equitable set-off against the loan debt. No further investigation of the facts is necessary to establish that this is so.

- [9] Consistently with the technique of equity, which does not seek to define what an elephant is but knows one when it sees one, the principles governing the availability of equitable set-off of cross-claims are couched in open textured terms, such as "sufficient connection" and "unfairness". In some cases, it will be necessary to engage in an evaluation of a range of facts which might establish "sufficient connection" or "unfairness" of the relevant kind. But the principles to be applied are not so vague or subjective that it is never possible to determine, for the purposes of an application for summary judgment, that the facts alleged by a defendant simply fall short of what is required.
- [10] It is important to emphasise that the availability of an equitable set-off between cross-claims does not depend upon an unfettered discretionary assessment of whether it would be "unfair" in a general sense for a plaintiff to insist on payment of the debt owed to it while the cross-claim remains unpaid. It is essential that there be such a connection between the claim and cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim.²
- [11] Thus in *Piggott v Williams*,³ the claim of a solicitor who sued his former client to recover fees for services rendered was successfully met by a plea of equitable set-off on the basis that the fees were only incurred by reason of the solicitor's lack of due skill and diligence. The solicitor's breach of his obligations of skill and diligence was itself the source of the claim for his fees. This case affords an example of what is meant when it is said that the claim to set-off must "impeach" or go to "the root of" the plaintiff's claim.⁴
- [12] An example of a failed attempt to assert an equitable set-off, which is particularly pertinent to a summary judgment situation, is afforded by the decision of the Full Court of the Supreme Court of Victoria in *Indrisie v General Credits Ltd*.⁵ There, an order for summary judgment was upheld against a guarantor who sought to rely upon a cross-claim for damages available to the principal debtor against its creditor by way of set-off against the guarantor's liability on the guarantee. The Full Court said:
- "... reference to cases such as *Edward Ward and Co v McDougall* [1972] VR 433; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137; [1979] 2 All ER 1063 and *Eagle Star Nominees Ltd v Merrill* [1982] VR 557 shows that, in order to rely upon a cross-claim as an equitable set-off, there

² Cf *United Dominions Corporation Limited v Jaybe Homes Pty Ltd* [1978] Qd R 111 at 116 – 117; *Hill Corcoran Constructions Pty Ltd v Navarro & Anor* [1992] QCA 17.

³ (1821) 6 Madd 95; 56 ER 1027.

⁴ Cf *Preston v Strutton* (1792) 1 Anst 50; 145 ER 797; *Hill v Ziy Mack* (1908) 7 CLR 352.

⁵ [1985] VR 251.

must be such a nexus between the claim and cross-claim that the cross-claim can be said to impeach the plaintiff's claim. In the present case the claim for unliquidated damages is founded, not upon the transaction in respect of which the principal debtor is said to be liable, but upon a collateral contract entirely independent of that for which the respondent has the benefit of a security for due performance. The appellants' claim clearly does not meet the test to be applied, namely can the cross-claim be said to impeach the title to the respondent's legal demand?"⁶

- [13] In the present case, even if the claims which the respondent seeks to set off were ultimately to be made out against G & S Forsyth Pty Ltd and the male appellant, the liabilities thus established could not in any way be said to impeach the appellants' claim to be repaid the debt for the moneys they lent to the respondent. That is because the transactions which gave rise to the respondent's claims were entirely distinct from the loans in respect of which the appellants sue.
- [14] In this regard, there is no suggestion that the respondent was induced to accept the loans provided by the appellants by reason of the misconduct alleged against G & S Forsyth Pty Ltd and the male appellant. There is no evidence that the respondent's loan indebtedness to the appellants arose, or was increased, by reason of any misconduct on the part of the male appellant or G & S Forsyth Pty Ltd or even by reason of the liabilities or losses incurred by the respondent consequential upon that misconduct.
- [15] That the misconduct relied upon by the respondent might have contributed in a general way to the respondent's failure to make profits or to its inability to make repayments of the loans is clearly an insufficient connection to give rise to a set-off. So much was indicated by this Court in *Hill Corcoran Constructions Pty Ltd v Navarro & Anor.*⁷ The point is that there must be a connection between claim and cross-claim beyond the mere fact that the payment of the claim has been rendered more difficult than would have been the case had it not been for the matters the subject of the cross-claim.
- [16] The respondent relied particularly upon observations by Giles J in *Murphy v Zamonex Pty Ltd*⁸ to support his argument that the fact that the loan debt was owed to the appellants as trustees did not disentitle the respondent to set-off his cross-claims against the male appellant and G & S Forsyth Pty Ltd. But here it is not necessary for the appellants to succeed with an argument that a claim brought in their capacity as trustees cannot, as a matter of law, be set off against a cross-claim brought against them, or one of them, in their personal capacity. In the present case, the appellants are able to rely upon this want of mutuality between the claims as merely one indication, among other more powerful indications, that there is no sufficient connection between the parties' claims to regard the respondent's claims as impeaching the appellants' claim to recover the debt undoubtedly owed them by the respondent.
- [17] In my respectful opinion, there was no basis on which the appellants' application could be resisted on the basis of equitable set-off. The position for the appellants

⁶ [1985] VR 251 at 254.

⁷ See *Hill Corcoran Constructions Pty Ltd v Navarro & Anor* [1992] QCA 17 at 8 – 9.

⁸ (1993) 31 NSWLR 439 at 463 – 468.

was even stronger in relation to the respondent's attempt to set up some form of estoppel in that there is no suggestion at all that the respondent assumed his loan obligations to the appellants by reason of the dealings of which he complains against the male appellant and G & S Forsyth Pty Ltd.

- [18] The appeal should be allowed.
- [19] The orders below should be set aside and, in lieu thereof, there should be judgment for the appellants in the sum of \$340,591.33 together with interest at the rate of 16 per cent from 20 September 2007.
- [20] The respondent should pay the appellants' costs of the appeal and of the action to be assessed on the standard basis.
- [21] **FRASER JA:** I agree with the reasons of Keane JA and the orders proposed by his Honour.