

DISTRICT COURT OF QUEENSLAND

CITATION: *National Australia Bank Ltd v Vidakovic* [2007] QDC 121

PARTIES: **NATIONAL AUSTRALIA BANK LTD**

(Plaintiff)

AND

PETER VIDAKOVIC

(First Defendant)

AND

DOMINICK VALDWYN MELROSE

(Second Defendant)

AND

VALWYN KERRY MELROSE

(Third Defendant)

AND

HERMINA THEODORA MELROSE

(Fourth Defendant)

FILE NO/S: BD263/2003

DIVISION: Civil

PROCEEDING: Application for summary judgment

ORIGINATING
COURT: District Court, Brisbane

DELIVERED ON: 8 June 2007

DELIVERED AT: Brisbane

HEARING DATE: 25 May 2007

JUDGE: Tutt DCJ

ORDER: **1. Judgment for the plaintiff/applicant against the second defendant Dominick Valdwyn Melrose for the amount of claim plus interest to the date of this judgment plus costs of and incidental to the proceeding and this application, so far as they relate to the second defendant only, to be agreed or assessed on the standard basis under the relevant scale.**

2. The application for summary judgment against the

third and fourth defendants be dismissed with costs of and incidental to the application to be reserved.

CATCHWORDS: Application for summary judgment – proceeding for debt owing – second, third and fourth defendants as guarantors – where defendants signed ‘Guarantee and Indemnity’ documents – where validity of ‘Guarantee and Indemnity’ challenged – whether defendants have any real prospect of success – whether defendant’s liability as guarantors was limited to their capacities as trustees – triable issue – relevant test to be applied

Uniform Civil Procedure Rules 1999 rr 292, 293.

Deputy Commissioner of Taxation v Salcedo [2005] QCA 227.

Helvetic Investment Corporation Pty Ltd v John Knight (as Trustee of the John Knight Family Trust) (1982) 7 ACLR 225.

Hoyt’s Pty Ltd v Spencer (1919) 27 CLR 133.

National Australia Bank Ltd v Troiani and Anor [2002] QCA 196

COUNSEL: Mr J. Peden for the plaintiff/applicant.

SOLICITORS: Flower and Hart for the plaintiff/applicant.

Mr P. Lynch of Lynch & Company for the second, third and fourth defendants/respondents.

Introduction:

- [1] This is an application by the plaintiff (“applicant”) for summary judgment to be entered against the second, third and fourth defendants pursuant to r 292 of the *Uniform Civil Procedure Rules 1999* (“UCPR”). At the commencement of the hearing on 22 May 2007 leave was granted to the second third and fourth defendants to file and read four (4) further affidavits in the proceeding and at the adjourned hearing on 25 May 2007 leave was granted to the applicant to file and read a further affidavit on the question of costs thrown away on 22 May 2007.

Background Facts:

- [2] The application is in respect of a proceeding for a debt owing to the applicant pursuant to two guarantees of overdraft facilities advanced by the applicant to a company called Ribford Pty Ltd (“the company”).¹
- [3] The guarantees were signed by each of the second third and fourth defendants to this application as well as the first defendant in the proceeding against whom default judgment was entered by this court on 14 April 2003.
- [4] From the material filed the applicant advanced to the company the sum of approximately \$89,000.00 in respect of which each of the second third and fourth defendants signed at least two “Guarantee and Indemnity” documents being Exhibits BH-1 and BH-2 to the affidavit of Bruce Hollas filed on behalf of the applicant.²
- [5] The evidence further shows that the company failed to repay to the applicant the amount advanced to it and on 28 May 2001 an administrator was appointed to the company which went into liquidation on or about 25 June 2001.³
- [6] Despite the applicant forwarding letters of demand for payment of the debt to the second third and fourth defendants, the applicant claims that the principal sums advanced together with interest thereon remain outstanding to it.
- [7] The second third and fourth defendants filed defences⁴ and an amended defence to the applicant’s claim which challenged the validity of the Guarantee and Indemnity documents and in particular the third and fourth defendants allege that they did not

¹ Paragraph 2 of applicant’s amended statement of claim filed 12 May 2006.

² Affidavit of B Hollas filed 26 April 2007.

³ Paragraphs 11 and 12 of affidavit of B Hollas filed 26 April 2007 and Exhibit BH-5 to that affidavit.

⁴ The third and fourth defendants filed their defence on 5 June 2003 and the second defendant filed his defence on 28 June 2004.

sign the document "... as guarantors in their personal capacity but as trustees for the Van Der Ham Family Trust and their liability is limited only to the trust assets."⁵

Applicant's submissions:

- [8] The applicant's submission is that it is entitled to summary judgment against the second third and fourth defendants on the basis that they "... have no real prospect of successfully defending the plaintiff's claim" and that notwithstanding the submission made on behalf of the third and fourth defendants that their liability in respect of the Guarantee and Indemnity is "limited to the assets of the Van Der Ham Family Trust", it is submitted that "the express terms of the Guarantee document provide that if the guarantor is a trustee then the guarantor is 'liable both personally and in your capacity as trustee' by clause 20.1(a) of the guarantee".⁶
- [9] Generally the applicant submits that "there is no merit" in the defences raised on behalf of the third and fourth defendants and further "Even if it be ultimately found that there is a verbal collateral agreement, it is inconsistent with and repugnant to the written agreement, and is therefore of no force and effect: see *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133 at 139";⁷ and that the application falls squarely within the provisions of r 292 of the UCPR.
- [10] It is further submitted "...that the second defendant was not a trustee of the trust, and accordingly the so called agreement cannot assist him. He has no defence to the claim and judgment must be given against him."⁸

Second third and fourth defendants' submissions:

⁵ Paragraph 3A(h) of the third and fourth defendants' amended defence.
⁶ Paragraph 15(a) of the applicant's submissions of 22 May 2007.
⁷ Paragraph 21 of the applicant's submissions of 25 May 2007.
⁸ Paragraph 15 of the applicant's submissions of 25 May 2007.

- [11] Although the second third and fourth defendants were represented at the hearing of this application by Mr Lynch and the application was generally opposed “... on legal and discretionary grounds”,⁹ the opposition to the application for summary judgment was effectively on behalf of the third and fourth defendants and it was submitted by Mr Lynch that “we say nothing of course and make no submissions in relation to the position of the second defendant.”¹⁰
- [12] The submissions made on behalf of the third and fourth defendants rely upon the issues raised in the defences filed and the affidavits filed by leave on 22 May 2007.
- [13] It was submitted on behalf of the third and fourth defendants that so far as they were concerned, their liability as guarantors was limited to their capacities as trustees for the Van Der Ham Family Trust and its assets and not personally.
- [14] Reliance is made on the affidavit of the third defendant in respect of an alleged conversation between the third and fourth defendants and the applicant’s representative that the third and fourth defendants “... were only agreeing to put up the trust assets as security for the Ribford loan”, and further that the applicant’s representative “indicated” to the third defendant “... that the bank agreed that the guarantee was to be confined to the assets of the trust only.”¹¹
- [15] It was submitted there is ample legal authority available to support the contention that the liability of Trustees can be limited to their capacity as Trustees only and not personally, subject of course to the construction of the documentation.¹²

⁹ Paragraph 2 of second third and fourth defendants’ written submissions.

¹⁰ Hearing transcript p 42 line 1; see also transcript p 40 lines 1-10.

¹¹ Paragraphs 16-18 inclusive of affidavit of BW Melrose filed by leave on 22 May 2007.

¹² *Helvetic Investment Corporation Pty Ltd v John Knight (as Trustee of the John Knight Family Trust)* (1982) 7 ACLR 225.

- [16] It was further submitted that the third and fourth defendants "... intend to amend their defence to incorporate particulars of the oral agreement made between the plaintiff and the third and fourth defendants in the event that this application for summary judgment is dismissed."¹³
- [17] It was submitted there are a number of defences including equitable defences available to the third and fourth defendants and the application should be refused.
- [18] Finally it was submitted that the applicant has unreasonably delayed without explanation in filing the current application in that the proceeding was commenced on 30 January 2003 and the applicant took no steps in the proceeding between 28 June 2004 and 31 January 2006 when it filed a notice of intention to proceed after which further pleadings were then exchanged by the parties. Granting summary judgment is a discretionary exercise and if all other relevant matters were equal, delay in bringing the application might "tip the balance"¹⁴ against it being granted.

The law:

- [19] Rule 292 of the UCPR provides as follows:
- "(1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
 - (2) If the court is satisfied that—
 - (a) the defendant has no real prospect of successfully defending 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;

¹³ Paragraph 31 of the affidavit of VK Melrose filed by leave on 22 May 2007.

¹⁴ Hearing transcript p 30 line 7.

the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[20] The test to be applied when considering whether summary judgment should be entered for either a plaintiff or defendant in a proceeding under rr 292 and 293 of the UCPR has been the subject of recent consideration by our Court of Appeal in the matter of *Deputy Commissioner of Taxation v Salcedo* [2005] QCA 227 ("*Salcedo*").

[21] As stated by Williams JA at paragraph [11] with whom McMurdo P and Atkinson J agreed:

"... Rule 292 and r 293 brought about significant changes in the law and procedure relating to summary judgment. The wording of r 292 and r 293 is clearly based on the drafting used in Part 24 of the *Civil Procedure Rules* (UK) which came into force in the United Kingdom in 1999. In *Swain v Hillman* [2001] 1 All ER 91 the Court of Appeal had to consider r 24.2, the equivalent of r 292. Lord Woolf MR said at 92:

"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."

Later, again speaking of the rule, he said at 94:

"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."

In his reasons at 95, Pill LJ accepted that the term "real" was used in contradistinction to "fanciful". The third member of the court, Judge LJ, whilst recognising that summary judgment was a "serious step", went on to say at 96:

"This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to

give summary judgment does not arise merely because the court concludes that success is improbable." ..."

[22] It is unnecessary for me to repeat what Williams JA said further in paragraphs [12] to [17] inclusive of his judgment but it is suffice to say that those paragraphs provide a succinct summary of the "test" to be applied by a judicial officer when considering an application for summary judgment under the UCPR. Further to this the comments of Atkinson J at paragraphs [42] and [45] are also apposite.

[23] A summary of the facts in this proceeding are:

- (a) Between August and October 2000 the applicant advanced to the company an amount of approximately \$89,000 by way of an overdraft facility in respect of which the second third and fourth defendants signed at least two Guarantee and Indemnity documents.
- (b) The documents were signed at various times by the respective second third and fourth defendants but the third and fourth defendants dispute the capacity in which the documents were executed relative to their liability to repay the debt.
- (c) The third and fourth defendants allege that it was their understanding that only the "trust assets" were to be used as security for the company's loan and that the applicant clearly understood this arrangement.
- (d) The applicant has submitted that the documents themselves and various authorities on point indicate that the third and fourth defendants must accept personal liability for the debt and cannot rely upon their position as trustees of the Van Der Ham Family Trust to limit their liability to that capacity only.

- (e) As such the third and fourth defendants have “no real prospect” of defending the claim and summary judgment should be entered against them as well as the second defendant who has no such defence available to him.

Findings:

- [24] In all the circumstances and relying upon the dicta expressed in *Salcedo* above, I am not satisfied that the third and fourth defendants have “... no real prospect of successfully defending” the applicant’s claim within the terms of r 292(2) of the UCPR in that they have raised issues on the material filed in this application which should be properly ventilated at trial notwithstanding the terms of the Guarantee and Indemnity documents on their face.
- [25] I find therefore in the exercise of my discretion that the applicant is not entitled to summary judgment against the third and fourth defendants as claimed.
- [26] I am satisfied however on the material filed and the submissions made that the second defendant “has no real prospect of successfully defending” the applicant’s claim and the applicant is therefore entitled to judgment against him.

Orders:

- [27] My orders in this matter will therefore be as follows:
1. Judgment for the plaintiff/applicant against the second defendant Dominick Valdwyn Melrose for the amount of claim plus interest to the date of this judgment plus costs of and incidental to the proceeding and this application, so far as they relate to the second defendant only, to be agreed or assessed on the standard basis under the relevant scale.

2. The application for summary judgment against the third and fourth defendants be dismissed, with costs of and incidental to the application to be reserved.