

# DISTRICT COURT OF QUEENSLAND

CITATION: *Cambio Group Pty Ltd v Fanengine Pty Ltd & Ors* [2014] QDC 115

PARTIES: **CAMBIO GROUP PTY LIMITED**  
**(plaintiff)**

v

**FANENGINE PTY LTD**  
**(first defendant)**

and

**BRETT JOHN MCCALLUM**  
**(second defendant)**

and

**DESMOND GEORGE SELVEWRIGHT**  
**(third defendant)**

FILE NO/S: 384/2013

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court, Southport

DELIVERED ON: 27 May 2014 *Ex tempore*

DELIVERED AT: Southport

HEARING DATE: 12 May 2014

JUDGE: Reid DCJ

ORDER:

1. Pursuant to rule 292 of the *Uniform Civil Procedure Rules (1999)* summary judgment be entered against the second defendant in the amount of \$187,089 together with interest pursuant to the Lease and the Guarantee in the amount of \$16,299.80.
2. The second defendant pay the plaintiff's costs of the proceedings assessed on an indemnity basis.

SOLICITORS: Rose Litigation for the plaintiff

## **THE APPLICATION**

- [1] This is an application by the plaintiff pursuant to r. 292 of the *Uniform Civil Procedure Rules (1999)* ('UCPR') for summary judgment against the first, second and third defendants in the amount of \$187,089, together with interest pursuant to the terms of a lease and guarantee.
- [2] As a result of an application by the third defendant, on behalf of himself and the first defendant, the application for summary judgement, insofar as it concerns the first and third defendants, has been adjourned to 9.00 am on 21 May 2014.
- [3] The application, therefore, concerns only the second defendant, who did not appear.

## **BACKGROUND**

- [4] Pursuant to its statement of claim of 27 November 2013, the plaintiff initiated proceedings. Both the second and third defendants are said to be directors of the first defendant.
- [5] It is alleged that on 28 March 2013 the plaintiff and the first defendant entered into a lease of premises at Marine Parade, Southport. The lease was for the period from 8 April 2013 to 28 February 2015. Annual base rental was \$91,700.00 plus GST, including outgoings. There was provision for variation thereof during the lease. On the same day, that is 28 March 2013, each of the second and third defendants executed guarantees with respect to the first defendant's obligations under the lease.

- [6] Those allegations were all admitted in the defence filed on behalf of all of the defendants.
- [7] It is also admitted in the defence that on 28 April and 29 May 2013 the first defendant failed to pay rental instalments, each payment being for an amount of \$7,641.66 and that the lease provided for interest on arrears at 15 per cent per annum.
- [8] It can be seen that much that is alleged in the statement of claim is admitted in the defence. Perusal of the defence also shows that what is denied in paragraphs 7, 13, 16, 18, 20 and 21 of the defence is the subject of a base denial without reference to any fact on which the denial is based. This is, of course, not in accord with requirements of the UCPR with respect to denial of matters alleged in a pleading.
- [9] The substantial matters contained in the defence are contained in paragraphs 9 to 14 of the defence. I do not propose to set them out in full. Essentially they allege that the plaintiff was a certified practicing accountant retained by the defendants to provide accountancy and financial advice services and that because of representations made by Mr Sessarago and Mr Eckersley, Directors of the plaintiff, about the first defendant's capacity to meet its obligations under the lease and because of representations about the benefit of entering into such a lease, it is said that the first defendant entered into the lease and the other defendants into the guarantee.
- [10] In its reply the plaintiff pleads:

5. *In respect of the allegations contained in paragraph 9 of the Defence, the Plaintiff denies the allegations on the grounds that they are untrue, and says:*
- a. *The Second Defendant only engaged the Plaintiff for general accounting advice;*
  - b. *The First Defendant engaged an alternative account in Casino in the State of New South Wales for taxation and financial matters;*
  - c. *The Plaintiff did not provide the Second and Third Defendants on behalf of the First Defendant any accounting or financial advice in relation tot eh First Defendant's cash flow, business development or whether it was feasible for the First Defendant to enter into the Lease;*
  - d. *The Plaintiff has never provided the Third Defendant with any advice whatsoever accounting or otherwise;*
  - e. *The accounting and financial services provided by the Plaintiff to the Second Defendant is unrelated to allegations in issue in this proceeding;*
  - f. *The Defendants entered into the Lease on their own free will and without any advice by the Plaintiff with respect to the Lease;*
  - g. *The Plaintiff did not owe a fiduciary duty to the First, Second and Third Defendants in respect of the Lease as alleged.*
6. *In respect of the allegations contained in paragraph 10 of the Defence, the Plaintiff denies the allegations on the grounds that they are untrue, and says:*
- a. *The conversation alleged between the Second and Third Defendants and Mr Mark Sessarago ("Mr Sessarago") and Mr David Eckersley ("Mr Eckersley") did not occur;*
  - b. *Mr Eckersley only met the Third Defendant on one occasion when the Third Defendant had travelled from Sydney for the purpose of signing the Lease;*
  - c. *Mr Sessarago denies ever meeting the Third Defendant; and*
  - d. *Repeat and rely on the matters pleaded in paragraph 5 herein.*

7. *In respect of the allegations contained in paragraph 11 of the Defence, the Plaintiff denies the allegations on the grounds that they are untrue, and says:*
  - a. *Repeat and rely on the matters pleaded in paragraphs 5 and 6 herein;*
  - b. *The Defendants entered into the Lease on their own free will and are liable to the Plaintiff for damages arising from the breach of the Defendants.*
8. *In respect of the allegations contained in paragraph 12 of the Defence, the Plaintiff joins issue with the Defendants, and repeat and rely upon the matters pleaded at paragraphs 5, 7(a) and 7(b) herein.*
9. *In respect of the allegations contained in paragraph 13 of the Defence, the Plaintiff joins issue with the Defendants, and repeat and rely on the matters pleaded in paragraphs 5(a), 5(b), 5(c) and 6(a) herein.*
10. *In respect of the allegations contained in paragraph 14 of the Defence, the Plaintiff joins issue with the Defendants, and says:*
  - a. *That the Second and Third Defendants on behalf of the First Defendant failed and/or refused to seek independent legal advice for reasons unknown to the Plaintiff; and*
  - b. *The Defendants entered into the Lease of their own free will.'*

[11] The application for summary judgment is supported by affidavits of David Eckersley and Lachlan Lemont, being documents 6 and 7 on the court file, together with a further affidavit of Mr Lemont sworn 9 May 2014, which was filed by leave. It attaches an exhibit, mistakenly omitted from the earlier affidavit, and a file note relating to communication with the second defendant of 6 May 2014 that indicates that the second defendant had received the application and supporting affidavits on or about 15 April 2014. It also indicates that the second defendant was to consult a lawyer about appearing before this Court on the return date of the application.

[12] As it transpired neither he, nor initially the first or third defendants, appeared.

- [13] Subsequently, the third defendant on behalf of himself and the first defendant appeared and the application in respect of their interest in the matter was adjourned until next week.
- [14] The name of the second defendant was called three times but he failed to appear.
- [15] In Mr Eckersley's affidavit he sets out the circumstances of the formal execution of the Lease and Guarantee and of the first defendant's default as well as details of the provision of a notice to remedy breach on 19 June 2013. He further says that the first defendant failed to remedy that breach. He attests to the termination of the lease by notice of 3 August 2013 and of subsequent demands for monies due.
- [16] The calculation of the debt of \$187,089 is shown as follows:

<b>ITEM</b>	<b>AMOUNT</b>
Total rent payment for the term of the lease	\$175,240.00
Plus GST	\$17,524.00
<hr/> Total	<hr/> \$192,764.00
Less payments made to date	(\$6,445.00)
Plus legal fees incurred	\$770.00
<hr/> <b>TOTAL DEBT</b>	<hr/> <b>\$187,089.00</b>

- [17] Mr Eckersley sets out from paragraph 21 of his affidavit attempts that were made to relet the premises. In particular, he refers to its being listed with various commercial letting websites from October 2013, and of the appointment of Ray White, Surfers Paradise to attempt to relet the premises. That has been, thus far, unsuccessful.

- [18] Mr Lemont's initial affidavit attests the service of the application and affidavit of Mr Eckersley upon the second defendant. Both that affidavit and the subsequent affidavit filed by leave, refers to conversations he had with the second defendant during which the second defendant acknowledged that service.
- [19] In circumstances where neither the second defendant nor any of the defendants have filed any material negating the allegations in the statement of claim or the contents of Mr Eckersley's affidavit, it is appropriate for judgment to be entered against the second defendant pursuant to the provisions of r. 292 of the UCPR.
- [20] The nature of the defence and the second defendant's failure to file any affidavit material to support the vague assertions in the defence cause me to conclude that there are no prospects of the second defendant succeeding with its defence to the claim, and no need for a trial.
- [21] The affidavit of Mr Eckersley denies the allegations in the defence and refers to the contents of the Reply to which I have referred. That pleading traverses the matters raised in the defence in an appropriate way, denying allegations therein with particularity and referring to facts on which the applicant relies. In particular, Mr Eckersley, in his affidavit, attests that:
1. The plaintiff did not provide the second and third defendants with any accounting or financial advise in relation to the first defendant's cash flow, business development or whether it was or was not feasible for the first defendant to lease the premises.

2. He only met the third defendant on one occasion when the third defendant travelled from Sydney to sign the lease. Mr Sessarago denies ever meeting the third defendant.
3. Although the plaintiff provided accounting and financial advice to the second defendant it was unrelated to allegations concerning the Lease, and the plaintiff did not advise any of the defendants with respect to that Lease.

[22] In the circumstances, I am satisfied on the material that the second defendant has no real prospect of succeeding with the defence. The plaintiff has satisfied me that it is entitled to judgment in circumstances where it is made out its case and where the defendant has failed to meet the evidentiary onus cast upon him by the contents of Mr Eckersley's affidavit to satisfy me that judgment ought not to be entered.

[23] In *Bolton Properties Proprietary Limited v JK Investment (Australia) Pty Ltd* [2009] QCA 135, a case referred to me in the applicant's solicitors submissions, Jones JA at [47] observed, in short, that the respondent, apart from its denial, failed to adduce any evidence relating to the issue of knowledge and intention, which could challenge the inference which the learned hearing judge obviously drew. In those circumstances, his Honour said the application's judge was entitled to come to the decision that there was no real prospect of the appellant succeeding in the defence.

[24] Similar considerations cause me to conclude that the applicant in this case is entitled to judgment against the second defendant. The term of the obligation of the first defendant under the lease and of the second defendant under the guarantee entitle the plaintiff to recover indemnity costs.

[25] In allowing interest in the sum of \$16,299.80 I note that in the statement of claim interest is calculated at that figure up to 26 November 2013. The plaintiff's solicitor indicated it was prepared to accept this sum rather than the full interest from 26 November 2013 to-date. It seems to me that the calculation is correct in accordance with the agreed interest rate at 15 per cent annum referred to in item 5(d) of the Schedule to the Lease.

[26] In those circumstances, I make the following orders:

**ORDERS:**

1. Pursuant to rule 292 of the *Uniform Civil Procedure Rules (1999)* summary judgment be entered against the second defendant in the amount of \$187,089 together with interest pursuant to the Lease and the Guarantee in the amount of \$16,299.80.
2. The second defendant pay the plaintiff's costs of the proceedings assessed on an indemnity basis.