# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Khatri & Anor v Wilson* [2002] QSC 239 |
| PARTIES: | **RAJ KHATRI**<br>(first plaintiff/first applicant)<br>**MICHAEL PELDAN**<br>(second plaintiff/second applicant)<br>**v**<br>**JOHN ELLIOT WILSON**<br>(defendant/respondent) |
| FILE NO/S: | No. S 100056 of 2001 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court Brisbane |
| DELIVERED ON: | 21 August 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 August 2002 |
| JUDGE: | White J |
| ORDER: | **1. Judgment for the plaintiff against the defendant in the sum of $2,190,000.**<br>**2. The defendant pay the plaintiffs' costs of and incidental to the application and the action to be assessed on the standard basis.** |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – whether judgment ought be granted under r 292 *Uniform Civil Procedure Rules* 1999 – whether defence has no real prospect of succeeding<br><br>MORTGAGES – MORTGAGES AND CHARGES GENERALLY – REMEDIES OF THE MORTGAGEE – SALE UNDER POWER – PRICE – where defendant resists judgment on basis of sale of property at undervalue – whether, in the circumstances, it amounted to a defence<br><br>*Swain v Hillman* [2001] 1 All ER 91, considered<br>*Three Rivers District Council v Bank of England (No 3)* [2001] 2 All ER 513, considered<br>*McPhee v Zarb* [2002] QSC 4, unreported, 8 January 2002, followed<br>*CSR Limited v Casaron Pty Ltd* [2002] QSC 21, unreported, 15 February 2002, followed |

*Barnes v Addy* (1874) LR 9 Ch App 244, mentioned

*Uniform Civil Procedure Rules* 1999, r 5, r 292

COUNSEL: Mr R Bain QC and Mr D Atkinson for the applicants / plaintiffs
Mr C Wilson for the respondent / defendant

SOLICITORS: Abbott Tout for the applicants / plaintiffs
John M O'Connor & Company for the respondent / defendant

[1] The applicants are the trustees and the liquidators of the run-out mortgage business conducted by Lex Nominees Pty Ltd ("Lex Nominees") and Paul Triscott trading as Paul Triscott & Associates ("Mr Triscott") under the rules of the Queensland Law Society Inc appointed by Chesterman J on 20 March 2001.

[2] Leegrove Pty Ltd, a company owned and controlled by the defendant entered into five loans with Lex Nominees in 1999 to acquire and partially develop commercial property at Surfers Paradise. The applicant seeks to recover summarily $2.190 million in respect of two of those loans from the defendant who guaranteed them.

[3] The application is brought pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999. It provides that a plaintiff may at any time after a defendant files a notice of intention to defend apply to the court for judgment against the defendant and the court may give judgment for the plaintiff 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 …."

[4] The defence was filed on 9 May 2002 but Mr C Wilson for the defendant acknowledges that it does not adequately reflect the defendant's position as set out in his affidavit although he continues to rely on the representations alleged in paragraphs 20 and 21. If the plaintiffs are not successful then amendment will be necessary.

[5] Rule 292 is quite different in its expression from the previous RSC. Its construction must be approached by reference to the philosophy of the *Uniform Civil Procedure Rules* expressed in r 5 and particularly sub rules (1) and (2). They state that the purpose of the rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. The rules, accordingly, are to be applied with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of the rules. If, however, the court is satisfied that there are circumstances that ought to be investigated then summary judgment should be refused.

[6] Rule 292 has been amended so that in its present form it reflects the *English Civil Procedure Rules* 24.2. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR said:

> "The words 'no real prospects 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".

[7] In the same case Lord Justice Judge said of the expression "no real prospect of succeeding":

> "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. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."

[8] The House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2001] 2 All ER 513 approved the observations of Lord Woolf MR at 541. Lord Justice Hope at 542 also approved the following passage from *Swain*'s case:

> "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 this as soon as possible … useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial … the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success … to be disposed of summarily".

[9] Those approaches to the power to dispose of an action summarily have been approved by single judges of this court in *McPhee v Zarb* [2002] QSC 4 unreported decision of Wilson J of 8 January 2002 and *CSR Limited v Casaron Pty Ltd* [2002] QSC 21 unreported decision of Holmes J of 15 February 2002.

[10] With the provisions then of r 292 in mind the matters deposed to may be considered.

***The liquidators' claim***

[11] The business operated by Lex Nominees and Mr Triscott was a contributory mortgage scheme as defined in the Queensland Law Society Rules whereby money was sought from investors for the purpose of investing those funds on the security of a registered mortgage. Leegrove obtained funds from Lex Nominees in the sum

of $800,000 on 15 April 1999 and $1.72 million on 7 May 1999 for the purchase and refurbishment of Lots 19-22 Surfers International Hotel, Hanlon Street, Surfers Paradise secured by mortgages over those properties. Mr Wilson signed a deed of guarantee and indemnity in relation to the first loan on 15 April and in relation to the second loan on 7 May 1999. The second guarantee is not available but no point is taken. He was liable to the lender for any loss or breach of the obligations of Leegrove. Each loan was for a period of two years from the date of the loan. Pursuant to clauses 2.1 and 2.2 of the deed of guarantee and indemnity Mr Wilson unconditionally and irrevocably guaranteed and indemnified the lender, Lex Nominees, in relation to the punctual payment of all money owing by Leegrove and to pay on demand any money not paid on the due date. Pursuant to clause 12 in the event of any default by Leegrove immediate payment of the moneys owing could be demanded.

[12] Between 15 April 1999 and 7 June 2000 Leegrove made payments of some of the interest and charges accumulated in the sum of $214,283.16 in respect of both loans but on 7 June 2000 it failed to make any further payments. The liquidators took possession of the property the subject of the loans on 10 May 2001 and it was sold for $330,000. In this summary judgment application the liquidators do not seek any amount for accrued interest or other fees associated with realising the security. The principal outstanding is $2.520 million less the sale price of $330,000 leaving an outstanding amount of $2.190 million.

***Mr Wilson's defence***

[13] Mr Wilson deposes that he entered into the securities guaranteeing the due performance by Leegrove of its obligations to Lex Nominees in reliance on certain representations made by Mr Triscott that he would fund the purchase and refurbishment of the properties "for as long as it takes" to have them operating and that Mr Triscott would not call up the guarantees given by Mr Wilson. Mr Wilson seeks to be relieved of the burden of the guarantees because of these allegedly misleading and deceptive representations about future matters and a declaration that the plaintiffs are thereby estopped from enforcing the rights secured by the securities.

[14] A separate basis for resisting summary judgment is the sale of the property at an alleged undervalue.

***Relationship between Mr Wilson and Mr Triscott***

[15] No affidavit or other material has been advanced by the plaintiffs to meet Mr Wilson's allegations about the representations. They do not say that Mr Triscott has not cooperated or that he has been approached. For the purposes of this application Mr Wilson's contentions stand unchallenged save by the loan and security documents and certain correspondence.

[16] Mr Wilson, who is experienced in refurbishing and operating hotels, knew Mr Triscott through previous borrowings from Lex Nominees. In December 1998 Mr Triscott advised Mr Wilson that he wished to sell Lots 138, 31-33 and 27-29 at Surfers International Hotel ("Surfers International") as mortgagee in possession and wanted Mr Wilson to buy them for what was owing, refurbish them and either sell the properties or operate them himself. Initially Mr Wilson said that he was not

keen but Mr Triscott offered to provide 100% of the finance to purchase and develop these properties and for associated charges and legal costs on the transactions. By then the properties were boarded up but had previously operated as a bar, restaurant and entertainment/nightclub area. Mr Wilson deposes that the price to cover what was owing was greater than the properties were worth.

[17] In consultation with his liquor licensing consultant, Mr Ron Currey, Mr Wilson concluded that obtaining a General Licence would not be difficult and that it might thereafter be possible to obtain a licence to install and operate gaming machines which would be profitable. He became aware that an enterprise known as Billy's Beach House which adjoined Surfers International held a General Licence and the business had been extended into Lots 19-22 of Surfers International and was available for sale from the liquidators. He thought that the combination of the lots which Mr Triscott wanted him to purchase and these lots would produce a most attractive business package.

[18] Mr Wilson says that he was somewhat concerned at the size of the operation and was not keen to expose himself personally to risk. Mr Triscott indicated that Lex Nominees would advance 100% to buy all the lots and to secure Billy's Beach House leasehold and business. Mr Wilson said that he wanted interest to be built into the loan over the whole period but Mr Triscott demurred indicating that it would be possible to do so only for 12 months. Mr Wilson deposes in paragraph 18 that he told Mr Triscott he would:

> "… not be prepared to give a personal guarantee of the project but again he [Mr Triscott] insisted and said that a personal guarantee would be necessary 'to make it look right', but he encouraged me not to worry about that aspect of the matter saying 'You just do the work and I'll make sure the money's there for you'. I recall he also said 'You don't have to worry, I won't act on the guarantees. I won't have to, I control the money here and I will fund this for as long as it takes you to fix it and make all of us some money …'"

Mr Wilson needed the loan for two years to bring the properties to restoration and to resume trading.

[19] Later in January, Mr Wilson deposes, Mr Triscott said to him:

> " 'I've got funds coming out my backside and I have to get that money loaned out. You do what you have to do down at the premises and let me look after the money side'", para 23.

[20] While Mr Wilson was still reluctant to be involved and to giving a personal guarantee he "ultimately relied completely" on Mr Triscott's promises particularly "with respect to the two year period for completion of the works and the availability of 100% financing and help with prepaid interest". Negotiations took place between Mr Triscott and Mr Wilson's solicitors over the ensuing months. In the event prepayment of interest was included in the loans only for the first eight months after which Leegrove was required to make interest payments monthly.

[21] Mr Wilson maintains that the negotiations with Mr Triscott for Lex Nominees to fund the initial properties, the acquisition of Lots 19-22 and their refurbishment were all part of the one arrangement and depended for their viability on all being included in an overall package. The loans were spread over five transactions and although Mr Wilson suggests that he found this unsatisfactory, Mr Triscott told him that they related to the different arrangements that he had with different fund providers and Mr Wilson agreed to those arrangements.

[22] The establishment of the loans was spread over several months. The fifth loan was for 12 months and not two years as were the other four. When challenged Mr Triscott allegedly said that he would roll the loan over without cost at the end of the 12 month period.

[23] Mr Wilson undertook extensive refurbishing and renovation and trading commenced in the entertainment area in July 2000. The Outrigger Bar commenced trading in October 2000. Mr Wilson deposes that it was very satisfactory. When the eight months of prepaid interest had expired Leegrove maintained interest payments.

[24] In early June 2000 Mr Triscott wrote that the loan from Lex Nominees for 12 months which had been the fifth and final loan had matured on 1 June 2000. He noted that the *Managed Investment Act* which had commenced operation with respect to solicitors' private mortgage schemes on 17 December 1999, meant that the loans by Lex Nominees could no longer be rolled over. If Leegrove required further funding it would need to make a written application which had to be submitted to an independent lending committee. Mr Wilson complained that all financial arrangements for the project were to be sourced by Mr Triscott and Lex Nominees. He deposes that he realised that the transaction "could not possibly" withstand the scrutiny of an independent lending committee because the business, although producing some income, was insufficient to service the loan and that this would not change until the General Licence was available. Mr Wilson decided that he would cease interest payments until Leegrove's "position became clear". He made no application for further financing.

***The representations***

[25] Mr Wilson's complaint seems to be that the fifth loan was for a period of 12 months when it was necessary for two years and Mr Triscott assured him that it would be rolled over. All other representations relating to the provision of finance, costs and prepaid interest for eight months were carried into effect. In June 1999 when Mr Triscott offered to rollover the loan for a further 12 months without charge there is nothing in the material to suggest that this was not a reasonably held expectation. The immediate reason there was no further funding for the fifth loan was Mr Wilson's decision not to make written application. He chose to cause Leegrove to cease making any repayments whilst he considered the position.

[26] Mr Wilson contends that he relied upon assurances by Mr Triscott that he would not take up the guarantees. This was in the context of early discussions between the parties in January 1999 when Mr Wilson expressed his unease at the size of the investment. The negotiations which occurred between Mr Wilson's solicitor and Mr Triscott's firm makes no reference to these matters although they were still, it may be accepted, a concern to Mr Wilson and the guarantees were part of the

package of the loans. It was expected by Mr Wilson that the funding would be sufficient to get the businesses profitable within the two years so that there would be no need to have recourse to the personal guarantees. Expectations about the acquisition of Billy's Beach House licence and the delay in obtaining his own licence created financial stresses not anticipated when the loans and guarantees were entered into. There is no material about the effect on the project of the failure to roll over the fifth loan for twelve months.

[27] The guarantees were serious commercial documents. Mr Wilson was under no constraints. His solicitor's certificate indicates that the effect of the guarantees was explained to Mr Wilson by his solicitor. He was involved in the loan transactions himself and was not without considerable commercial experience. He was aware that the securing of licences was always subject to delays and potential setbacks.

[28] I can see no real prospect that Mr Wilson can successfully defend this claim based on the alleged representations by Mr Triscott.

***Sale at undervalue***

[29] The final matter concerns sale at undervalue. Mr Peldan, one of the trustees and liquidators, deposes that Lots 19-22 described as the Outrigger Bar were sold after extensive advertising (in local, State and National newspapers) by CB Richard Ellis Brisbane and Gold Coast. A valuation for the Outrigger Bar was obtained from CB Richard Ellis of $396,000. This was a component of a valuation for the whole area including the entertainment/nightclub area and vacant retail space. Mr Wilson has obtained a valuation from Mr Stephen Charles Trewin, a licensed valuer and hotel broker, well known to Mr Wilson (and to Mr Triscott for whom he has carried out mortgage lending valuations).

[30] At the heart of the complaint about the price obtained for the mortgaged property is the failure to advertise the potential for the acquisition of a General Licence and a Gaming Licence, particularly in view of the likelihood that Mr Wilson would have been successful in his application having already advanced the process significantly.

[31] Mr Triscott sought a valuation from Mr Trewin in 1999 for lending purposes prior to Leegrove's purchase of the property. Mr Trewin valued the Outrigger Bar area "in conjunction with its access to income earned from 35 poker machines pursuant to the Diamond Park QOGR approval at $3,600,000". It is worth noting that Leegrove then signed a contract to purchase Lots 19-22 which comprised ultimately the Outrigger Bar for $520,000. Mr Trewin's valuation for all the properties the subject of the loans was $11 million based on their potential value when fully operational and used in conjunction with the General Licence held by Diamond Park for Billy's Beach House.

[32] Prior to the completion of the refurbishment in July 2000 Mr Triscott sought a further valuation for a further advance on the securities from Mr Trewin on an "as is" and "on completion" basis. Mr Trewin deposes that he valued the Outrigger Bar which had been completed, as if there were no potential for a General Licence at $2 million, and if a General Licence was attached to the property at $2.5 million.

[33] Mr Trewin criticises the marketing material prepared for the trustees and liquidators because it does not describe the recent refurbishment of the property nor that the

grant of a General Licence or an application for a Gaming Licence was imminent. The marketing brochures are extensive, describe the liquor licence details and are certainly not couched in the enthusiastic language of Mr Trewin's valuation. It might be expected that any potential purchaser would inspect the property and see the refurbishment. The valuation prepared by CB Richard Ellis is extensive and more measured in its tone than that of Mr Trewin. There are no other features to account for the enormous discrepancy between its valuation of $396,000 and Mr Trewin's of $2 million without closer analysis than counsel gave on a summary application save that Mr Trewin's valuation was in 2000 and the present sale was by a mortgagee in possession. The failure to mention recent refurbishment and the potential to operate poker machines if a licence could be obtained are most unlikely to account for the difference between what was obtained on sale and Mr Trewin's valuation which would have to be realised if Mr Wilson were to avoid proceedings. Mr Trewin's valuations are not compelling when the actual prices achieved in 1999, said to be too high, and on the mortgagee sale.

[34] Mr Bain has raised a *Barnes v Addy* (1874) LR 9 Ch App 244 point with respect to Mr Wilson's participation in Mr Triscott's alleged fraudulent breach of trust to the investors in the contributory mortgage scheme. There is some suggestion in Mr Wilson's affidavit that he knew that the funds advanced to Leegrove were not Lex Nominees own funds but were sourced elsewhere. The submission can go nowhere on the state of the material and the pleadings.

[35] I am satisfied that there is no real prospect of Mr Wilson successfully defending the claim and it would be wasteful of the resources of the parties and of the court to proceed to trial.

[36] Accordingly, I order that there be judgment for the plaintiffs against the defendant in the sum of $2.190 million.

[37] I further order that the defendant pay the plaintiffs' costs of and incidental to the application to be assessed on the standard basis.