SUPREME COURT OF QUEENSLAND

CITATION:	*Rodgers v ANZ Banking Group Ltd & Anor* [2005] QSC 365
PARTIES:	**STEPHEN ALEXANDER RODGERS and ROSLYN RODGERS** (Plaintiffs/Respondents) **v** **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ABN 11 005 357 522)** (First Defendant/Applicant) **and** **MINTER ELLISON LAWYERS** (Second Defendant/Applicant)
FILE NO:	S319/2005
DIVISION:	Trial Division
DELIVERED ON:	8 December 2005
DELIVERED AT:	Rockhampton
HEARING DATE:	22 August 2005
JUDGE:	Dutney J
ORDER:	**Action S319 of 2005 filed in Rockhampton Registry be struck out**
CATCHWORDS:	PRACTICE – APPLICATION – STRIKE OUT – where the first defendant commenced an action against the plaintiff to recover money payable under a written guarantee and recovery of possession of mortgaged property – where the judgment was given against the plaintiff – where the plaintiff appealed against findings of fact – where appeal was dismissed – where the plaintiff sought special leave to appeal to the High Court – where special leave refused – where the plaintiff alleges orders in the original proceedings were obtained by fraud – where the plaintiff seeks to reopen decision of the trial judge and subsequent appeal and special leave application – whether the plaintiff's pleadings are embarrassing – whether proceedings amount to abuse of process PRACTICE – ACTION – SETTING ASIDE JUDGMENT – where the plaintiff alleges fresh evidence emerged after the conclusion of initial proceedings – where the fresh evidence does not establish the judgment was produced by the fraud of the first defendant – where new fresh evidence is not material to affect the outcome of the trial

ANZ Banking Group Ltd v Rodgers & Anor [2003] QSC 304, cited.

ANZ Banking Group Ltd v Rodgers & Anor [2004] QCA 186, cited.

Assets Co Ltd v Mere Roihi [1905] AC 176, cited.

Birch v Birch [1902] P 130 at 135, cited.

Boughen v Abel [1987] 1 Qd R 138, applied.

Butler v Fairclough (1917) 23 CLR 78, cited.

Charles Bright & Co Ltd v Sellar [1904] 1 KB 6, cited.

D'Orta-Ekenaike v Victorian Legal Aid (2005) 29 ALJR 755, cited.

Emanuel Management Pty Ltd v Foster's Brewing Group Ltd [2000] QSC 430, cited.

Henderson v Henderson (1843) 3 Hare 100, cited.

Jonesco v Beard [1930] AC 298, cited.

McDonald v McDonald (1965) 113 CLR 529, cited.

McHarg v Woods Radio Pty Ltd [1948] VLR 496, cited.

Monroe Schenider Associates Inc v No 1 Raberem Pty Ltd (No 2) (1992) 37 FCR 234, cited/applied.

Port of Melbourne Authority v Anshun (1981) 147 CLR 589, followed/applied.

Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd [1988] 1 VR 188, cited.

The Ampthill Peerage Case [1977] AC 547, cited.

Wentworth v Rogers (No 5) (1986) 6 NSWLR 534, cited/followed.

Yat Tung Investment Co Ltd v Dao Hing Bank Ltd [1975] AC 581, cited.

Young v Hoger [2001] QCA 453, cited.

Uniform Civil Procedure Rules 1999 (Qld), r 171, 667.

COUNSEL: Plaintiff/Respondent in person

Mr. J. D. McKenna SC with Mr I R Perkins for the Defendants/Applicants

SOLICITORS: Minter Ellison Lawyers for the Defendants/Applicants

[1] The First Defendant ("the bank") and the Second Defendant ("the solicitors") have applied under Rule 171 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) to strike out the Plaintiff's Claim and Statement of Claim. In the alternative, the bank seeks a permanent stay of the action as an abuse of process.

[2] The bank commenced an action ("the first action") against the Plaintiffs on 21 August 2002 claiming, among other things, money payable under a written guarantee and recovery of possession of mortgaged property. The Plaintiffs defended the action on the ground, inter alia, that the guarantee and mortgage documents were forgeries.

[3] The action was tried over 5 days in September 2003. Judgment was given in favour of the bank for the amount owing by the Plaintiffs under their guarantee and for possession

of the mortgaged land.[1] The Plaintiffs appealed. On the appeal the Plaintiffs, who represented themselves, challenged the trial judge's finding that they had executed the security documents and his rejection of the Plaintiffs contention that the bank had entered into a collateral agreement the effect of which was to extend the credit limit available to the Plaintiffs. A third ground of appeal related to an alleged agreement by the bank to accept a sum of $50,000 to remedy any default in the Plaintiffs' arrangements with the bank. Each ground of appeal challenged the trial judge's findings of fact. The appeal was dismissed.[2]

[4] The Plaintiffs then sought special leave to appeal to the High Court. Special leave was refused.

[5] On 8 July 2005, the Plaintiffs commenced a new action ("the second action") against the bank and solicitors. The second action seeks to re-litigate the issues determined in the first action.

[6] By paragraph [4] of the Amended Claim, the Plaintiffs allege that the bank obtained the orders in the first action by unconscionable conduct, fraud and fraudulent misrepresentation. Further, by paragraph [7], the Plaintiffs seek to invoke an inherent power of the Court to reopen the matters 'to prevent irremediable injustice.' It is asserted that not to reopen the proceedings 'would be manifestly unfair to the party to the litigation or would otherwise bring the administration of justice into disrepute.'

[7] In their written submissions opposing the present application, the Plaintiffs place reliance on alleged fresh evidence discovered after the Court Appeal decision.

[8] In their submissions, the bank and the solicitors argue that the Plaintiffs' pleadings are embarrassing – that is, they lack sufficient detail to sustain their cause of action or fail to plead the elements of the cause of action. Further, the Defendants submit that the proceedings commenced by the Plaintiffs, are an abuse of process.

[9] It is well settled that once proceedings are concluded by the regular entry of the judgment, the judicial role of the Court is at an end. If a party is dissatisfied the only remedy is to appeal to a higher Court. In this instance, the Plaintiffs wanted to bring the initial judgment into question and appropriately did so by appealing to the Court of Appeal. They then also sought leave to appeal to the High Court.

[10] Recently, Gleeson CJ, Gummow, Hayne & Heydon JJ reaffirmed the underlying principles applicable to setting aside a judgement:[3]

> "[34] A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the brining of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet finds the reflection in the doctrines of *res judicata* and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue

[1] *ANZ Banking Group Ltd v Rodgers & Anor* [2003] QSC 304.
[2] *ANZ Banking Group Ltd v Rodgers & Anor* [2004] QCA 186.
[3] *D'Aorta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 ([2005] HCA 12) at [34]-[35].

> that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.
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> [35] … As was said in the joint reasons in *Coulton v Holcombe*: "[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial."

[11] Although a judgment is normally final, there exists a power under Rule 667 to set it aside if it was procured by fraud or under Rue 668 to set it aside where facts are discovered after the trial.[4]

[12] The Plaintiffs submit that new evidence, which came to their knowledge only after the conclusion of the first action, now exists and points to the bank obtaining 'the orders by fraud, fraudulent misrepresentations and unconscionable conduct.' A comparison should be drawn between a case where a judgment is affected by fraudulent conduct and one where fresh evidence has been discovered which would have produced a different result.[5]

[13] It has been long held that 'a complete judgment may be impeached by a fresh action on the ground that the judgment is tainted by fraud.'[6] In *Boughen v Abel*[7] Moynihan J stated that "the fresh action will however be regarded as an abuse of process of the Court unless the Plaintiff can establish that he has a reasonable prospect of success based on facts discovered since the judgment he seeks to impeach.'[8] There cannot be mere suspicion of fraud.

[14] The legal principles relating to proceedings to have a judgment set aside on the ground that it was obtained by fraud, are summarised in *Wentworth v Rogers (No 5)*[9] by Kirby P (with whom Hope and Samuel JJA agreed):

> "In summary, he or she must establish that the case is based on newly discovered facts; that the facts are material and such as to make it reasonably probable that the case will succeed; that they go beyond mere allegations of perjury on the part of the witnesses at the trial; and that the opposing party who took advantage of the judgment is shown, by admissible evidence, to have been responsible for the fraud in such a way as to render it inequitable that such party should take the benefit of the judgment."

[15] The first element of the new cause of action is that the Plaintiffs are required to prove that there are new facts discovered since the conclusion of the earlier proceedings. Connolly J (with whom Vasta J agreed) in *Boughen v Abel*,[10] citing *Charles Bright & Co Ltd v Sellar*[11] observed that cases such as this cannot invite the Court to simply

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[4] See *Emanuel Management Pty Ltd v Foster's Brewing Group Ltd* [2000] QSC 430.
[5] *McDonald v McDonald* (1965) 113 CLR 529.
[6] *Jonesco v Beard* [1930] AC 298.
[7] [1987] 1 Qd R 138 at 146.
[8] *Jonesco v Beard* [1930] AC 298. This point was also reaffirmed in *McHarg v Woods Radio Pty Ltd* [1948] VLR 496 and *Birch v Birch* [1902] P 130 at 135.
[9] (1986) 6 NSWLR 534 at 538-539.
[10] [1987] 1 Qd R 138 at 144.
[11] [1904] 1 KB 6.

rehear upon the old materials but fresh facts must be brought forward so that the cause of action may well be regarded as new and not appellate in its nature.

[16] In the course of this application, I have been provided with a great deal of material of varying relevance to the issues at hand. Before looking at the fresh evidence and whether it bears upon the allegation of fraud, I should look at specific complaints the Plaintiffs make about the first action. The complaints made by the Plaintiffs in this case fall into a number of discrete categories with which I shall deal seriatim.

[17] The first category of complaint concerns what might be loosely described as interlocutory complaints. These relate to late disclosure by the bank, late delivery of affidavits by the bank, complaints about the documents making up the trial bundle and general tardiness in complying with interlocutory orders. The Plaintiffs raise various concerns about compliance with time limits imposed by the trial judge, the timing of the provision of various documents, the trial bundle not being prepared in accordance with the trial judge's directions and the difference between some documents contained in the bundle and those exhibited to affidavits. It seems to me that no new information was raised by the Plaintiffs in the affidavits before me regarding these issues. All of the documents; the trial bundle as well as the affidavits with exhibited documents were before the trial judge. These are matters which should properly have been raised before him. Any dissatisfaction with the way in which the trial judge dealt with them was properly a subject for the appeal. It is inappropriate for me to revisit those issues even if I had the power.

[18] The second complaint concerns what are described as "wrong facts" in the trial judge's reasons for judgment. At least one of these was acknowledged by senior counsel for the bank. It was a reference in paragraph 41 of the judgement of the trial judge to a figure of $348,431.34 which the trial judge indicated was owing by the Plaintiffs on their private account at a particular time. The figure should have been $38,431.34. The size of the figure in the judgment embarrassed the Plaintiffs. However, it did not affect the judgment amount and was not material to the trial judge's reasons. It was merely a typographical error. Another such "error" concerned the trial judge's finding in paragraph [37] that Mr Nagle's handwriting did not appear on certain documents. In fact his handwriting does appear on one of them, a fact acknowledged by the trial judge in paragraph [38]. The complaint thus seems to be concerned more with the trial judge's manner of expression rather than with any matter of substance. Again, even had the judge made an error, it was not material to the overall outcome. The third error to which particular reference was made in paragraph [48] where the trial judge refers to a letter dated 2 March 2002 rather than 2 May 2002. Again, this was a typographical error in an unimportant detail. Paragraph [49] correctly refers to the date of the letter. The error has no impact on the judgment.

[19] There were other alleged errors. All matters in this category appeared on the face of the reasons for judgment. None of them affected the judgment. It was open to the Plaintiffs to raise these concerns on the appeal although from a practical point of view, since they did not affect the outcome, the Court of Appeal may have been disinclined to deal with them in other than a general way.

[20] The third category of complaint concerns what is said to be misleading conduct by the bank and the solicitors. The Plaintiffs allege that the bank and the solicitors falsely represented to the trial judge that the Plaintiffs had recently changed their allegations concerning execution of the security documentation. The bank delayed its written

outline of submissions thus preventing the Plaintiffs from calling evidence to answer an alternative argument put forward by the bank. The bank further falsely alleged that the Plaintiffs had tailored their allegations to take advantage of shoddy practices by the bank. None of these matters was new in the sense that all could and should have been raised before the trial judge. Moreover, I do not think that they would have materially affected the outcome of the trial.

[21] The final category of complaint concerned the bank's conduct in relation to the special leave application in the High Court. The Plaintiffs allege that the solicitors wrote a letter to the Registrar in which "scandalous and offensive assertions" were made concerning them. A copy of the letter was not promptly given to the Plaintiffs. The bank's supplementary application book was also alleged to contain some unidentified documents. These were matters which should have been drawn to the attention of the High Court. The bank denies these allegations. In the end, nothing turns on them. Special Leave was refused. They are not matters that affect the original judgment or provide any basis to assert that the primary judgment was obtained by fraud. By their nature, they do not constitute new facts which might have entitled the Plaintiffs to a different judgment if known at trial.

[22] That leaves the issue of the "fresh evidence".

[23] Overall, it seems to me that while the Plaintiffs raise some evidence which could perhaps be classified as not being available at the time of the judgment, it is nothing more than mere receipt of confirmatory evidence or particulars of facts previously known.[12]

[24] Fresh evidence is judged by reference to the substance of the matter in the light of the general principle that it is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings.[13] From my reading of this voluminous material, the Plaintiffs brought forward in the trial of the first action every point which properly belonged to the subject matter of that litigation.

[25] In any event, two further elements are required before fresh evidence would entitle the Plaintiffs to have the judgment in the first action set aside. These are: (1) the fresh evidence must establish that the judgment was produced by the fraud of a party and (2) the fraud must have had a material effect upon the outcome of the proceedings. I will briefly deal with each of these.

[26] The party alleging fraud must strictly plead and prove such fraud. There are a number of definitions that have emerged over the years as to what the fraud is and no definition is preferred to the other. The case of *Young v Hoger*[14] defines fraud as 'wilful blindness, an abstention from inquiry for fear of learning the truth,[15] and possibly reckless indifference in other respects but that, in either case, it must amount to actual dishonesty.'[16] In *The Ampthill Peerage Case*[17] the fraud was defined as 'conscious and deliberate dishonesty.'

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[12] *Monroe Schenider Associates Inc v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 243.
[13] *Yat Tung Investment Co Ltd v Dao Hing Bank Ltd* [1975] AC 581 following the principle set out in *Henderson v Henderson* (1843) 3 Hare 100 at 115; *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589.
[14] [2001] QCA 453 at [11].
[15] The Court citing *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210.
[16] The Court also referred to *Butler v Fairclough* (1917) 23 CLR 78 at 90 and 97; *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1988] 1 VR 188 at 192-195.
[17] [1977] AC 547.

[27] The Plaintiffs in their submissions referred to an allegedly independent witness, Mr X, to whom they have given an undertaking not to disclose his identity because he is apparently 'harbouring a grave apprehension of intimidation and/or retribution.'[18] I assume that Mr X is the former bank manager to whom the Plaintiffs referred in their oral submissions. The evidence of Mr X is said to relate to a number of lending approval issues which were issues in the trial and subsequent appeals. These include allegations that the Plaintiffs' bank manager had exceeded his lending authority on other occasions. Apart from that, the fresh evidence seems to be to the effect that some bank practices were lax and the bank has been unusually harsh in its dealings with the Plaintiffs compared to the banks dealings with some other customers. I cannot see how that evidence is relevant to proving actual fraud on the part of the First Defendant. Moreover, the evidence is predominantly hearsay, speculation or opinion such as to make it inadmissible in any trial.

[28] Further, to rely on Mr X's evidence, assuming it was relevant, it would have to be provided in proper form in a sworn affidavit. It has not been and cannot be taken into account. Mere allegation of the existence of some unidentified person whose evidence will be relied upon in the Court for the purpose of determining the matter between the parties is not acceptable.

[29] In cases where the fraud is established, that fraud must have a material effect upon the outcome of the proceedings. That is to say that the new evidence must be 'so material that its production at the trial would probably have affected the outcome and it is so strong that it would reasonably be expected to be decisive at a rehearing.'[19] Here, that would not be the case. As I have repeated on a number of occasions, it is my view that all the issues raised here have already been raised in the earlier proceedings. Thus, this element is not established.

[30] In all the circumstances, I am of the view that the only ground for setting the trial judge's decision aside would be on the basis of fraud by the bank. Such fraud must be properly pleaded with fresh evidence existing to establish that the bank committed such fraud. The fraud must be so material as to have affected the outcome in the first instance. Failure to plead and establish a new cause of action based on fraud, amounts to abuse of process.

[31] As far as the solicitors are concerned, there is no relief claimed against them. They are not for any other reason a necessary party to the proceedings. For that reason alone they would be entitled to have the action against them struck out.

[32] Accordingly, I order that action S319 of 2005 filed in Rockhampton Registry be struck out.

[33] I will hear argument about costs.

[34] In the view of these findings, it is unnecessary to deal with the further application to set aside the subpoenas issued in relation to these proceedings.

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[18] The Respondent's Outline of Submissions at paragraph [85].
[19] *Monroe Schenider Associates Inc v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 241-242.